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HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal
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WHO: Sponsored by the Office of the Federal Register.
WHAT: Free public briefings (approx. 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register
system and the public’s role in the development of
regulations.
2. The relationship between the Federal Register and Code of
Federal Regulations.
3. The important elements of typical Federal Register
documents.
WHY: To provide the public with access to information necessary to
research Federal agency regulations which directly affect them.
There will be no discussion of specific agency regulations.

NEW YORK, NY
WHEN: September 17, 1996 at 9:00 am.
WHERE: National Archives—Northwest Region
201 Varick Street, 12th Floor
New York, NY
RESERVATIONS: 800-688-9889
(Federal Information Center)

WASHINGTON, DC
WHEN: September 24, 1996 at 9:00 am.
WHERE: Office of the Federal Register
Conference Room
800 North Capitol Street, NW.
Washington, DC
(3 blocks north of Union Station Metro)
RESERVATIONS: 202-523-4538
Agriculture Department
See Animal and Plant Health Inspection Service
See Cooperative State Research, Education, and Extension Service
See Federal Crop Insurance Corporation
See Natural Resources Conservation Service

Air Force Department
RULES
Aircraft:
  Aircraft arresting systems; CFR part removed, 45322
  Air Force responsibilities for aircraft leased for airshows; CFR part removed, 45322–45323
Military training and schools:
  Contractor employees training; CFR part removed, 45323
Special investigation; authority to administer oaths; CFR part removed, 45323

Alcohol, Tobacco and Firearms Bureau
PROPOSED RULES
Firearms:
  Firearms and ammunition; manufacturers excise taxes—Parts and accessories, 45377–45378

Animal and Plant Health Inspection Service
NOTICES
Environmental statements; availability, etc.:
  Veterinary unlicensed biological products for field testing; shipment, 45396
Harry S. Truman Animal Import Center; importation procedures; application period and lottery; correction, 45396–45397

Antitrust Division
NOTICES
National cooperative research notifications:
  Environmental Research Institute of Michigan, 45457
  Mobile Information Infrastructure for Digital Video and Multimedia Applications Joint Venture, 45458
  Model HDTV Station Project, Inc., 45458
  National Center for Manufacturing Sciences, Inc., 45458

Army Department
See Engineers Corps

Centers for Disease Control and Prevention
NOTICES
Agency information collection activities:
  Proposed collection; comment request, 45429–45430
Meetings:
  Workers’ Family Protection Task Force, 45430

Children and Families Administration
NOTICES
Agency information collection activities:
  Submission for OMB review; comment request, 45430–45431

Civil Rights Commission
NOTICES
Meetings; State advisory committees:
  California, 45398–45399
  Oklahoma, 45399

Coast Guard
RULES
Ports and waterways safety:
  Vessel traffic management—New York Harbor, NY; Vessel Traffic Service New York (VTSNY) area; boundary expansion, 45323–45327

Commerce Department
See Economic Development Administration
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities:
  Submission for OMB review; comment request, 45399

Comptroller of the Currency
RULES
National Flood Insurance Reform Act of 1994; implementation:
  Loans in special flood hazard areas, 45684–45711

Cooperative State Research, Education, and Extension Service
RULES
Grants:
  National research initiative competitive grants program, 45319

Customs Service
NOTICES
Hong Kong; quota categories monitored for transshipment concerns, 45473

Defense Department
See Air Force Department
See Engineers Corps
RULES
Federal Acquisition Regulation (FAR):
  Payment by electronic funds transfer, 45770–45775
  Small entity compliance guide, 45775–45776
NOTICES
Agency information collection activities:
  Submission for OMB review; comment request, 45412
Civilian health and medical program of uniformed services (CHAMPUS):
  Specialized treatment services program; designations—Walter Reed Army Medical Center et al.; cardiac surgery facilities, 45412–45413
Meetings:
  Armed Forces Code Committee, U.S. Court of Appeals, 45413

Economic Development Administration
RULES
Simplification and streamlining regulations; Federal regulatory reform; correction, 45738
IV  Federal Register / Vol. 61, No. 169 / Thursday, August 29, 1996 / Contents

Education Department
NOTICES
Grants and cooperative agreements; availability, etc.:
   Individuals with disabilities—Children and youth attainment to higher levels of academic achievement, 45718-45724
Meetings:
   Education Statistics Advisory Council, 45414-45415

Energy Department
See Federal Energy Regulatory Commission

PROPOSED RULES
Acquisition regulations:
   Non-statutorily imposed contractor and offeror certification requirements; elimination, 45391-45394

Engineers Corps
NOTICES
Environmental statements; availability, etc.:
   St. Joseph Harbor, MI; long-term dredged material management, 45413-45414

Environmental Protection Agency
RULES
Air quality implementation plans; approval and promulgation; various States:
   Wisconsin, 45327-45329
Clean Air Act:
   State operating permits programs—California, 45330-45336
Superfund program:
   National oil and hazardous substances contingency plan—National priorities list update, 45336
Toxic substances:
   Lead—Lead-based paint activities; requirements, 45778-45830
Water pollution control:
   National pollutant discharge elimination system—Marine waters; secondary treatment requirements, 45832-45833
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
   Wisconsin, 45379
Clean Air Act:
   State operating permits programs—California, 45379
Water pollution control:
   Water quality standards—Pennsylvania, 45379-45385
NOTICES
Water pollution control:
   National pollutant discharge elimination system; State programs—Oklahoma, 45420-45426

Executive Office of the President
See Presidential Documents

Farm Credit Administration
RULES
National Flood Insurance Reform Act of 1994; implementation:
   Loans in special flood hazard areas, 45684-45711

Federal Aviation Administration
PROPOSED RULES
Airworthiness directives:
   Boeing, 45373-45375
   McDonnell Douglas, 45375-45377
NOTICES
Airport noise compatibility program:
   Blue Grass Airport, KY, 45470-45471
Environmental statements; availability, etc.:
   General Mitchell International Airport, WI, 45471-45472

Federal Communications Commission
RULES
Radio services, special:
   Commercial mobile radio services—Flexible service offerings, 45336
Telecommunications Act of 1996; implementation:
   Common carrier services—Local competition provisions, 45476-45637
Television broadcasting:
   Cable Television Consumer Protection and Competition Act of 1992—Rate regulation, 45336
PROPOSED RULES
Television broadcasting:
   Cable television systems—Cable pricing flexibility, 45387-45391
NOTICES
Agency information collection activities:
   Proposed collection; comment request, 45426

Federal Crop Insurance Corporation
PROPOSED RULES
Crop insurance regulations:
   Texas citrus tree crop, 45369-45373

Federal Deposit Insurance Corporation
RULES
National Flood Insurance Reform Act of 1994; implementation:
   Loans in special flood hazard areas, 45684-45711

Federal Election Commission
NOTICES
Special elections; filing dates:
   Missouri, 45426-45427

Federal Emergency Management Agency
NOTICES
Hotel and Motel Fire Safety Act:
   National master list, 45726-45727

Federal Energy Regulatory Commission
NOTICES
Electric rate and corporate regulation filings:
   Wisconsin Public Service Corp. et al., 45417-45419
Natural gas certificate filings:
   East Tennessee Natural Gas Co. et al., 45419-45420
Applications, hearings, determinations, etc.:
   Eastern Shore Natural Gas Co., 45415
   International Paper Co. et al., 45415-45416
   OKTex Pipeline Co., 45416
   Shell Gas Pipeline Co., 45416
   Transcontinental Gas Pipe Line Corp., 45416
Federal Highway Administration
RULES
Right-of-way and environment:
  Highway traffic and construction noise abatement procedures, 45319-45321
NOTICES
Environmental statements; notice of intent:
  Rockland County, NY, 45472

Federal Reserve System
RULES
National Flood Insurance Reform Act of 1994; implementation:
  Loans in special flood hazard areas, 45684-45711

Fish and Wildlife Service
RULES
Hunting and fishing:
  Open areas list additions, 45336
Migratory bird hunting:
  Early-season regulations (1996-1997); frameworks, 45836-45848
NOTICES
Agency information collection activities:
  Submission for OMB review; comment request, 45454

Food and Drug Administration
NOTICES
Agency information collection activities:
  Proposed collection; comment request, 45431-45433
Human drugs:
  Patent extension; regulatory review period determinations—Vexol, 45433-45434

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
  Indiana
    Fujitsu Ten Corp. of America; automotive audio products and electronic components manufacturing plant, 45399-45400
  South Carolina, 45400
  Washington, 45400-45401

General Services Administration
RULES
Federal Acquisition Regulation (FAR):
  Payment by electronic funds transfer, 45770-45775
Small entity compliance guide, 45775-45776
NOTICES
Federal telecommunications standards:
  Telecommunications—
    High frequency radio automatic link establishment, 45429
    High frequency radio modems, 45428-45429
  Terms glossary, 45427-45428

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health

Health Resources and Services Administration
NOTICES
Grant and cooperative agreement awards:
  University of Pennsylvania School of Dental Medicine et al., 45434

Housing and Urban Development Department
RULES
Community facilities:
  Base closure community redevelopment and homeless assistance, 45321-45322
NOTICES
Agency information collection activities:
  Proposed collection; comment request, 45435-45453

Interior Department
See Fish and Wildlife Service
See Land Management Bureau
See National Park Service

International Trade Administration
NOTICES
Countervailing duties:
  Live swine from—Canada, 45402
  Refrigeration compressors from—Singapore, 45402-45404
Applications, hearings, determinations, etc.:
  Florida International University et al., 45401
  Lehigh University et al., 45401
  University of Massachusetts, 45401

International Trade Commission
NOTICES
Import investigations:
  Monolithic microwave integrated circuit downconverters and products containing same, including low noise block downconverters, 45456
  U.S. merchandise trade in 1996; shifts, 45456-45457

Justice Department
See Antitrust Division
See Justice Programs Office
NOTICES
Pollution control; consent judgments:
  Farmland Industries, Inc., 45457

Justice Programs Office
NOTICES
Agency information collection activities:
  Proposed collection; comment request, 45458-45459

Labor Department
See Mine Safety and Health Administration
See Occupational Safety and Health Administration

Land Management Bureau
PROPOSED RULES
Range management:
  Grazing administration—
    Standards and guidelines development and completion, etc., 45385-45387
NOTICES
Meetings:
  Green River Basin Advisory Committee, 45454
Realty actions; sales, leases, etc.:
  California, 45454-45455
Legal Services Corporation
RULES
Aliens; legal assistance restrictions, 45750-45753
Attorneys' fees, 45762-45764
Fund recipients; application of Federal law, 45760-45762
Lobbying and certain other activities; restrictions, 45741-45747
Non-LSC funds use; client identity and statement of facts, 45740-45741
Priorities in use of resources, 45747-45750
Prisoner representation, 45754-45755
Solicitation restriction, 45755-45757
Subgrants, fees, and dues:
  Prohibition of use of funds to pay membership dues to private or nonprofit organization, 45753-45754
Welfare reform, 45757-45759
PROPOSED RULES
Fee-generating cases, 45765-45767

Mine Safety and Health Administration
RULES
Coal mine safety and health:
  Underground coal mines—
    Personal noise dosimeters use, 45322

National Aeronautics and Space Administration
RULES
Federal Acquisition Regulation (FAR):
  Payment by electronic funds transfer, 45770-45775
  Small entity compliance guide, 45775-45776

National Credit Union Administration
RULES
National Flood Insurance Reform Act of 1994;
  implementation:
    Loans in special flood hazard areas, 45684-45711

National Highway Traffic Safety Administration
RULES
Motor vehicle safety standards:
  Lamps, reflective devices, and associated equipment—
    Motorcycle headlamps; new photometric requirements, 45336

National Institutes of Health
NOTICES
Meetings:
  National Institute of Dental Research, 45434-45435
  National Institute on Drug Abuse, 45434

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
  Alaska; fisheries of Exclusive Economic Zone
    Correction, 45336
PROPOSED RULES
Fishery conservation and management:
  Atlantic sea scallop, 45395
  Puerto Rico and U.S. Virgin Islands queen conch
    resources, 45395
NOTICES
Marine mammals:
  Incidental taking; authorization letters, etc.—
    Vandenberg Air Force Base, CA; McDonnell Douglas
    Aerospace Delta II vehicles, 45404-45407
Meetings:
  North Pacific Fishery Management Council, 45407-45408
  Western Pacific Fishery Management Council, 45408

National Park Service
NOTICES
Agency information collection activities:
  Proposed collection; comment request, 45455
Native American human remains and associated funerary objects:
  Alaska State Office, Savoonga, AK; inventory, 45455-45456

National Science Foundation
NOTICES
Meetings:
  Design, Manufacture, and Industrial Innovation Special
    Emphasis Panel, 45460-45461
  Earth Sciences Proposal Review Panel, 45461-45462
  Materials Research Special Emphasis Panel, 45462
  Mathematical Sciences Special Emphasis Panel, 45462
  Physics Special Emphasis Panel, 45462
  Research, Evaluation and Communication Special
    Emphasis Panel, 45462
  Theoretical Physics Panel, 45462-45463

Natural Resources Conservation Service
NOTICES
Environmental statements; availability, etc.:
  Limestone-Graveyard Creeks Watershed, CO, 45397-45398

Occupational Safety and Health Administration
NOTICES
Committees; establishment, renewal, termination, etc.:
  Metalworking fluids, occupational exposure; standards
    advisory committee, 45459-45460

Presidential Documents
PROCLAMATIONS
Tariff-rate quotas for certain cheeses (Proc. 6914), 45851-45856
ADMINISTRATIVE ORDERS
Albania; reconfirmation of findings with respect to trade
  agreement (Presidential Determination No. 96-44 of
  August 27, 1996), 45859
Armenia; reconfirmation of findings with respect to trade
  agreement (Presidential Determination No. 96-47 of
  August 27, 1996), 45865
Georgia; findings with respect to trade agreement
  (Presidential Determination No. 96-49 of August 27, 1996), 45869
Kyrgyzstan; reconfirmation of findings with respect to trade
  agreement (Presidential Determination No. 96-45 of
  August 27, 1996), 45861
Moldova; reconfirmation of findings with respect to trade
  agreement (Presidential Determination No. 96-48 of
  August 27, 1996), 45867
Ukraine; reconfirmation of findings with respect to trade
  agreement (Presidential Determination No. 96-46 of
  August 27, 1996), 45863

Public Health Service
See Centers for Disease Control and Prevention
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
Railroad Retirement Board
NOTICES
Agency information collection activities:
Proposed collection; comment request, 45463
Privacy Act:
Systems of records, 45463-45464

Securities and Exchange Commission
PROPOSED RULES
Securities:
Securities Exchange Act of 1934; section 10A reporting requirements, 45730-45735

NOTICES
Self-regulatory organizations; proposed rule changes:
Cincinnati Stock Exchange, Inc., 45467-45468
Pacific Stock Exchange, Inc., 45468-45469
Applications, hearings, determinations, etc.:
BT Investment Portfolios et al., 45464-45467
Pralgo Life Individual Variable Annuity Account, 45467

Social Security Administration
NOTICES
Agency information collection activities:
Proposed collection; comment request, 45470

State Department
NOTICES
Meetings:
International Telecommunications Advisory Committee, 45470
Shipping Coordinating Committee, 45470

State Justice Institute
NOTICES
Grants, cooperative agreements, and contracts; guidelines, 45640-45682

Thrift Supervision Office
RULES
National Flood Insurance Reform Act of 1994; implementation:
Loans in special flood hazard areas, 45684-45711

Transportation Department
See Coast Guard
See Federal Aviation Administration
See Federal Highway Administration
See National Highway Traffic Safety Administration

Treasury Department
See Alcohol, Tobacco and Firearms Bureau
See Comptroller of the Currency
See Customs Service
See Thrift Supervision Office

United States Information Agency
NOTICES
Art objects; importation for exhibition:
Corot, 45473
Eugene Cuvelier, Photographer in the Circle of Corot, 45473
Georges de la Tour and His World, 45473

Separate Parts In This Issue

Part II
Federal Communications Commission, 45476-45637

Part III
State Justice Institute, 45640-45682

Part IV
Treasury Department, Comptroller of the Currency, 45684-45716

Part V
Education Department, 45718-45724

Part VI
Federal Emergency Management Agency, 45726-45727

Part VII
Securities and Exchange Commission, 45730-45735

Part VIII
Commerce Department, Economic Development Administration, 45738

Part IX
Legal Services Corporation, 45740-45767

Part X
Department of Defense, General Services Administration, National Aeronautics and Space Administration, 45770-45775

Part XI
Environmental Protection Agency, 45778-45830

Part XII
Environmental Protection Agency, 45832-45833

Part XIII
Interior Department, Fish and Wildlife Service, 45836-45848

Part XIV
The President, 45851-45856

Part XV
The President, 45859-45869

Reader Aids
Additional information, including a list of public laws, telephone numbers, reminders, and finding aids, appears in the Reader Aids section at the end of this issue.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR
Proclamations:
6914........................................45850
Presidential Determinations:
96–44 of August 27, 1996..........................45859
96–45 of August 27, 1996..........................45861
96–46 of August 27, 1996..........................45863
96–47 of August 27, 1996..........................45865
96–48 of August 27, 1996..........................45867
96–49 of August 27, 1996..........................45869

7 CFR
3411........................................45319

12 CFR
22........................................45684
208........................................45684
309........................................45684
563........................................45684
614........................................45684
760........................................45684

13 CFR
316........................................45738

14 CFR
Proposed Rules:
39 (2 documents)..................45373, 45375

17 CFR
Proposed Rules:
210........................................45730
240........................................45730

23 CFR
772........................................45319

24 CFR
586 (2 documents)..................45321, 45322

27 CFR
Proposed Rules:
53........................................45377

30 CFR
70........................................45322
71........................................45322

32 CFR
856........................................45322
862........................................45322
903........................................45323
950........................................45323

33 CFR
28........................................45323
161........................................45323

40 CFR
52........................................45327
70........................................45330
125.......................................45332
300........................................45336
745........................................45778
Proposed Rules:
52........................................45379
70........................................45379
131.......................................45379

43 CFR
Proposed Rules:
4100.......................................45385
This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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

DEPARTMENT OF AGRICULTURE
Cooperative State Research, Education, and Extension Service

7 CFR Part 3411
National Research Initiative
Competitive Grants Program;
Administrative Provisions;
Nomenclature Changes

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Technical Amendment.

SUMMARY: The Cooperative State Research, Education, and Extension Service (CSREES) is amending its administrative provisions to correct the cross-references to reflect the redesignation of a part within the Code of Federal Regulations.

EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Phillip A. Carter, Policy Advisor, STOP 2245, Washington, D.C. 20250-2245. Telephone: (202) 720-9181. E-mail: oep@reeusda.gov.

SUPPLEMENTARY INFORMATION:

On December 8, 1995, in 60 FR 63368-63370, CSREES published an amendment to redesignate 7 CFR part 3200 as part 3411. The amendatory language did not direct the Office of the Federal Register to change the cross-references.

Under the authority Sec. 2(i) of the Act of August 4, 1965, as amended (7 U.S.C. 450(i)), the cross-references in 7 CFR part 3411 are amended as indicated in the table below:

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<td>3411.7(c)</td>
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<td>3411.5(b)</td>
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<td>3411.14, 3200.14, respectively</td>
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<td>3411.14, 3200.5(a), respectively</td>
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<td>3411.14, 3200.5(a), respectively</td>
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</table>

Done at Washington, D.C., this 22nd day of August, 1996.

B.H. Robinson,
Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 96-22033 Filed 8-28-96; 8:45 am]

BILLING CODE 3410-22-M

DEPARTMENT OF TRANSPORTATION
Federal Highway Administration

23 CFR Part 772

[FHWA Docket No. 96-26]

RIN 2125-AD97

Procedures for Abatement of Highway Traffic Noise and Construction Noise

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: This document revises the FHWA regulation that allows Federal participation for Type II noise abatement projects. Type II projects are proposed Federal or Federal-aid highway projects for noise abatement on an existing highway. This revision will make the regulation consistent with the National Highway System Designation Act of 1995 (NHS). This action will restrict Federal participation for Type II projects to those that were approved before the date of enactment of the NHS legislation or are proposed along lands that were developed or were under substantial construction before approval.
of the acquisition of the rights-of-way for, or construction of, an existing highway.

DATES: This interim final rule is effective September 30, 1996. Written comments must be received on or before November 27, 1996.

ADDRESSES: Submit signed, written comments to FHWA Docket No. 96–26, Federal Highway Administration, Office of the Chief Counsel, Room 4232, HCC–10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., et., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.


SUPPLEMENTARY INFORMATION:

Background

Type II projects are not mandatory requirements of 23 CFR Part 772, but are proposed solely at the option of a State highway agency. By the end of 1992, 17 States had constructed at least one Type II project.

The FHWA believes that highway traffic noise should be reduced through a program of shared responsibility and, thus, has encouraged State and local governments to practice noise compatible land use planning and control in the vicinity of highways. However, lands immediately adjacent to highways frequently have been developed without proper regard for traffic noise impacts. Later, State highway agencies have constructed Type II noise barriers to abate these impacts. Since 1976, the FHWA noise regulations have required local officials to take measures to exercise land use control over undeveloped lands adjacent to highways to prevent development of incompatible activities before FHWA funds could normally be used to abate noise impacts upon land uses which came into existence after May 14, 1976.

In the recently passed NHS legislation (Pub. L. 104–99, 109 Stat. 605), Congress limited Federal participation in Type II projects to those which were already approved or future projects where development occurred prior to the construction of an existing highway. Thus, the FHWA is amending Part 772 to be consistent with the NHS legislation.

Federal participation in noise abatement measures will only be approved for projects that were approved before November 28, 1995, the date of enactment of the NHS, or for projects that are proposed along lands that were developed or were under substantial construction before approval of the acquisition of the rights-of-way for, or construction of, an existing highway. Land development or substantial construction must have predated the existence of any highway. The granting of a building permit, filing of a plat plan, or a similar action must have occurred prior to right-of-way acquisition or construction approval for the original highway.

In addition, the amendment provides that Federal participation in Type II abatement will be prohibited for lands or activities where Type I abatement has been previously determined not to be reasonable and feasible. This makes explicit that which is implicit in the noise regulations. If a noise abatement project does not qualify as reasonable and feasible when proposed as a Type I project, it won’t later qualify as reasonable and feasible when proposed as a Type II project.

Rulemaking Analyses and Notices

The FHWA has determined that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B) because this interim final rule incorporates into the regulations the language of the NHS statute. In addition, the FHWA has determined that prior notice and opportunity for comment are not required under the Department of Transportation’s regulatory policies and procedures, as it is not anticipated that such action would result in the receipt of information that would substantially change the regulation, since the revised rule incorporates a legislative change.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

National Environmental Policy Act

The agency has analyzed this action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes
the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 772
Highways and roads, Noise control.
Issued on: August 21, 1996.
Rodney E. Slater,
Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends chapter I of title 23, Code of Federal Regulations, Part 772 as set forth below.

PART 772—PROCEDURES FOR ABATEMENT OF HIGHWAY TRAFFIC NOISE AND CONSTRUCTION NOISE

1. The authority citation for Part 772 is revised to read as follows:


2. In §772.13, paragraph (b) is revised to read as follows:

§772.13 Federal participation. * * * *

(b) For Type II projects, noise abatement measures will only be approved for projects that were approved before November 28, 1995, or are proposed along lands where land development or substantial construction predated the existence of any highway. The granting of a building permit, filing of a plat plan, or a similar action must have occurred prior to right-of-way acquisition or construction approval for the original highway. Noise abatement measures will not be approved at locations where such measures were previously determined not to be reasonable and feasible for a Type I project.

* * * *

[FR Doc. 96-22059 Filed 8-28-96; 8:45 am]
BILLING CODE 4910-22-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 586

[Docket No. FR–3820–I–05]

RIN 2506–AB72

Office of the Assistant Secretary for Community Planning and Development; Base Closure Community Redevelopment and Homeless Assistance

AGENCY: Office of the Assistant Secretary for Community Planning and Development (HUD).

ACTION: Interim rule.

SUMMARY: This interim rule removes 24 CFR 586.50, to extend until the effective date of a final rule the period that the interim rule for the Base Closure Community Redevelopment and Homeless Assistance Program will be in effect.

DATES: Effective Date: September 30, 1996.

FOR FURTHER INFORMATION CONTACT: Perry Vietti, Office of Community Viability, Office of the Assistant Secretary for Community Planning and Development, Room 7220, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, (202) 708–2186, ext. 4396, or, TTY number for hearing and speech-impaired, (202) 708–0738 (these telephone numbers are not toll-free).

SUPPLEMENTARY INFORMATION:

Section 586.50 was added to implement a Department-wide policy for the expiration of interim rules within a set period of time if they are not issued in final form before the end of the period. The rule provides that the effective period of the interim rule may be extended by notice published in the Federal Register. Because the expiration date for the Base Closure Community Redevelopment and Homeless Assistance Program interim rule is currently September 17, 1996, and a final rule is not expected to be effective before that date, such a notice has been published extending the effective period of the interim rule until the final rule is published and made effective. This rule makes the conforming change to §586.50.

II. Other Matters

Impact on the Environment

For the interim rule published for this part, HUD made a Finding of No Significant Impact with respect to the environment in accordance with HUD regulations in 24 CFR Part 50, which implement Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The changes made by this rule do not substantively affect the Finding of No Significant Impact prepared for the interim rule, and it remains applicable. That Finding of No Significant Impact is available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This rule only eliminates a sunset provision and keeps the interim rule in effect until the publication of a final rule.

Federalism Impact

The General Counsel of HUD, as the Designated Official under Executive Order 12612, Federalism, has determined that the policies contained in this rule would not have any impact under the Order. This rule only eliminates a sunset provision and keeps the interim rule in effect until the publication of a final rule.

Impact on the Family

The General Counsel of HUD, as the Designated Official under Executive Order 12606, The Family, has determined that this interim rule would not have an impact on family formation, maintenance, and general well-being. This rule only eliminates a sunset provision and keeps the interim rule in effect until the publication of a final rule.

List of Subjects in 24 CFR Part 586

Homeless, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, part 586 of title 24 of the Code of Federal Regulations is amended to read as follows:

PART 586—BASE CLOSURE COMMUNITY REDEVELOPMENT AND HOMELESS ASSISTANCE

1. The authority citation for part 586 continues to read as follows:


§586.50 [Removed]

2. Section 586.50 is removed.

Dated: August 21, 1996.

Andrew Cuomo,
Assistant Secretary for Community Planning and Development.

[FR Doc. 96–22023 Filed 8–28–96; 8:45 am]
BILLING CODE 4210–29–P
DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 70 and 71

Safety Standards for Underground Coal Mines

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of MSHA acceptance of new personal noise dosimeters.

SUMMARY: After testing and evaluation, the Mine Safety and Health Administration (MSHA) announces the acceptance of the Quest Technologies Models Q-100, Q-200, Q-300, and Q-400 Personal Noise Dosimeters for use in coal mines.

EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Robert G. Peluso, Pittsburgh Technical Support Center, Mine Safety and Health Administration, 4800 Forbes Avenue, Pittsburgh, PA 15213, (412) 621-4500.

SUPPLEMENTARY INFORMATION: On September 12, 1978, the Mine Safety and Health Administration (MSHA) published a final rule that became effective on October 1, 1978 and amended the mandatory health standards governing noise dosimeters (43 FR 40760). Those amendments to 30 CFR parts 70 and 71 permitted the use of personal noise dosimeters to make required noise exposure measurements in coal mines and set forth the procedures to be followed in taking such noise measurements. When noise exposure measurements and surveys required by parts 70 and 71 are taken by personal noise dosimeters, the dosimeters must be acceptable to MSHA.

The test and criteria used by MSHA to determine acceptability of personal noise dosimeters are published in "MSHA Test Procedures and Acceptability Criteria for Noise Dosimeters," MSHA Informational Report IR-1072. MSHA has recently completed testing and evaluation of the Quest Technologies Models Q-100, Q-200, Q-300 and Q-400 Personal Noise Dosimeters. MSHA has determined that the dosimeters met all of the criteria listed in MSHA's Informational Report IR-1072 and hereby gives notice that these dosimeters are acceptable for use under 30 CFR 70.505 and 71.801.

Accordingly, operators may use the Quest Technologies Models to take the noise exposure measurements and surveys at underground coal mines as required by 30 CFR 70.503, 508 and 509 and at surface coal mines as required by 30 CFR 71.802, 803 and 804.

Dated: August 14, 1996.

J. Davitt McAteer,
Assistant Secretary for Mine Safety and Health.

32 CFR Part 856

Aircraft Arresting Systems

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of the Air Force is removing the rule on Aircraft Arresting Systems because it has limited applicability to the general public. This action is the result of departmental review. The intended effect is to ensure that only rules which substantially affect the public are maintained in the Air Force portion of the Code of Federal Regulations.

EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Ms Patsy Conner, Air Force Federal Register Liaison Officer, SAF/AAX, 1720 Air Force Pentagon, Washington DC 20330-1720.

SUPPLEMENTARY INFORMATION: List of Subjects in 32 CFR Part 856

Aircraft, Airports, Aviation safety.

PART 856—[REMOVED]

Accordingly under the authority 10 U.S.C. 8013, 32 CFR Chapter VII is amended by removing Part 856.

Patsy J. Conner,
Air Force Federal Register Liaison Officer.
[FR Doc. 96-22068 Filed 8-28-96; 8:45 am]

32 CFR Part 882

U.S. Air Force Responsibilities for Aircraft Leased for Airshows

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of the Air Force is removing the rule on U.S. Air Force Responsibilities for Aircraft Leased for Airshows. The rule is removed since the source document has been rescinded.
EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Ms Patsy Conner, Air Force Federal Register Liaison Officer, SAF/AAX, 1720 Air Force Pentagon, Washington DC 20330-1720.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 862

Aircraft, Aviation safety, Government contracts, Government property.

PART 862—[REMOVED]

Accordingly under the authority 10 U.S.C. 8013, 32 CFR Chapter VII is amended by removing Part 862.

Patsy J. Conner,
Air Force Federal Register Liaison Officer.
[FR Doc. 96-22070 Filed 8-28-96; 8:45 am]
BILLING CODE 3910-01-M

32 CFR Part 909

USAF Training for Contractor Employees

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of the Air Force is removing the rule on USAF Training for Contractor Employees. The rule is removed since the source document has been rescinded. EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Ms Patsy Conner, Air Force Federal Register Liaison Officer, SAF/AAX, 1720 Air Force Pentagon, Washington DC 20330-1720.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 909

Education, Government contracts.

PART 909—[REMOVED]

Accordingly under the authority 10 U.S.C. 8013, 32 CFR Chapter VII is amended by removing Part 909.

Patsy J. Conner,
Air Force Federal Register Liaison Officer.
[FR Doc. 96-22071 Filed 8-28-96; 8:45 am]
BILLING CODE 3910-01-W

32 CFR Part 950

Authority to Administer Oaths

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of the Air Force is removing the rule on Authority to Administer Oaths. The rule is removed since the source document has been rescinded. EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Ms Patsy Conner, Air Force Federal Register Liaison Officer, SAF/AAX, 1720 Air Force Pentagon, Washington DC 20330-1720.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 950

Investigations, Military law.

PART 950—[REMOVED]

Accordingly under the authority 10 U.S.C. 8013, 32 CFR Chapter VII is amended by removing Part 950.

Patsy J. Conner,
Air Force Federal Register Liaison Officer.
[FR Doc. 96-22071 Filed 8-28-96; 8:45 am]
BILLING CODE 3910-01-W

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 26 and 161

[CGD 92-052]

RIN 2115-AE36

Vessel Traffic Service New York Area

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is expanding the boundaries of Vessel Traffic Service New York (VTSNY) Area. This expansion provides the Vessel Traffic Center (VTC) with a more complete vessel traffic image for the entrances to New York Harbor via Ambrose Channel, Raritan Bay, and Long Island Sound. The expansion also furnishes additional information on weather conditions and potential hazards to navigation. As a result, the VTSNY area expansion will assist in safer and more efficient vessel transits in the congested New York Harbor channels and reduce the potential for groundings, rammings, and collisions.

EFFECTIVE DATE: This rule is effective on December 1, 1996.

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

FOR FURTHER INFORMATION CONTACT: Irene Hoffman, Project Manager, Office of Vessel Traffic Management. The telephone number is 202-267-6277.

SUPPLEMENTARY INFORMATION:

Regulatory History


The original VTSNY Area was bounded by the Verrazano-Narrows Bridge to the south, the Brooklyn Bridge and Holland Tunnel to the east and north, Kill Van Kull to the Arthur Kill Railroad Bridge, and Newark Bay to the Lehigh Valley Draw Bridge.

On May 25, 1993, the Coast Guard published an NPRM to expand the VTSNY area in three phases (58 FR 30098). Phase I would expand VTSNY's required participation area from the existing boundary at the Verrazano-Narrows Bridge south to the entrance buoys at Ambrose, Swash, and Sandy Hook Channels in Lower New York Bay, and west into Raritan Bay terminating at a line from Great Kills Light on Staten Island to Point Comfort in New Jersey.

Phase II would expand the VTSNY area to encompass the Arthur Kill, south from the boundary at the Arthur Kill Railroad Bridge to the line in Raritan Bay, described above in the Phase I description. The Raritan River above the Raritan River Railroad Bridge is not included within the VTSNY area.

Phase III would expand the VTSNY boundary at the Brooklyn Bridge up the East River to the Throgs Neck Bridge. The Coast Guard received two letters commenting on the proposal which were addressed in the Interim Final Rule (58 FR 460081, Sept. 1, 1993) implementing Phase I of the VTSNY area expansion.

Background and Purpose

The Ports and Waterways Safety Act (33 U.S.C. 1221 et seq.), as amended by Port and Tanker Safety Act of 1978 and the Oil Pollution Act of 1990, provides authority for the Secretary of the Department of Transportation to construct, operate, maintain, improve or expand vessel traffic services. The Secretary has delegated this authority to the Commandant, U.S. Coast Guard.

Existing regulations require compliance with reporting and participation procedures for certain vessels entering and operating within the VTSNY area. VTSNY has a
surveillance system and radiotelephone network for collecting and disseminating information within this prescribed area.

The expansion of VTSNY furnishes additional information on weather conditions, traffic congestion, and potential hazards to navigation. This information is then relayed to vessels operating in the expanded area, permitting them to respond to conditions as necessary.

Discussion of Changes

In the NPRM, the Coast Guard proposed to expand VTSNY's area incrementally. There were to be two interim final rules for Phases I and II and a final rule encompassing Phase III. However, due to construction and software development delays and funding problems, Phases II and III will be implemented together in this final rule. The interim final rule implementing Phase I expansion area will also be adopted as final in this rule.

There will be a "VTS User Familiarization" period between August 29, 1996, through November 30, 1996. This familiarization period will allow both the VTS operators and VTS Users to gradually become familiar with the new service area before participation becomes mandatory. During the "VTS User Familiarization" period, the VTC will be prepared to provide VTS services and vessels will be encouraged to participate voluntarily in using the VTS services in the expanded area.

The combined Phase II and III expanded areas extend into the Raritan Bay and north through the Arthur Kill, connecting with the existing VTSNY boundary at the Arthur Kill Railroad Bridge; and from the existing VTSNY boundary at the Brooklyn Bridge up the East River to the Throgs Neck Bridge.

The tables contained in 33 CFR parts 26 and 161 which describe the radio frequency monitoring areas assigned to the VTSNY Area are being modified to coincide with the effective date of the area expansion.

The Coast Guard and VTS Users of the VTSNY area recently evaluated the usage levels of the radiotelephone frequencies assigned to VTSNY. This evaluation concluded that VHF–FM Channel 14 was overloaded and Channel 11 was under-used. To correct this disparity and distribute the voice communications equally among the available radio frequencies, the reporting and monitoring frequencies for VTS New York have been changed.

Vessel Movement Reporting System (VMRS) participants will now make their initial Sail Plan Report on Channel 11. The Final Report and all other reports will be made on Channel 14. VMRS participants and other VTS Users will monitor Channel 14 while transiting the VTS area. Vessels will not be required to monitor Channels 11 and 14 simultaneously. Instead of having two distinct frequency monitoring areas, the required monitoring areas for VHF–FM Channel 11 and Channel 14 will now extend throughout the VTS area.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979).

The Coast Guard expects the economic impact of this proposal to be so minimal that a full regulatory evaluation is unnecessary. Most vessels that are affected by this rule are already required to participate in VTSNY. The expansion of the VTS area only requires vessels to communicate with the VTC earlier than presently required. In some cases, vessels are already voluntarily participating in the expanded areas. This final rule does not impose a measurable impact on these vessels.

Small Entities

The cost to small entities will not be significant because the expansion of VTSNY area only requires certain vessels to communicate with the VTC earlier than presently required. This requirement will have little impact on vessels that are affected by this rule. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains no collection-of-information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Federalism

The Coast Guard has analyzed this regulation under the principles and criteria contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this final rule and concluded that under section 2.B.2 of Commandant Instruction M 16475.1B, this rule is categorically excluded from further environmental documentation. Section 2.B.2.1 of that instruction excludes administrative action and procedural regulations and policies which clearly do not have any environmental impact. "A Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES. This rule, which is primarily administrative, requires the Master, Pilot or person directing the movement of a vessel to participate in an expanded VTSNY area. No significant effect on the environment is expected. The Coast Guard also recognizes that this rulemaking may have a positive effect on the environment by minimizing the risk of environmental harm.

List of Subjects

33 CFR Part 26

Communications Equipment, Navigation (water), Marine safety, Radio, Telephone, Vessels.

33 CFR Part 161

Harbors, Reporting and recordkeeping requirements, Navigation (water), Vessels, Waterways.

Accordingly, the interim final rule amending 33 CFR Part 161 which was published at 58 FR 46081 on September 1, 1993, is adopted as final without change and 33 CFR parts 26 and 161 are amended as follows:

PART 26—VESSEL BRIDGE-TO-BRIDGE RADIOTELEPHONE REGULATIONS

1. The authority citation for part 26 continues to read as follows:


2. In § 26.03, Table 26.03(f) is revised to read as follows:
<table>
<thead>
<tr>
<th>Vessel traffic services ¹ call sign</th>
<th>Designated frequency ² (channel designation)</th>
<th>Monitoring area</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York ³</td>
<td>156.550 MHz (Ch. 11) and 156.700 MHz (Ch. 14)</td>
<td>The navigable waters of the Lower New York Harbor bounded on the east by a line drawn from Norton Point to Brezezy Point; on the south by a line connecting the entrance buoys at the Ambrose Channel, Swash Channel and Sandy Hook Channel to Sandy Hook Point; and on the southeast including the waters of the Sandy Hook Bay south to a line drawn at latitude 40°25' N.; then west into waters of the Raritan Bay to the Raritan River Rail Road Bridge; and then north including the waters of the Arthur Kill and Newark Bay to the Lehigh Valley Draw Bridge at latitude 40°41.95' N.; and then east including the waters of the Kill Van Kull and Upper New York Bay north to a line drawn east-west from the Holland Tunnel Ventilator Shaft at latitude 40°43.7' N.; longitude 74°01.6' W. in the Hudson River; and continuing east including the waters of the East River to the Throgs Neck Bridge, excluding the Harlem River. Each vessel at anchor within the above areas.</td>
</tr>
<tr>
<td>Houston ³</td>
<td>156.600 MHz (Ch. 12)</td>
<td>The navigable waters north 29° N., west of 94°20' W., south of 29°49' N., and east of 95°20' W.:</td>
</tr>
<tr>
<td>Berwick Bay</td>
<td>156.550 MHz (Ch. 11)</td>
<td>The navigable waters south of a line extending due west from the southern most end of Exxon Dock #1 (29°43.37' N., 95°01.27' W.).</td>
</tr>
<tr>
<td>St. Marys River</td>
<td>Soo Control</td>
<td>The navigable waters of the St. Marys River between 45°57' N. (De Tour Reef Light) and 46°38.7' N. (Ile Parisienne Light), except the St. Marys Falls Canal and those navigable waters east of a line from 46°04.16' N. and 46°01.57' N. (La Pointe to Sims Point in Portagannissing Bay and Worsley Bay).</td>
</tr>
<tr>
<td>San Francisco ³</td>
<td>San Francisco Offshore Vessel Movement Reporting Service.</td>
<td>The waters within a 38 nautical mile radius of Mount Tamalpais (37°55.8' N., 122°34.6' W.) excluding the San Francisco Offshore Precautionary Area.</td>
</tr>
<tr>
<td>Puget Sound ⁵</td>
<td>Seattle Traffic ⁶</td>
<td>The navigable waters of Puget Sound, Hood Canal and adjacent waters south of a line connecting Marrowstone Point and Lagoon Point in Admiralty Inlet and south of a line drawn due east from the southernmost tip of Possession Point on Whidbey Island to the shoreline.</td>
</tr>
<tr>
<td>Tofino Traffic ⁷</td>
<td>156.725 MHz (Ch. 74)</td>
<td>The waters west of 124°40' W. within 50 nautical miles of the coast of Vancouver Island including the waters north of 48° N., and east of 127° W.</td>
</tr>
<tr>
<td>Vancouver Traffic</td>
<td>156.550 MHz (Ch. 11)</td>
<td>The navigable waters of the Strait of Georgia west of 122°52' W., the navigable waters of the central Strait of Juan de Fuca north and east of Race Rocks, including the Gulf Island Archipelago, Boundary Pass and Haro Strait.</td>
</tr>
<tr>
<td>Prince William Sound ⁸</td>
<td>Valdez Traffic</td>
<td>The navigable waters south of 61°05' N., east of 147°20' W., north of 60° N., and west of 146°30' W., and, all navigable waters in Port Valdez.</td>
</tr>
<tr>
<td>Louisville ⁸</td>
<td>Louisville Traffic</td>
<td>The navigable waters of the Ohio River between McAlpine Locks (Mile 606) and Twelve Mile Island (Mile 593), only when the McAlpine upper pool gauge is at approximately 13.0 feet or above.</td>
</tr>
</tbody>
</table>
Notes:
1 VTS regulations are denoted in 33 CFR Part 161. All geographic coordinates (latitude and longitude) are expressed in North American Datum of 1983 (NAD 83).
2 In the event of a communication failure either by the vessel traffic center or the vessel or radio congestion on a designated VTS frequency, communications may be established on an alternate VTS frequency. The bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13), is monitored in each VTS area; and it may be used as an alternate frequency, however, only to the extent that doing so provides a level of safety beyond that provided by other means.
3 Designated frequency monitoring is required within U.S. navigable waters. In areas which are outside the U.S. navigable waters, designated frequency monitoring is voluntary. However, prospective VTS Users are encouraged to monitor the designated frequency.
4 VMRS participants shall make their initial report (Sail Plan) to New York Traffic on Channel 11 (156.550 MHz). All other reports, including the Final Report, shall be made on Channel 14 (156.700 MHz). VMRS and other VTS Users shall monitor Channel 14 (156.700 MHz) while transiting the VTS area. New York Traffic may direct a vessel to monitor and report on either primary frequency depending on traffic density, weather conditions, or other safety factors. This does not require a vessel to monitor both primary frequencies.
5 A Cooperative Vessel Traffic Service was established by the United States and Canada within adjoining waters. The appropriate vessel traffic center administers the rules issued by both nations; however, it will enforce only its own set of rules within its jurisdiction.
6 Seattle Traffic may direct a vessel to monitor the other primary VTS frequency 156.250 MHz or 156.700 MHz (Channel 5A or 14) depending on traffic density, weather conditions, or other safety factors, rather than strictly adhering to the designated frequency required for each monitoring area as defined above. This does not require a vessel to monitor both primary frequencies.

PART 161—VESSEL TRAFFIC MANAGEMENT

3. The authority citation for part 161 continues to read as follows:


4. In § 161.12, Table 161.12(b) is revised to read as follows:

<table>
<thead>
<tr>
<th>Vessel traffic services call sign</th>
<th>Designated frequency (channel designation)</th>
<th>Monitoring area</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York ²</td>
<td>156.550 MHz (Ch. 11) and 156.700 MHz (Ch. 14)</td>
<td>The navigable waters of the Lower New York Harbor bounded on the east by a line drawn from Norton Point to Breezy Point; on the south by a line connecting the entrance buoys at the Ambrose Channel, Swash Channel and Sandy Hook Channel to Sandy Hook Point; and on the southeast including the waters of the Sandy Hook Bay south to a line drawn at latitude 40°25′N.; then west into waters of the Raritan Bay to the Raritan River Railroad Bridge; and then north including the waters of the Arthur Kill and Newark Bay to the Lehigh River Draw Bridge at latitude 40°41.95′N.; and then east including the waters of the Kill Van Kull and Upper New York Bay north to a line drawn east-west from the Holland Tunnel Ventilator Shaft at latitude 40°43.7′N.; longitude 74°01.6′W. in the Hudson River; and continuing east including the waters of the East River to the Throgs Neck Bridge, excluding the Harlem River.</td>
</tr>
<tr>
<td>Houston ²</td>
<td>156.600 MHz (Ch. 12)</td>
<td>Each vessel at anchor within the above areas.</td>
</tr>
<tr>
<td>Houston Traffic</td>
<td>156.550 MHz (Ch. 11)</td>
<td>The navigable waters north of 29°N., west of 94°20′′W., south of 29°49′N., and east of 95°20′W.</td>
</tr>
<tr>
<td>Berwick Bay</td>
<td>156.600 MHz (Ch. 12)</td>
<td>The navigable waters south of a line extending due west from the southernmost end of Exxon Dock #1 (29°43.37′N., 95°01.27′W.)</td>
</tr>
<tr>
<td>Soo Control</td>
<td>156.600 MHz (Ch. 12)</td>
<td>The navigable waters south of a line extending due west from the southernmost end of Exxon Dock #1 (29°43.37′N., 95°01.27′W.)</td>
</tr>
<tr>
<td>San Francisco ²</td>
<td>156.600 MHz (Ch. 12)</td>
<td>The navigable waters of the St. Marys River between 45°57′N. (De Tour Reef Light) and 46°38.7′N. (Ile Parisienne Light), except the St. Marys Falls Canal and those navigable waters east of a line from 46°04.16′N. and 46°01.57′N. (LaPonte to Sims Point in Potagannissing Bay and Worsley Bay).</td>
</tr>
<tr>
<td>Reporting Service San Francisco Traffic</td>
<td>156.700 MHz (Ch. 14)</td>
<td>The waters within a 38 nautical mile radius of Mount Tamalpais (37°55.8′N., 122°34.6′W.) excluding the San Francisco Offshore Precautionary Area.</td>
</tr>
<tr>
<td>Puget Sound ²</td>
<td>156.700 MHz (Ch. 14)</td>
<td>The waters of the San Francisco Offshore Precautionary Area eastward to San Francisco Bay including its tributaries extending to the ports of Stockton, Sacramento and Redwood City.</td>
</tr>
<tr>
<td>Seattle Traffic ⁵</td>
<td>156.700 MHz (Ch. 14)</td>
<td>The navigable waters of Puget Sound, Hood Canal and adjacent waters south of a line connecting Marrowstone Point and Lagoon Point in Admiralty Inlet and south of a line drawn due east from the southernmost tip of Possession Point on Whidbey Island to the shoreline.</td>
</tr>
</tbody>
</table>

³In the event of a communication failure either by the vessel traffic center or the vessel or radio congestion on a designated VTS frequency, communications may be established on an alternate VTS frequency. The bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13), is monitored in each VTS area; and it may be used as an alternate frequency, however, only to the extent that doing so provides a level of safety beyond that provided by other means.

²The bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13), is used in these VTSs because the level of radiotelephone transmissions does not warrant a designated VTS frequency. The listening watch required by 26.05 of this chapter is not limited to the monitoring area.
### TABLE 161.12(b).—VEssel Traffic Services (VTS) Call Signs, Designated Frequencies, and Monitoring Areas—Continued

<table>
<thead>
<tr>
<th>Vessel traffic services call sign</th>
<th>Designated frequency (channel designation)</th>
<th>Monitoring area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tofino Traffic 6</td>
<td>156.725 MHz (Ch. 74)</td>
<td>The navigable waters of the Strait of Georgia west of 122°52′W., the navigable waters of the central Strait of Juan de Fuca north and east of Race Rocks, including the Gulf Island Archipelago, Boundary Pass and Haro Strait.</td>
</tr>
<tr>
<td>Vancouver Traffic</td>
<td>156.550 MHz (Ch. 11)</td>
<td>The navigable waters of the Strait of Georgia west of 122°52′W., the navigable waters of the central Strait of Juan de Fuca north and east of Race Rocks, including the Gulf Island Archipelago, Boundary Pass and Haro Strait.</td>
</tr>
<tr>
<td>Prince William Sound 7</td>
<td>156.650 MHz (Ch. 13)</td>
<td>The navigable waters south of 61°05′N., east of 147°20′W., north of 60°N., and west of 146°30′W.; and, all navigable waters in Port Valdez.</td>
</tr>
<tr>
<td>Louisville 7</td>
<td>156.650 MHz (Ch. 13)</td>
<td>The navigable waters of the Ohio River between McAlpine Locks (Mile 606) and Twelve Mile Island (Mile 593), only when the McAlpine pool gauge is at approximately 13.0 feet or above.</td>
</tr>
</tbody>
</table>

Notes:
1. In the event of a communication failure either by the vessel traffic center or the vessel or radio congestion on a designated VTS frequency, communications may be established on an alternate VTS frequency. The bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13), is monitored in each VTS area; and it may be used as an alternate frequency, however, only to the extent that doing so provides a level of safety beyond that provided by other means.
2. Designated frequency monitoring is required within U.S. navigable waters. In areas which are outside the U.S. navigable waters, designated frequency monitoring is voluntary. However, prospective VTS Users are encouraged to monitor the designated frequency.
3. VTS traffic service was established by the United States and Canada within adjoining waters. The appropriate vessel traffic service is established by both nations; however, it will enforce only its own set of rules within its jurisdiction.
4. The bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13), is used in these VTSs because the level of radiotelephone transmission does not warrant a designated VTS frequency. The listening watch required by 28.05 of this chapter is not limited to the monitoring area.

§ 161.25 Vessel Traffic Service New York Area.

The area consists of the navigable waters of the Lower New York Harbor bounded on the east by a line drawn from Norton Point to Breezy Point; on the south by a line connecting the entrance buoys at the Ambrose Channel, Swash Channel, and Sandy Hook Channel to Sandy Hook Point; and on the southeast including the waters of Sandy Hook Bay south to a line drawn at latitude 40°25′N.; then west into waters of the Raritan Bay to the Raritan River Rail Road Bridge; and then north including the waters of the Arthur Kill and Newark Bay to the Lehigh Valley Draw Bridge at latitude 40°41.9′N.; and then east including the waters of the Kill Van Kull and Upper New York Bay north to a line drawn east-west from the Holland Tunnel Ventilator Shaft at latitude 40°43.7′N., longitude 74°01.6′W. in the Hudson River; and then continuing east including the waters of the East River to the Throgs Neck Bridge, excluding the Harlem River.

Note: Although mandatory participation in VTSNY is limited to the area within the navigable waters of the United States, VTSNY will provide services beyond those waters. Prospective users are encouraged to report beyond the area of required participation in order to facilitate advance vessel traffic management in the VTS area and to receive VTSNY advisories and/or assistance.

Dated: August 20, 1996.

J.C. Card,
Rear Admiral, U.S. Coast Guard Chief, Marine Safety and Environmental Protection.

[FR Doc. 96–21733 Filed 8–28–96; 8:45 am]
BILING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VI69–01–7295a; FRL 5552–1]

Approval and Promulgation of State Implementation Plan; Wisconsin; GenCorp Inc. Site-Specific SIP Revision

AGENCY: Environmental Protection Agency (EPA).
ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) approves a revision to the Wisconsin State Implementation Plan (SIP) for ozone that was submitted on November 17, 1995. This revision is an alternative control method for controlling volatile organic compound (VOC) emissions from storage tanks at the GenCorp Inc.-Green Bay facility. The EPA has approved Wisconsin's general rule for the storage of VOCs. The approved rule states that any deviation from the specifically required control methods found in the State's rule must be proven to be equivalent in controlling the VOC emissions before being approved into the SIP. Because GenCorp Inc. has chosen a different control method than those listed specifically in Wisconsin's rule, a site-specific SIP revision is required to evaluate the control method being used at the Green Bay facility. In the proposed rules section of this Federal Register, the EPA is proposing approval of, and soliciting comments on, this requested SIP revision. If adverse comments are received on this action, the EPA will withdraw this final rule and address the comments received in response to this action in a final rule on the related proposed rule, which is being published in the proposed rules section of this Federal Register. A second public comment period will not be held. Parties interested in commenting on this action should do so at this time. This approval makes federally enforceable the State's rule that has been incorporated by reference.

DATES: The “direct final” is effective on September 30, 1996. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESS: Written comments should be sent to: Carlton T. Nash, Chief, Regulation Development Section, Air Programs Branch (AR–18), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the proposed SIP revision and EPA’s analysis are available for inspection at the U.S. EPA, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone Douglas Aburano at (312) 353-6960 before visiting the Region 5 Office.)


SUPPLEMENTARY INFORMATION:

I. Background Information

Wisconsin rule NR 419 is currently approved into the Wisconsin SIP. Part 419.05 applies to the storage of volatile organic compounds (VOCs). Rule 419.05 requires the use of specific control methods or equally effective alternative control methods approved by both the Wisconsin Department of Natural Resources (WDNR) and Environmental Protection Agency (EPA). As part of a proposed project at the GenCorp Inc.-Green Bay facility, a tank used to store acrylonitrile, a VOC, will be constructed and be subject to the requirements of 419.05. Since the GenCorp facility will not be using the controls specified in Rule 419.05, WDNR has submitted a site-specific SIP revision to obtain federal approval of the alternative control methods that the GenCorp facility will be employing. The WDNR has made the determination that the controls that the GenCorp facility will be using are more effective than the controls required by Rule 419.05.

II. Evaluation of State Submittal

The GenCorp facility proposes to construct a styrene-butadiene-acrylonitrile latex manufacturing project. As part of this project a vessel used to store acrylonitrile will be necessary. A vessel of this type is subject to the requirements of Wisconsin Rule NR 419.05.

Acrylonitrile will be unloaded from a railcar, approximately one 26,000 gallon railcar will be unloaded per month. The railcars will be connected to the unloading rack piping through reinforced hoses. One or two hoses will convey liquid while another will return the liquid to the storage tank. In addition to the safety rupture disk and telltale gage. The tank will be padded with nitrogen gas to maintain working pressure above one atmosphere to eliminate any working losses due to pressure changes. These last two control devices are usually not used in combination with floating roofs because the floating roofs will minimize working loss emissions significantly and would not require additional control.

The WDNR has approved GenCorpInc.’s proposed alternative storage tank controls as being more effective than the control methods approved by Rule 419.05. The use of a low-pressure tank will eliminate the standing storage losses and the use of a vapor recovery system will virtually eliminate any working losses as well. It is estimated that GenCorp-Inc.’s proposed controls will achieve an additional 1,113 pounds of VOC per year in reductions above the controls specifically mentioned in Rule 419.05.

III. Final Action

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 28, 1996 unless, by September 30, 1996, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The
EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective October 28, 1996.

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.

The EPA approves the condition from Wisconsin’s construction permit #95-CHB-407 That requires the use of a pressure vessel storage tank with a vapor balance system for storage of acrylonitrile which will be used in the process of manufacturing styrene-butadiene-acrylonitrile latex making this condition federal enforceable.

IV. Administrative Requirements
A. Executive Order 12866

This action has been classified as a Table 3 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 a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

B. Regulatory Flexibility Act

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).

C. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 28, 1996. 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, Ozone, Reporting and recordkeeping requirements.

Dated: August 5, 1996.

Vaidas V. Adamkus, Regional Administrator.

For the reasons stated in the preamble, part 52, chapter 1, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart YY—Wisconsin

2. Section 52.2570 is amended by adding paragraph (c)(94) to read as follows:

§ 52.2570 Identification of plan.

| * | * | * | * | * | * |

(94) A revision to the ozone State Implementation Plan (SIP) was submitted by the Wisconsin Department of Natural Resources on November 17, 1995. This revision consists of a site-specific revision for the GenCorp Inc.-Green Bay facility. This revision is required under Wisconsin’s federally approved rule, NR 419.05. The storage requirements contained in NR 419.05 specifically require floating roofs, vapor condensation systems, and vapor holding tanks, or an equally effective alternative control method approved by the Wisconsin Department of Natural Resources and U.S. EPA. The GenCorp Inc.-Green Bay facility has chosen to utilize a pressure vessel storage tank with a vapor balance system, as specified in Permit #95– CHB-407 which was issued on August 29, 1995. This pressure vessel will be used for the storage of acrylonitrile that will be used to manufacture styrene butadiene-acrylonitrile latex.

(i) Incorporation by reference. The following sections of the Wisconsin air pollution construction permit #95–CHB-407 are incorporated by reference.

(A) The permit condition requiring a pressure vessel storage tank with a vapor balance system for the styrene-butadiene-acrylonitrile latex manufacturing process, as created and published Wisconsin Permit #95–CHB-407, August 29, 1995 and effective August 29, 1995.

[FR Doc. 96–21908 Filed 8–28–96; 8:45 am]

BILLING CODE 6560–50–P
40 CFR Part 70

[AD–FRL–5559–1]

Clean Air Act Interim Approval of Operating Permits Program; South Coast Air Quality Management District, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is promulgating direct final interim approval of the title V operating permits program submitted by the California Air Resources Board, on behalf of the South Coast Air Quality Management District (South Coast or District), for the purpose of complying with federal requirements for an approvable state program to issue operating permits to all major stationary sources and to certain other sources. Today's action also promulgates direct final approval of South Coast's mechanism for receiving delegation of authority by the California Air Resources Board, for the purpose of complying with federal requirements for an approvable state program to issue operating permits to all major stationary sources and to certain other sources. Today's action also promulgates direct final approval of South Coast's mechanism for receiving delegation of authority by the California Air Resources Board, for the purpose of complying with federal requirements for an approvable state program to issue operating permits to all major stationary sources and to certain other sources.

EFFECTIVE DATE: This direct final rule is effective on October 28, 1996 unless adverse or critical comments are received by September 30, 1996. If the effective date is changed, a timely notice will be published in the Federal Register.

ADDRESSES: Copies of the District's submittal and other supporting information used in developing this direct final rule are available for public inspection (docket number CA–SC–96–1–OPS) during normal business hours at the following location: Operating Permits Section (A–5–2), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas (telephone 415/744–1252), Operating Permits Section (A–5–2), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (Act)), and implementing regulations at 40 Code of Federal Regulations (CFR) part 70 (part 70), require that states develop and submit operating permits 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.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing interim approval of the operating permit program submitted by South Coast should adverse or critical comments be filed.

If EPA receives adverse or critical comments, this action will be withdrawn before the effective date by publishing a subsequent document 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 the proposed rule. The EPA will not institute a second comment period. 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 October 28, 1996.

B. Federal Oversight and Sanctions

This interim approval, which may not be renewed, extends until October 29, 1998. During this interim approval period, South Coast is protected from sanctions, and EPA is not obligated to promulgate, administer and enforce a federal operating permits program in the District. 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 the effective date of this interim approval, as does the 3-year time period for processing the initial permit applications.

If South Coast fails to submit a complete corrective program for full approval by April 29, 1998, EPA will start an 18-month clock for mandatory sanctions. If South Coast then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that South Coast has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the District, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that South Coast has come into compliance. In any case, if, six months after application of the first sanction, the District still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves South Coast's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date South Coast has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of the District, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that South Coast has come into compliance. In all cases, if, six months after EPA applies the first sanction, the District has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if South Coast has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to the District's program by the expiration of this interim approval, EPA must promulgate, administer and enforce a federal permits program for South Coast upon interim approval expiration.

II. Direct Final Action and Implications

A. Analysis of State Submission

The analysis contained in this notice focuses on specific elements of South Coast's title V operating permits program that must be corrected to meet the minimum requirements of part 70. The full program submittal; the Technical Support Document (TSD), which contains a detailed analysis of the submittal; and other relevant materials are available for inspection as part of the public docket (CA–SC–96–1–OPS). The docket may be viewed during regular business hours at the address listed above.
1. Support Materials

South Coast's title V program was submitted by the California Air Resources Board (CARB) on December 27, 1993. The South Coast submittal included the following implementing and supporting regulations: Regulation XXX—Title V Permits; Rule 204—Permit Conditions; Rule 206—Posting of Permit to Operate; Rule 210—Applications; Rule 301—Permit Fees; Rule 518—Hearing Board Procedures for Title V Facilities; and Rule 219—Equipment not Requiring a Written Permit Pursuant to Regulation II. The EPA found the program to be incomplete on March 4, 1994 because it lacked permit application forms. On March 6, 1995, the District submitted its forms and EPA found the program complete on March 30, 1995. On February 10, 1995, the District adopted a rule to implement title IV. EPA deemed the South Coast acid rain program acceptable on March 29, 1995 (see 60 FR 16127) and on April 11, 1995, it was submitted to EPA as part of the District's title V program. On August 11, 1995, the District amended the regulatory portion of its submittal. On September 26, 1995, EPA received from CARB, on behalf of the District, the revised Regulation XXX, revised Rule 518—Variances and Supporting Procedures for Title V Facilities, and a new rule, Rule 518.1—Permit Appeal Procedures for Title V Facilities. Additional materials were received on April 24, 1996, including draft revised application forms, a demonstration of adequacy of the District's group processing provisions, and several additional rules, including the following, which are relied upon to implement the title V program: Rule 219—Equipment not Requiring a Written Permit Pursuant to Regulation II, adopted August 12, 1994 (supersedes previously submitted version); Rule 301—Permit Fees, adopted October 13, 1995 (supersedes previously submitted version); and Rule 441—Research Operations, adopted May 5, 1976. In conjunction with its evaluation of the South Coast's title V operating permits program, EPA reviewed all of the rules, including Regulations XX and XIII, submitted by the District. While EPA is not specifically approving rules not directly relied upon to implement part 70 as part of the District's operating permits program, changes to these rules will be reviewed by EPA to ensure implementation of the part 70 program is not compromised. See the TSD for a complete listing of rules submitted by the District.

2. Regulations and Program Implementation

South Coast's title V implementing regulation, District Regulation XXX, was first adopted on October 8, 1993. EPA reviewed Regulation XXX both before and after rule adoption and identified numerous regulatory deficiencies. These deficiencies were communicated to South Coast in letters dated October 7, 1993, December 7, 1994, April 6, 1995, April 13, 1995, and May 1, 1995. In response, South Coast revised District implementing regulations, and all other program documentation required by section 70.4. An implementation agreement is currently being developed between South Coast and EPA.

The variance process is described in section II.A.2.d. below. The variance process allows the District to establish and EPA to approve provisions of state and local law. EPA has no authority to approve provisions of state or local law, such as the variance provisions referred to, that are inconsistent with the requirements of the Title V permitting process.

A part 70 permit may incorporate, via part 70 permit issuance or modification procedures, those provisions of state and local law that are consistent with the program requirements. EPA reserves the right to pursue enforcement of any applicable requirements notwithstanding the existence of a compliance schedule in a permit to operate. This is consistent with 40 CFR § 70.5(c)(B)(iii)(C), which states that a schedule of compliance "shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based."

EPA does not recognize the ability of a permitting authority to grant relief from the duty to comply with a federally enforceable part 70 permit, except where such relief is granted through procedures allowed by part 70. A part 70 permit may be issued or revised to incorporate those terms of a variance that are consistent with applicable requirements.

b. Group Processing Provisions. Part 70 provides for the group processing of minor permit modifications, providing the cumulative emissions increases from the pending changes do not exceed 10% of allowable emissions for the unit, 20% of the major source threshold, or 5 tons per year (tpy), whichever is lower. Section 70.7(e)(3)(i)(B) allows the District to establish and EPA to approve alternative levels, if such alternative levels would reasonably alleviate severe administrative burdens and the individual processing of changes below the levels would yield trivial environmental benefits.

South Coast allows cumulative emissions increases of up to 5 tons per year under its group processing...
provisions. This will in some cases exceed the levels set out in part 70. For example, 20% of the major source threshold for NO\textsubscript{x} and VOC in the South Coast is 2 tons per year. Appendix C of the South Coast's April 24, 1996 submittal contains a demonstration that supports the use of a 5 ton per year cut-off for group processing. The District notes that its requirement that sources obtain a permit revision prior to making a change eliminates any environmental risk associated with delays allowed by group processing. It also points out that the ability to group several changes into one permit action alleviates the administrative burden of multiple rounds of processing and provides for a shorter period of time when a facility permit is in flux. EPA believes the District has met the requirements of 70.7(e)(3)(i)(B) and is therefore approving the alternative group processing level in the South Coast regulation.

c. Provisions for Processing Certain Modifications Subject to Major NSR Via the Minor Permit Revision Track. The South Coast Air Quality Management District is the only extreme ozone nonattainment area in the country. Because of its nonattainment status, any increase of emissions of NO\textsubscript{x} or VOC from a discrete operation, unit or other pollutant emitting activity is a modification subject to major NSR. Such modifications are generally required by part 70 to undergo public review. Potentially several hundred to several thousand individual modifications can occur each year in the South Coast under applicable definitions of major source (10 tons per year) and major modification (any emissions increase). For perspective, a major modification in serious or severe ozone nonattainment areas is triggered by 25 tons of emissions accumulated over a five year period, and in most areas in the country, a major modification does not occur unless there is an emissions increase of 40 tons per year (tpy). The District has included in its rule provisions allowing modifications that result in cumulative (over the 5 year term of the permit) emissions increases of up to 40 pounds per day (about 7.3 tpy) of NO\textsubscript{x} and 30 pounds per day (about 5.5 tpy) of VOC to be processed via its minor permit revision procedures. South Coast does not allow applicants to implement minor permit revisions prior to final action by the District on the revision. Therefore, what distinguishes this treatment from the significant revision procedure is that a minor modification that would otherwise be required is that there would be no public comment period during the permit issuance process. The public does have the opportunity, however, to review the revision after it is issued and to petition EPA to object to the permit. (See 70.8 and 3003(l)).

EPA believes that this aspect of the South Coast program is approvable. Requiring full public participation procedures for modifications that result in emissions increases below the levels specified in the District's operating permits rule would be unworkable in the South Coast. The sheer number of notices that would be required if all major modifications were handled in this way would dilute attention that should be focused on the more significant of the changes that qualify as "major." Although it makes sense that the scope of changes subject to prior public review should be broadest in areas with the greatest nonattainment problems, EPA believes that such a notice requirement ceases to yield a benefit, and may in fact be damaging to the purpose of a public review requirement, if applied to the smallest changes that would qualify as "major" in an extreme area. EPA further believes that the threshold levels for prior public review found in the South Coast program are reasonable, and will strike an appropriate balance between the need for broad public review on the one hand, and on the other, the administrative burden on the District and the quantitative limits on the public's ability to provide review that is meaningful. EPA notes that it has previously considered five "triggers" for public notice in the context of the District's new source review program, and believes them to be adequate.

EPA wishes to emphasize that this finding is unique to the South Coast. As the only extreme area in the nation, the South Coast District is subject to statutory constraints referred to above that affect NSR and title V. These constraints, which flow directly from the provisions of the CAA, result in both a volume and proportion of changes classified as "major" that distinguish the South Coast from all other title V programs.

See section II.B.1.(3) below for a discussion of aspects of the South Coast permit modification procedures that are proposed for interim approval.

d. Applicability and Duty to Apply: Two Phases of Permitting. While the "title V facility" definition in South Coast's title V program fully meets the applicability requirements of part 70, the District has allowed sources with actual emissions below certain thresholds to defer the obligation to apply for title V permits until no later than three and a half years after the program effective date (3000(b)(28), 3001(b), and 3003(a)(3)). Ordinarily, part 70 requires sources to apply within one year of the program effective date. This deferral is effectively a request for source category-limited interim approval for sources with actual emissions below the given thresholds.

EPA's policy on source category-limited interim approval is set forth in a document entitled, "Interim Title V Program Approvals," signed on August 2, 1993 by John Setz. In order to meet the interim approval criteria described in that memorandum, South Coast demonstrated that it would permit, during the first phase of the program, more than 60% of the District's title V sources and more than 80% of the pollutants emitted by title V sources. This requirement is addressed in a letter from Pang Mueller, Senior Manager of Stationary Source Compliance, dated May 16, 1996. South Coast estimated that there are more than 1600 title V facilities located in the District and that the workload to permit all of those sources in the initial three year period would be "excessively burdensome." The EPA believes that South Coast has demonstrated compelling reasons for a source category-limited interim approval. The Setz memo also requires that source category-limited interim approval be granted only if all sources will be permitted within five years of the date required for EPA final action. Because the South Coast program guarantees that all title V sources will be permitted within five years following program approval, and because South Coast has satisfied the criteria set forth in the August 2, 1993 memorandum, EPA finds the District's program to be eligible for source category-limited interim approval.

e. Enhanced New Source Review. South Coast's title V permit program provides for enhanced preconstruction review, an optional process that allows sources to satisfy both new source review and title V permit modification requirements at the same time. Any modification processed pursuant to South Coast's enhanced preconstruction review procedures may be incorporated into the title V permit as an administrative permit amendment. These enhanced procedures obviate the need to undergo two application, public notice, and permit issuance/revision processes for the same change. (See 3000(b)(1)(D).)

f. Regional Clean Air Incentives Market (RECLAIM). RECLAIM is the South Coast's emissions-limited economic incentives program. It targets facilities with four or more tons of NO\textsubscript{x}.
or SO2 emissions per year from permitted equipment for participation in a pollutant-specific market with the goal of reducing emissions at a significantly lower cost. The program subsumes fourteen SCAQM Air Quality Management Plan (AQMP) control measures and is projected to reduce emissions by an equivalent amount. Sources are not, however, relieved from the duty to comply with new source review requirements and must comply with best available control technology requirements established pursuant to the District’s new source review process.

For the most part, RECLAIM facilities that are subject to Regulation XXX are treated the same as non-RECLAIM facilities. Certain aspects of the permit modification provisions do, however, set out different treatment for RECLAIM and non-RECLAIM facilities, and the regulation sets out different means for establishing applicability. EPA has evaluated the procedures for modifying part 70 operating permits that are issued to RECLAIM facilities along with the means for determining the applicability of Regulation XXX to RECLAIM facilities and has found them to be adequate for approval. For additional background and analysis, see Attachment J of the TSD.

3. Permit Fee Demonstration

Section 502(b)(3) of the Act requires that each permitting authority collect fees sufficient to cover all reasonable direct and indirect costs required to develop and administer its title V operating permit program. Each title V program submittal must contain either a detailed demonstration of fee adequacy or a demonstration that aggregate fees collected from title V sources meet or exceed $25 per ton per year (adjusted annually based on the Consumer Price Index (CPI), relative to 1989 CPI). The $25 per ton amount is presumed, for program approval, to be sufficient to cover all reasonable program costs and is thus referred to as the “presumptive minimum” (40 CFR 70.9(b)(2)(i)).

South Coast has opted to make a presumptive minimum fee demonstration. By dividing the fees charged to facilities it believes will be subject to its title V program by those facilities’ emissions, the District calculates its effective fee rate is $323 per ton of emissions. This amount is appreciably higher than the current presumptive minimum of $30.93.

4. Provisions Implementing the Requirements of Other Titles of the Act

a. Authority and Commitments for Section 112 Implementation. South Coast has demonstrated in its title V program submittal adequate legal authority to implement and enforce all section 112 requirements through the title V permit. This legal authority is contained in the State of California enabling legislation and in regulatory provisions defining federal “applicable requirements” and requiring each permit to incorporate conditions that assure compliance with all applicable requirements. EPA has determined that this legal authority is sufficient to allow South Coast to issue permits that assure compliance with all section 112 requirements. For further discussion, please refer to the TSD accompanying this action and the April 13, 1993 guidance memorandum entitled, “Title V Program Approval Criteria for Section 112 Activities,” signed by John Seitz.

b. Authority for Title IV Implementation. On February 11, 1995, South Coast incorporated by reference part 72, the federal acid rain permitting regulations. The incorporation by reference was codified in Regulation XXXI. EPA determined Regulation XXXI to be acceptable on March 29, 1995 (See 60 FR 16127).

B. Proposed Interim Approval and Implications

1. Title V Operating Permits Program

The EPA is promulgating direct final interim approval of the operating permits program submitted by the California Air Resources Board, on behalf of the South Coast Air Quality Management District, on December 27, 1993 and amended on March 6, 1995, April 11, 1995, September 26, 1995, April 24, 1996, May 6, 1996, May 23, 1996, June 5, 1996, and July 29, 1996. Areas in which South Coast’s program is deficient and requires corrective action prior to full approval are as follows:

(1) California State law currently exempts agricultural production sources from permit requirements. CARB has requested source category-limited interim approval for all California districts. In order for South Coast’s program to receive full approval (and to avoid a disapproval upon the expiration of this interim approval), the California Legislature must revise the Health and Safety Code to eliminate the exemption of agricultural production sources from the requirement to obtain a permit.

(2) Section 70.5(c) states that EPA may approve, as part of a state program, a list of insignificant activities and emissions levels which need not be included in permit applications. Section 70.5(c) also states that an application for a part 70 permit may not omit information needed to determine the
applicability of, or to impose, any applicable requirement, or to evaluate appropriate fee amounts. Section 70.4(b)(2) requires states to include in their part 70 programs any criteria used to determine insignificant activities or emission levels for the purpose of determining complete applications. Under part 70, however, does not establish appropriate emission levels for insignificant activities, relying instead on a case-by-case determination of appropriate levels based on the particular circumstances of the part 70 program under review. South Coast submitted an extensive list of insignificant activities in the form of Rule 219—Equipment Not Requiring a Written Permit Pursuant to Regulation II. The District did not provide criteria that were used to determine that the listed activities are appropriately treated as insignificant. The regulation does not ensure that activities to which non-general applicable requirements apply are excluded from the list of insignificant activities, nor does the program demonstrate that emissions from the listed activities are truly insignificant. While many of the listed activities do appear to be reasonable candidates for such treatment, some do not. For instance, paragraph (d)(2) of Rule 219 exempts most refrigeration units regardless of size. Such units, if they have a charge rate of 50 pounds or more of a Class I or II ozone-depleting compound, may be subject to unit-specific applicable requirements and could not, therefore, be considered insignificant. EPA believes that, for the insignificant activities provisions to be fully approvable, the list must not create confusion regarding the regulated community's obligation to provide all information needed to determine the applicability of, or to impose, any applicable requirement, nor may the list interfere with the permitting authority's obligation to issue permits that assure compliance with all applicable requirements.

For interim approval, EPA is relying on certain provisions in Regulation XXX that affect the scope and usage of insignificant activities. Specifically, paragraph (b) of Rule 3003 requires that applicants shall submit "* * all information necessary to evaluate the subject facility and the application, including all information specified in 40 CFR 70.5, the applicability of and to impose any regulatory requirement * * *." The application forms require the listing of all equipment that is exempt from permitting. In addition, Rule 3001(b), (c) and (d), and Rule 3000(b)(15) ensure that the source's potential to emit, which does not include unpermitted activities, will generally determine title V applicability. For full approval, South Coast must provide supporting criteria and revise its list of insignificant activities, as appropriate. The District must remove any activities from its list of insignificant activities that are subject to a unit-specific applicable requirement and adjust or add size cut-offs to ensure that the listed activities are truly insignificant. (See sections 70.4(b)(2) and 70.5(c).)

(3) The South Coast rule (3005(b)(1)) allows the following types of changes, which are required under part 70 to be processed as significant permit modifications, to be processed under minor modification procedures:

(1) NSPS and NESHAP (parts 60 and 61) modifications that result in emissions increases up to "de minimis" thresholds (the de minimis levels are: HAP, VOC and PM10—5.5 tpy; NOX—7.3 tpy; SOX—11 tpy; and CO—40 tpy). (Any emissions increase resulting from an NSPS or NESHAP modification should be processed under the significant modification procedures);

(2) Establishment of or changes to case-by-case emissions limitations, providing the changes do not result in emissions increases above the de minimis thresholds. (Part 70 requires that such actions must be processed as significant modifications, regardless of any resulting changes in emissions); and

(3) Changes to permit conditions that the facility has assumed to avoid an applicable requirement, providing the changes do not result in emissions increases above the de minimis thresholds. (Part 70 requires that all such changes must be processed as significant modifications, regardless of any resulting changes in emissions.)

The District may modify its program so that these changes will be subject to the procedural requirements of the significant modification track. (See 70.7(e)(2)(i)(3), (4), and (4)(A)).

(4) Because the initial implementation of the South Coast program will not include all title V sources (see section II.A.2.d. above), the District is receiving a source category limited interim approval. The District's regulation, however, does include language that expands the applicability of the program after the initial determination that all title V sources will be permitted within five years. Although this phase-in is considered to be an interim approval issue, no change to the regulation is required to resolve it.

(5) The South Coast's group processing provisions are set out in paragraph (c) of Rule 3005. Subparagraph (c)(1)(B) provides that when emissions increases resulting from pending revisions exceed 5 tons per year for a given pollutant, the pending revisions must be processed. Rule 3005(c)(2), however, references 3000(b)(6) (South Coast's higher de minimis significant permit revision thresholds) when instructing the applicant of its responsibilities. This reference conflicts with 3005(c)(1)(B) and must be amended. In order to properly implement its program, South Coast must adhere to the levels specified in 3005(c)(1)(B).

(6) The language in rule 3004(a)(3)(C) must be amended to conform with the part 70 language. It currently requires that the permit include "periodic monitoring or recordkeeping * * * representative of the source's potential to emit for the term of the permit," rather than "with the terms of the permit." (See 70.6(a)(3)(i)(B)).

(7) Rule 3004(a)(9) must be revised to specify that any trading of emissions increases and decreases allowed without changes to the permit must meet the requirements of the part 70 program. (See 70.6(a)(10)(iii)).

(8) The South Coast program must be amended to provide that a source that is granted a general permit shall be subject to enforcement action for operating without a permit if the source is later determined not to qualify for the conditions and terms of the general permit, regardless of any application shield provisions. (See 70.6(d)(1)).

(9) 3002(g)(1) allows an emergency to constitute an affirmative defense if "properly signed, contemporaneous operating logs or other credible evidence are kept at the facility." The rule must be amended to require that the logs or other evidence demonstrate that the conditions set out in the rule were met by the facility. (See 70.6(g)(3)).

(10) The definition of "renewal" in 3000(b)(22) must be modified to clarify that permits will be renewed at least every 5 years, regardless of whether renewal is necessary to incorporate new regulatory requirements.

(11) Paragraph (g)(1) of Rule 3005 provides for Section 502(b)(10) changes (changes that violate an express permit term or condition). The South Coast rule appropriately limits the types of changes that can qualify for this category. The change in Section 3005(g)(1)(C)(i) that excludes compliance plan requirements instead of compliance certification

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requirements. The rule must be revised to state that changes that would violate compliance certification requirements are not allowed.

(12) Paragraph (g) of Rule 3005 must be amended to specify that the District and the source must attach a copy of any notice of 502(b)(10) changes to the permit. (See 70.4(b)(12).)

(13) Provisions must be added to Rule 3005(i) that specify the following: (1) Any change allowed under this section must meet all applicable requirements and shall not violate existing permit terms; (2) the source must provide contemporaneous notice to the District and EPA; and (3) the source must keep a record of the change. (See 70.4(b)(14).)

(14) Rule 3002(g) provides that, in addition to meeting the Regulation XXX requirements implementing 70.6(g), a source must comply with District Rule 430—Breakdown Provisions in order to avail itself of the affirmative defense set out in 70.6(g). Paragraph (5) of 70.6(g) states that, in addition to any emergency or upset provisions contained in any applicable requirement. Because Rule 430 is not SIP approved, however, it is not an applicable requirement. In order to resolve this issue, South Coast is required to either submit an approvable version of Rule 430 to EPA for inclusion in the SIP or to delete the reference to Rule 430. Note that the cross reference to Rule 430 included in 3002(g) does not alter the provisions of 70.6(g) and that Rule 430 is wholly external to the part 70 program.

This Interim approval, which may not be renewed, extends for a period of up to two years. During the interim approval period, South Coast is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate a federal permits program in the District. Permits issued under a program with interim approval have full standing with respect to part 70, and the one-year time period for submittal of permit applications by subject sources begins upon interim approval, as does the three-year time period for processing the initial permit applications.

The scope of South Coast's part 70 program that EPA is acting on in this notice applies to all part 70 sources (as defined in the approved program) within South Coast's jurisdiction. The approved program does not apply to any part 70 sources over which an Indian tribe has jurisdiction. See, e.g., 59 FR 55813, 55815–18 (Nov. 9, 1994). The term "Indian tribe" is defined under the Act as an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. See section 302(r) of the CAA; see also 59 FR 43956, 43962 (Aug. 25, 1994); 58 FR 54364 (Oct. 21, 1993).

2. State Preconstruction Permit Program Implementing Section 112(g)
The EPA has published an interpretive notice in the Federal Register regarding section 112(g) of the Act (60 FR 8333; February 14, 1995) that postpones the effective date of section 112(g) until after EPA has promulgated a rule addressing that provision. The interpretive notice also explains that EPA is considering whether the effective date of section 112(g) should be delayed beyond the date of promulgation of the federal rule so as to allow states time to adopt rules implementing the federal rule, and that EPA will provide for any such additional delay in the final section 112(g) rulemaking. Unless and until EPA provides for such an additional postponement of section 112(g), South Coast must be able to implement section 112(g) during the period between promulgation of the federal section 112(g) rule and adoption of implementing State regulations.

For this reason, EPA is approving the use of South Coast's preconstruction review program as a mechanism to implement section 112(g) during the transition period between promulgation of the section 112(g) rule and adoption by South Coast of rules specifically designed to implement section 112(g). However, since the sole purpose of this approval is to confirm that the District has a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that there will be no transition period. The EPA is limiting the duration of this approval to 18 months following promulgation by EPA of the section 112(g) rule.

3. Program for Delegation of Section 112 Standards as Promulgated

Requirements for approval, specified in 40 CFR 70.4(b), encompass 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 a 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 promulgating approval under section 112((l)(5) and 40 CFR 63.91 of South Coast's program for receiving delegation of section 112 standards that are unchanged from federal standards as promulgated. California Health and Safety Code section 39658 provides for automatic adoption by CARB of section 112 standards upon promulgation by EPA. Section 39666 of the Health and Safety Code requires that districts then implement and enforce these standards. Thus, when section 112 standards are automatically adopted pursuant to section 39658, South Coast will have the authority necessary to accept delegation of these standards without further regulatory action by the District. The details of this mechanism and the means for finalizing delegation of standards will be set forth in an implementation agreement between South Coast and EPA. This program applies to both existing and future standards but is limited to sources covered by the part 70 program.

III. Administrative Requirements

A. Docket

Copies of South Coast's submittal and other information relied upon for this direct final action are contained in docket number CA--SC--96--1--OPS 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 direct final rulemaking. The docket is available for public inspection at the location listed under the ADDRESSES section of this document.

B. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with
statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the approval action promulgated today does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This federal action approves pre-existing requirements under state or local law, and imposes no new federal requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

D. Small Business Regulatory Enforcement Fairness Act

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today’s Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

E. Executive Order 12866

The Office of Management and Budget has exempted this action from review under Executive Order 12866.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: August 9, 1996.

Felicia Marcus,
Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for Part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

2. Appendix A to Part 70 is amended by adding paragraph (dd) to the entry for California to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

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[FR Doc. 96–21950 Filed 8–28–96; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 300

[FRL–5560–6]

National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of Deletion of the Leetown Pesticide Site in Leetown, Jefferson County, West Virginia, from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region III announces the deletion of the Leetown Pesticide site (Site) located in Jefferson County, West Virginia, from the National Priorities List (NPL). The NPL constitutes Appendix B to 40 CFR Part 300. Part 300 comprises the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA and the West Virginia Division of Environmental Protection have determined that all appropriate CERCLA actions have been implemented and that the Site poses no significant threat to public health or the environment. Therefore, further remediation measures pursuant to CERCLA are not needed.

EFFECTIVE DATE: August 29, 1996.


SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is: the Leetown Pesticide Site, Leetown, Jefferson County, West Virginia.

A Notice of Intent to Delete this Site was published on June 14, 1996 in the Federal Register (56 FR 11597). The closing date for comments on the Notice of Intent to Delete was July 15, 1996. EPA did not receive any comments on the proposed deletion. EPA identifies sites that appear to present a significant risk to public health 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 Substances Superfund Response Trust Fund (Fund). Pursuant to 40 CFR 300.426(e)(3), any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action in the future. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: August 20, 1996.

W. Michael McCabe,
Regional Administrator, U.S. EPA Region 3.

For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for Part 300 continues to read as follows:


Appendix B—[Amended]

2. Table 1 of Appendix B to part 300 is amended by removing the Leetown Pesticide Site, Leetown, West Virginia.

[FR Doc. 96–21824 Filed 8–28–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 22, 24, and 90

[WT Docket No. 96–6; FCC 96–283]

Flexible Service Offerings in the Commercial Mobile Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this First Report and Order in WT Docket No. 96–6, the Commission amends its rules to allow providers of narrowband and broadband Personal Communications Services (PCS), cellular, CMRS Specialized Mobile Radio (SMR), and CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their...
assigned spectrum on a co-primary basis with mobile services. The rule amendments are necessary to respond to the strong support to flexible services show in the initial Notice of Proposed Rule Making.

**EFFECTIVE DATE:** October 28, 1996.

**FOR FURTHER INFORMATION CONTACT:** David Krech, Commercial Wireless Services Division, Wireless Telecommunications Bureau, at (202) 418-0620.


**Summary of Action**

**I. Introduction & Executive Summary**

1. In the Notice of Proposed Rule Making in WT Docket No. 96-6 (“NPRM”) (Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Notice of Proposed Rule Making, WT Docket No. 96-6, 11 FCC Rcd 2445 (1996)), 61 FR 6189 (February 16, 1996), we sought comment on proposals for expanding permitted offerings of fixed wireless service by Commercial Mobile Radio Service (“CMRS”) providers. In addition, we sought comment with regard to the regulatory treatment for such services under Section 332 of the Communications Act of 1934, as amended. 47 U.S.C. § 332. We received 52 comments and 22 reply comments in response to the Notice. That record shows strong support for allowing the provision of fixed wireless services by licensees operating in the CMRS bands. In this First Report and Order, we conclude that, while licensees previously could provide some fixed services over CMRS spectrum, the public interest would be served by giving licensees maximum flexibility in the uses of CMRS spectrum. Allowing service providers to offer all types of fixed, mobile, and hybrid services will allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services.

2. We therefore amend our rules to allow providers of narrowband and broadband Personal Communications Services (PCS), cellular, CMRS Specialized Mobile Radio (SMR), CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services. Specifically,

- We conclude that fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS.
- We modify our CMRS service rules to allow spectrum allocated to these services to be used on a co-primary basis for fixed services, mobile services, or any combination of the two, and we eliminate the classification of fixed services as limited to auxiliary or ancillary uses in these bands.
- We maintain the technical rules currently in place for CMRS and require licensees who wish to offer co-primary fixed services on CMRS spectrum to comply with those rules.
- We refer universal service issues that may arise from our decisions in this Report and Order to the Commission’s pending universal service proceeding, CC Docket No. 96-45. (Federal-State Joint Board on Universal Service, Notice of Proposed Rule Making and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93 (released March 8, 1996) [61 FR 10499 (March 14, 1996)].)

**II. First Report and Order**

A. Flexible Use of CMRS Spectrum

3. Discussion. The record supports our observation in the Notice that sufficient uncertainty exists in our current rules to warrant clarification with respect to the provision of fixed services over spectrum allocated for CMRS. Rather than continuing to define allowable fixed services in terms of whether they are “ancillary,” “auxiliary,” or “incidental” to mobile services, we conclude that our rules should more broadly allow fixed services to be provided on a co-primary basis with mobile services.

4. As a threshold matter, we note that the record in this proceeding strongly supports our proposal to encourage the provision of fixed services by licensees operating in the CMRS bands. Commenters have provided several examples of potential applications of fixed wireless technology. For example, fixed wireless systems can be imbedded into PBXs and local area networks to permit continued service even when wired line service is interrupted due to weather or other emergencies. Call routing may become more efficient by allowing CMRS providers to offer fixed wireless services. Omnipoint suggests that fixed wireless links could be used to provide “local loop” to apartment buildings, office buildings, and older homes where rewiring costs are high. Nortel envisions a variety of “fixed wireless access” services coming into homes and residences that would provide an alternative to end-to-end wiring by the carrier from the switch to the end user.

5. We agree with the many commenters that support the Commission’s proposal to allow CMRS providers to offer fixed wireless services. We believe that the public interest is better served by not attempting to limit potential use of CMRS spectrum to specific applications. We agree with SBC Communications that imposing such a limitation could lead to difficult definitional questions about what constitutes “wireless local loop” or other defined services. For example, Nortel’s concept of fixed wireless access includes not just low-power wireless “drops” from the street to the home, but also fixed wireless architectures that would link end users to the public switched network through cellular switches, and remote base stations (in rural areas). If we were to restrict fixed service to certain configurations, Nortel and other carriers might be reluctant to pursue some potentially efficient options out of concern that they would be considered to fall outside the definition of our prescribed service definition. Rather than limit the flexibility of carriers in this manner, we prefer to encourage innovation and experimentation through a broader, more flexible standard.

6. In the NPRM, we sought comment on whether allowing CMRS providers to provide fixed services without restriction could result in limiting capacity for mobile services. In that regard, we observed that current technology supports use of spectrum to provide mobile service only below the 3 GHz band, while fixed uses are feasible on higher bands. Based on the record, we conclude that this need not be a concern. First, with the advent of PCS and other new CMRS services, we have significantly increased the amount of spectrum available for mobile services over what was available previously. Second, carriers are using advanced technology. Third, nothing in the record suggests that giving licensees who provide CMRS services the flexibility to offer fixed service would make them less responsive to market demand for mobile services.

7. For these reasons, we conclude that licensees should have maximum...
flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS services, including PCS, cellular, and SMR services. We believe that limitations on fixed uses are unnecessary because the market is the best predictor of the most desirable division of this spectrum. We are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation. Allowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition. This is consistent with the goals of the Telecommunication Act of 1996 Act, Public Law No. 104–104, 110 Stat. 56 (1996) (1996 Act) which seeks to increase competition between the various providers of telecommunications services, including competitive alternatives to traditional local exchange service. All consumers will also benefit from technological advances in fixed services and fixed/mobile combinations that potentially could be stifled by restrictive service definitions.

8. In the NPRM we proposed to increase flexibility to provide fixed wireless service for broadband CMRS services—broadband PCS, cellular, SMR. We sought comment on whether narrowband CMRS services—paging, narrowband PCS, commercial 220 MHz service and for profit interconnected Business Radio Service—should also be permitted greater flexibility to offer fixed wireless services. We agree with commenters that we should extend the flexibility to offer fixed services to the narrowband services set out in the NPRM as well as broadband CMRS. In the CMRS Third Report and Order, 59 FR 59945 (November 21, 1994), we found that narrowband and broadband CMRS are potentially competitive with one another and should be subject to comparable regulation. We conclude that subjecting narrowband licensees to more stringent regulatory constraints than broadband CMRS providers would be inconsistent with principles of regulatory parity and serves no public interest goal. By contrast, allowing narrowband CMRS providers to provide fixed services on the same basis as broadband CMRS providers provides incentives for increased innovation, diversity of services, and increased competition. Although there may be technical constraints on the ability to provide fixed service on narrowband channels, we conclude that narrowband licensees should nevertheless be entitled to the regulatory flexibility so that they may take advantage of technological advances that may occur without being required to seek additional changes to the rules. This result is also in keeping with the goals of the 1996 Act to make available the most competitive environment possible for telecommunications services.

9. For the foregoing reasons, we conclude that service providers using spectrum allocated for CMRS should have the flexibility to provide fixed services on a co-primary basis with mobile services. Thus, service providers could choose to provide exclusively fixed services, exclusively mobile services, or any combination of the two. (Cellular carriers are subject to the requirements set out in Sections 22.901 and 22.933 of our rules, to provide cellular mobile service upon request to all cellular subscribers in good standing, except in instances where a cellular provider chooses to provide solely fixed service over its spectrum. See 47 CFR §§ 22.901, 22.933.) Accordingly, we modify the language in Section 22.901 of the Commission’s rules (cellular service), Section 24.3 of the Commission’s rules (PCS), and Section 90.419 of the Commission’s rules (SMR) to establish a uniform description of fixed wireless services that may be offered on this spectrum. We adopt the same modifications to our rules governing narrowband CMRS, including paging, narrowband PCS, 220 MHz service, and for profit interconnected Business Radio Services.

10. In adopting these modifications, we retain the prohibition on licensees in these services offering broadcast services. This prohibition applies regardless of whether licensees are offering fixed or mobile services or a combination of the two. In addition, we note that under applicable international allocation agreements, broadcast use of the spectrum at issue in this proceeding is restricted. Therefore, we conclude it would be inappropriate to amend our rules in this regard.

B. Technical and Operational Rules

11. Discussion. The comments that we received regarding the technical rules indicate that we should maintain the technical rules that are currently in place and require CMRS providers who wish to offer co-primary fixed services to comply with those rules. We agree with SBC that fixed services should be engineered so that they conform to our existing interference rules and do not interfere with the operations of co-channel or adjacent channel carriers providing mobile service. Thus, so long as out-of-band and co-channel/frequency-block criteria are met, base stations used to support fixed services may operate at the same maximum power levels as base and mobile stations on the same frequencies. We also decline to adopt the specific rule changes proposed by PacTel relating to in-home base stations. The issue raised by PacTel is outside the scope of this proceeding. We will also defer consideration of the cellular rule changes requested by RCC and SR Telecom. We intend to consider technical concerns regarding CMRS, including those discussed above, in future proceedings that will more broadly address conforming our technical rules for CMRS providers.

C. Table of Frequency Allocations

12. Discussion. We will amend the Table of Frequency Allocations as proposed in the Notice to permit licensees to make use of the affected allocations for both fixed and mobile services on a co-primary basis. Specifically, we allocate the 27.41–27.54, 30.56–32, 33–34, 35–36, 42–43.69, 150.8–152.855, 154–156.2475, 157.45–161.575, 220–222, 454–455, 456–462.5375, 462.7375–467.5375, 467.7375–512, 806–821, 824–849, 851–866, 869–894, 896–901, 929–930, 931–932 and 935–940 MHz bands to the fixed service on a co-primary basis. (The 220–222 MHz band is shared Government/non-Government spectrum. During our consultations with NTIA regarding this band, the Commission and NTIA agreed to allocate the 220–222 MHz band to the fixed service on a co-primary basis for both Government and non-Government operations. Accordingly, the fixed service is also added to the Government column in the 220–222 MHz band on a co-primary basis.) In addition, we delete footnotes US330 and US331, which prohibited narrowband and broadband PCS licensees from providing fixed services, except for ancillary fixed services used in support of mobile PCS.

13. Further, we are updating the international table of the Table of Frequency Allocations to reflect the Final Acts of the 1992 World Administrative Radio Conference. Additionally, we are removing international footnote 613 from the 157.45–158.115 MHz band and footnote NG153 from the 849–851 and 894–896 MHz bands, which are bands to which these footnotes do not apply. With regard to the rule part cross references, we are updating the title of Part 22 to
Public Mobile (from Domestic Public Land Mobile) in the 35.19–35.69, 43.19–43.69, 152–152.255, 152.495–152.855, 157.755–162.0125, 454–455, 459–460, 470–512, 824–849, 869–894, 928–929, 931–932 and 944–960 MHz bands; displaying the rule parts in the 173.2–173.4 and 1850–1990 MHz bands in capital letters to indicate that the allocations in these bands are on a primary basis; updating the PCS rule part to Part 24 (from Part 99) in the 901–902, 930–931 and 940–941 MHz bands; adding Part 22 to the 851–866 MHz band, Parts 22 and 101 to the 932–935 and 943–942 MHz bands, and Part 101 in the 942–944 MHz band; replacing Part 94 with Part 101 in the 928–929, 944–960 and 1850–1990 MHz bands; and deleting Satellite Communications (25) from the 450–451 MHz band, Domestic Public Land Mobile (22) from the 929–930 MHz band and Private Land Mobile (90) from the 931–932 MHz band. Finally, we are revising the Government column in the 30–30.56 MHz band by displaying the fixed service as a primary—not secondary—allocation; correcting typographical errors in the 42–43.19 MHz band for columns 4 through 6; and adding footnotes US116, US215, US268 and G2 to the Government column in the 928–932 MHz band.

D. Universal Service Obligations

14. Discussion. We believe that it would be premature to address in this Report and Order whether universal service requirements should be extended to CMRS providers offering fixed wireless service. It is also apparent both from our experience with universal service issues and the comments in response to the NPRM that the public interest is better served by allowing the Joint Board to address the universal service issues raised in this proceeding. Thus, we defer discussion of the proposals discussed by commenters in response to the NPRM for consideration by the Joint Board in CC Docket No. 96–45.

III. Procedural Matters

A. Regulatory Flexibility Act


1. Need for and Purpose of the Action

16. The First Report and Order has implemented Sections 332 and 3(n), respectively, of the Communications Act of 1934, as amended. The rules adopted herein will carry out Congress’ intent to establish a consistent regulatory framework for all commercial mobile radio services (CMRS). In addition, the rules adopted herein will assist in the development of competition among wireless and wireline services for the benefit of the consumer.

2. Issues Raised in Response to the IRFA

17. No comments were submitted in response to the IRFA. In general comments on the Notice of Proposed Rule Making, however, some commenters raised issues that might affect small business entities. One commenter, PCS One, a small business entity, argued that the proposed flexibility to offer fixed services should not be extended to cellular at this time in order to preserve Personal Communications Services (PCS) licenses, many of whom are small business entities, an opportunity to enter the marketplace and establish themselves against incumbent cellular providers. Some other parties agreed that if the Commission should make a distinction between broadband CMRS providers, it should allow PCS providers the greatest flexibility. The Commission chooses to provide all CMRS providers with the increased flexibility. Granting all CMRS providers increased flexibility to provide fixed wireless services is consistent with principles of regulatory parity, will allow all CMRS providers to determine the services that they will provide to the public, and will increase competition between the CMRS services.

3. Description, and Number of Small Entities Involved

18. This rule making proceeding applies to providers of cellular, narrowband and broadband personal communications services (PCS), CMRS specialized mobile radio services (SMR), CMRS paging, commercial 220 MHz services, and for-profit interconnected business radio services. Since this rule making proceeding applies to multiple services, we will analyze the effects of these rules on a service-by-service basis.

a. Estimates for Cellular Licensees

19. Since the Commission did not define a small business with respect to cellular services, we will utilize the Small Business Administration’s (SBA) definition applicable to radiotelephone companies—i.e., an entity employing less than 1,500 persons. 13 CFR § 121.201, Standard Industrial Classification (SIC) Code 4812. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees. U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy). We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the Census’ 1992 study indicates that only 12 out of a total of 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92–5–1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC Code 4812 (issued May 1995). However, we do not know how many of the 1,178 firms were cellular telephone companies. Given this fact, we assume, for purposes of our evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we are unable to determine the number of cellular licensees because a single cellular licensee may own several licenses.
b. Estimates for PCS Services

20. The Commission, with respect to narrowband and broadband PCS, defines small businesses to mean firms who have gross revenues of not more than $40 million in each of the preceding three calendar years. This definition of "small entity" in the context of the PCS services has been approved by the SBA.

21. The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. The Commission does not have sufficient information to determine whether any small businesses within the SBA-approved definition bid for licenses A or B Block auctions. As of now, there are 90 non-defaulting winning bidders that qualify as small entities in the C Block PCS auctions. Based on this information, we conclude that the number of broadband PCS licenses affected by the rule adopted in this proceeding includes the 89 winning bidders that qualified as small entities in the Block C broadband PCS auction.

22. At present, there have been no auctions held for the D, E, and F Blocks of broadband PCS spectrum. The Commission anticipates a total of 1,479 MTA licenses and 2,958 BTA licensees will be awarded in the auctions. Those auction have not yet been scheduled, however. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of our evaluations and conclusion in this Final Regulatory Flexibility Analysis, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

c. Estimates for SMR Services

24. The Commission, with respect to 800 MHz and 900 MHz SMR services, has adopted a two-tiered approach to the definition of small businesses: (a) "very small businesses" are firms who have gross revenues of not more than $3 million in each of the preceding three calendar years; and (b) "small businesses" are firms who have annual gross revenues of not more than $15 million in each of the preceding three years. This definition of "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.

25. The Commission recently held auction for the 900 MHz SMR services. There were 60 winning bidders who qualified as small entities. Based on this information, we conclude that the number of 900 MHz SMR licensees affected by the proceeding includes these 60 small entities.

26. No auctions have been held for the 800 MHz SMR services. While the Commission anticipates a total of 525 licenses awarded for the upper 200 channels in the 800 MHz auctions, it has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz SMR auction. Despite the current incumbents in the 800 MHz SMR service, due to the impending auction, we are unable to determine the ultimate number of small businesses who will receive licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective licenses can be made, we assume, for purposes of our evaluations and conclusion in this Final Regulatory Flexibility Analysis, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

d. Commercial Paging and Commercial 220 MHz Radio Services

27. Since the Commission has not yet defined a small business with respect to paging services, we will utilize the SBA's definition applicable to radiotelephone companies—i.e., an entity employing less than 1,500 persons. With respect to commercial 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for EA licenses (EA licenses refer to the 60 channels in the 172 geographic economic areas as defined by the Bureau of Economic Analysis, Department of Commerce), a firm with average annual gross revenues of not more than $6 million for the preceding three years and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than $15 million for the preceding 3 years. Since this definition has not yet been approved by the SBA, we will utilize the SBA's definition applicable to radiotelephone companies. We note that while there are incumbents in this service, they are not commercial providers and will not be affected by this proceeding. Since there have been no auctions for either service as of yet and the parameters of the industry have not been fully defined, any estimate of the number of small businesses who will seek to bid in the future auctions is not yet determined. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of prospective licensees can be made, we assume, for purposes of our evaluations and conclusion in this Final Regulatory Flexibility Analysis, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

e. Interconnected Business Services

28. Since the Commission did not define a small business with respect to for-profit interconnected business services, we will utilize the SBA’s definition applicable to radiotelephone companies—i.e., an entity employing less than 1,500 persons. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of for-profit interconnected business service providers which are small entities because it combines all radiotelephone companies with 500 or more employees. We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Bureau of the
Census’ 1992 study indicates that only 12 out of a total of 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees. However, we do not know how many of the 1,178 firms were for-profit interconnected business service companies. Given this fact, we assume, for purposes of our evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all of the current interconnected business service licensees are small entities, as that term is defined by the SBA. Although there are in excess of 13,000 for-profit interconnected business service licenses, we are unable to determine the number of for-profit interconnected business service licensees because a single licensee may own several licenses.

4. Reporting, Recordkeeping, and Other Compliance Requirements

29. The rules adopted in the First Report and Order do not impose any additional reporting, recordkeeping, or other compliance requirements.

5. Steps Taken To Minimize Burdens on Small Entities

30. In the First Report and Order the Commission amends its rules to allow providers of narrowband and broadband PCS, cellular, CMRS SMR, CMRS paging, CMRS 220 MHz service, and interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile service. These rule changes will allow CMRS providers greater flexibility to provide new and innovative services to meet consumer demands. Allowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition both between CMRS providers and wireline providers, as well as between CMRS providers. This is consistent with the goals of the Telecommunications Act of 1996, Public Law No. 104–104, 110 Stat. 56 (1996). (1996 Act), which amended the Communications Act of 1934, which seeks to increase competition between the various providers of telecommunications services, including competitive alternatives to traditional local exchange service. All consumers will also benefit from technological advances in fixed services and fixed/mobile combinations that potentially could be stifled by restrictive service definitions.

6. Significant Alternatives Considered and Rejected

31. In the NPRM we sought comment on alternative approaches to allowing PCS and other CMRS providers more flexibility to offer fixed services, including: (1) Adopting a rule that would expressly allow CMRS providers to offer “fixed wireless local loop,” (2) permitting CMRS providers to offer wireless local loop and other defined fixed services, or (3) allowing CMRS providers to offer any form of fixed service without restriction. An overwhelming majority of the commenters support amending our rules to allow all CMRS providers to offer all types of fixed wireless services without restriction. One commenter, GO Communications, a small business entity, argued that CMRS providers should be required to offer at least some mobile service over their frequencies. Based on the record in this proceeding, the Commission believes that the public interest is better served by not attempting to limit potential use of CMRS spectrum to specific applications. Imposing such a limitation could lead to difficult definitional questions about what constitutes “wireless local loop” or other defined services. Further, if we were to restrict fixed service to certain configurations, carriers might be reluctant to pursue some potentially efficient options out of concern that they would be considered to fall outside the definition of our prescribed service definition. Rather than limit the flexibility of carriers in this manner, we prefer to encourage innovation and experimentation through a broader, more flexible standard. This will benefit small business by allowing them greater flexibility in determining which services they will provide to the public.

32. In the NPRM, the Commission also proposed to apply whatever increased flexibility we granted to broadband CMRS services—broadband PCS, cellular, and SMR—and sought comment on whether narrowband CMRS services—narrowband PCS, paging, commercial 220 MHz services, and interconnected business radio services—should also have such increased flexibility. Commenters also generally support extending flexibility to all CMRS bands, including both broadband and narrowband services. PCS One, a small business entity, opposes the Commission’s proposal to allow cellular licensees to provide fixed wireless services, arguing that the Commission must permit PCS, for at least a reasonable interval, greater flexibility than cellular in the use of its spectrum. We find that we should extend the flexibility to offer fixed services to all the broadband services, including cellular, as well as the narrowband services set out in the Notice. We conclude that subjecting narrowband licensees to more stringent regulatory constraints than broadband CMRS providers would be inconsistent with principles of regulatory parity and serves no public interest goal. We conclude that narrowband licensees should be entitled to the regulatory flexibility so that they may take advantage of technological advances that may occur without being required to seek additional changes to the rules. This result is also in keeping with the goals of the 1996 Act to make available the most competitive environment possible for telecommunications services. It will also benefit all small business, including all PCS licensees, by providing them greater flexibility to determine which service they will provide to the public.

7. Report to Congress

33. The Commission shall send a copy of this Final Regulatory Flexibility Analysis with this First Report and Order in a report to Congress pursuant to Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Regulatory Flexibility Analysis will also be published in the Federal Register.

B. Initial Paperwork Reduction Act of 1995 Analysis

34. The First Report and Order and Further Notice of Proposed Rule Making do not contain either a proposed or modified information collection.

C. Ordering Clauses

35. Accordingly, it is ordered that pursuant to Sections 4(i), 4(j), 7(a), 303(b), 303(f), 303(g), 303(r), 332(a), and 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 157(a), 303(b), 303(f), 303(g), 303(r), 332(a), and 332(c) the rules and policies set forth in the First Report and Order and Further Notice of Proposed Rule Making are adopted, and Parts 2, 22, 24, and 90 of the Commission’s Rules are amended as specified below.

36. The rule changes made herein will become effective October 28, 1996.

D. Contacts for Information

37. For further information concerning this proceeding, contact David Krehc at (202) 418–0620 (Commercial Wireless Division, Wireless Telecommunications Bureau).
List of Subjects
47 CFR Part 2
Radio.
47 CFR Part 22
Communications common carriers, Radio.
47 CFR Part 24
Communications common carriers, Radio.
47 CFR Part 90
Business and industry, Common carriers, Radio.

Federal Communications Commission
William F. Caton,
Acting Secretary.

Rules Changes
Parts 2, 22, 24 and 90 of title 47 of the Code of Federal Regulations are amended as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:
   Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.

§ 2.106 Table of Frequency Allocations

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2. Section 2.106, the Table of Frequency Allocations, is amended as follows:
   a. Revise entries for 26175–28000 kHz, 29.7–37.5 MHz, 38.25–47 MHz, 150.05–174 MHz, 220–222 MHz, 450–960 MHz and 1710–2110 MHz in columns (1) through (7).
   b. Revise International footnotes 672, 675, 676, 678, 697 and 703.
   c. Remove International footnotes 551, 612, 614, 682 and 708.

§ 2.106 Table of Frequency Allocations
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**International Footnotes**

- **672** Different category of service: in Afghanistan, Bulgaria, China, Cuba, Japan, Mongolia, Czechoslovakia and the U.S.S.R., the allocation of the band 460-470 MHz to the meteorological-satellite service (space-to-Earth) is on a primary basis (see No. 425) and is subject to agreement obtained under the procedure set forth in Article 14.

- **675** Additional allocation: in China, Cuba, Ecuador, the United States, Guyana, Honduras, Jamaica, Mexico and Panama, the allocation of the bands 470-512 MHz and 614-806 MHz to the fixed and mobile services is on a primary basis (see No. 425), subject to agreement obtained under the procedure set forth in Article 14.

- **676** Additional allocation: in Burundi, Cameroon, the Congo, Ethiopia, Israel, Kenya, Lebanon, Libya, Malawi, Senegal, Sudan, Syria, and Yemen, the band 470-582 MHz is also allocated to the fixed service on a secondary basis.

- **678** Additional allocation: in Costa Rica, Cuba, El Salvador, Ecuador, the United States, Guatemala, Guyana, Honduras, Jamaica, Mexico and Venezuela, the band 512-608 MHz is also allocated to the fixed and mobile services on a primary basis, subject to agreement obtained under the procedures set forth in Article 14.

- **697** Additional allocation: in the Federal Republic of Germany, Burkina Faso, Cameroon, Côte d’Ivoire, Denmark, Egypt, Finland, Israel, Kenya, Libya, Liechtenstein, Monaco, Norway, the Netherlands, Portugal, Sweden, Switzerland and Yugoslavia, the band 790-830 MHz, and in these same countries and in Spain, France, Malta, the Gabonese Republic and Syria, the band 830-862 MHz, are also allocated to the mobile, except aeronautical mobile, service on a primary basis. However, stations of the mobile service in the countries mentioned in connection with each band referred to in this footnote shall not cause harmful interference to, or claim protection from, stations of services operating in accordance with the Table in countries other than those mentioned in connection with this band.

- **703** In Region 1, in the band 862-960 MHz, stations of the broadcasting service shall be operated only in the African Broadcasting Area (see Nos. 400 to 403) excluding Algeria, Egypt, Spain, Libya and Morocco, subject to agreement obtained under the procedure set forth in Article 14.

**PART 22—PUBLIC MOBILE SERVICES**

3. The authority citation for Part 22 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, unless otherwise noted.
4. Section 22.901 is amended by revising the introductory text and paragraph (d) to read as follows:

§ 22.901 Cellular service requirements and limitations.

Cellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers, while such subscribers are located within any portion of the authorized cellular geographic service area (see § 22.911), where facilities have been constructed and mobile service to subscribers has commenced. A cellular system licensee may refuse or terminate service, however, subject to any applicable state or local requirements for timely notification to any subscriber who operates a cellular telephone in an airborne aircraft in violation of § 22.925 or otherwise fails to cooperate with the licensee in exercising operational control over mobile stations pursuant to § 22.927.

(d) Alternative technologies and co-primary services. Licensees of cellular systems may use alternative cellular technologies and/or provide fixed services on a co-primary basis with their mobile offerings, including personal communications services (as defined in Part 24 of this chapter) on the spectrum within their assigned channel block. Cellular carriers that provide mobile services must make such service available to subscribers whose mobile equipment conforms to the cellular system compatibility specification (see § 22.933).

(1) Licensees must perform or obtain an engineering analysis to ensure that interference to the service of other cellular systems will not result from the implementation of co-primary fixed services or alternative cellular technologies.

(2) Alternative technology and co-primary fixed services are exempt from the channeling requirements of § 22.905, the modulation requirements of § 22.915, the wave polarization requirements of § 22.367, the compatibility specification in § 22.933 and the emission limitations of §§ 22.357 and 22.917, except for emission limitations that apply to emissions outside the assigned channel block.

PART 24—PERSONAL COMMUNICATIONS SERVICES

5. The authority citation for Part 24 continues to read as follows:

Authority: Secs. 4, 301, 302, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

6. Section 24.3 is revised to read as follows:

§ 24.3 Permissible communications.

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided on a co-primary basis with mobile operations. Broadcasting as defined in the Communications Act is prohibited.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

7. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

8. Section 90.419 is revised to read as follows:

§ 90.419 Points of communication.

Normally, operations licensed under this part are intended to provide intrastate mobile communications. For example, a base station is intended to communicate with its associated mobile stations and mobile stations are intended to communicate between associated mobile stations and associated base stations of the licensee. Accordingly, operations between base stations at fixed locations are permitted only in the following situations:

(a) Base stations licensed under the Public Safety and Special Emergency Radio Services that operate on frequencies below 450 MHz may communicate on a secondary basis with other base stations, operational fixed stations, or fixed receivers authorized in these services.

(b) Base stations licensed on any frequency in the Industrial and Land Transportation Radio Services and on base station frequencies above 450 MHz in the Public Safety and Special Emergency Services may communicate on a secondary basis with other base stations, operational fixed stations, or fixed receivers authorized in these services only when:

(1) The messages to be transmitted are of immediate importance to mobile stations; or

(2) Wireline communications facilities between such points are inoperative, economically impracticable, or unavailable from communications common carrier sources. Temporary unavailability due to a busy wireline circuit is not considered to be within the provisions of this paragraph.

(c) Operational fixed stations may communicate with units of associated mobile stations only on a secondary basis.

(d) Operational fixed stations licensed in the Industrial and Land Transportation Radio Services may communicate on a secondary basis with associated base stations licensed in these services when:

(1) The messages to be transmitted are of immediate importance to mobile stations; or

(2) Wireline communications facilities between such points are inoperative, economically impracticable, or unavailable from communications common carrier sources. Temporary unavailability due to a busy wireline circuit is not considered to be within the provisions of this paragraph.

(e) Travelers’ Information Stations are authorized to transmit certain information to members of the traveling public (see § 90.242).

(f) CMRS Licensees in the SMR categories of Part 90, Subpart 5, CMRS providers authorized in the 220 MHz service of Part 90, Subpart T, CMRS paging operations as defined by Part 90, Subpart P and for-profit interconnected business radio services with eligibility defined by Section 90.75 are permitted to utilize their assigned spectrum for fixed services on a co-primary basis with their mobile operations.

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47 CFR Part 76

[MM Docket No. 92–266; FCC 96–316]

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992—Rate Regulation

AGENCY: Federal Communications Commission.

ACTION: Final Rule.

SUMMARY: In this Memorandum Opinion and Order ("Order"), the Commission revises the decision in the Third Report and Order to require cable operators to use the same method of initial rate regulation, either benchmark or cost-of-service, for both the BST and the CPSTs. This requirement applies for one year from the date that the operator first becomes subject to regulation on any tier. The Third Report and Order sought to remove incentives to engage in retrenching strategies during the initial rate setting process that would result in operators receiving more than compensatory rates. The Commission indicated that it would review the requirement after 18 months. Upon
review of the record the Commission elects to modify the requirement set forth in the Third Report and Order so that consistent rate methodologies must be used for the entire period in which an operator is subject to rate regulation on both the BST and CPST(s). This Order is adopted concurrently with a Notice of Proposed Rulemaking which is summarized elsewhere in this issue of the Federal Register. The intended effect of this Order is that consistent rate methodologies be used for the entire period in which an operator is subject to rate regulation on both the BST and CPST(s).

EFFECTIVE DATE: September 30, 1996.

FOR FURTHER INFORMATION CONTACT: Cable Services Bureau, (202) 418-7200.


Synopsis of the Memorandum Opinion and Order

1. In the Third Report and Order in MM Docket No. 92–266, 58 FR 63087 ("Third Report and Order") the Commission determined that operators must use the same rate-setting method for all tiers. This requirement applies for one year from the date an operator initially becomes subject to rate regulation on either the BST or a CPST. The Commission established this requirement because, in some circumstances, using the benchmark approach for one tier and the cost-of-service approach for another tier could result in a double recovery of costs by the cable operator.

2. The regulatory review process for BST rates is separate from the review process for CPST rates. Regulation of rates for BSTs is the responsibility of certified local franchising authorities ("LFAs"), pursuant to standards and procedures established by the Commission. An operator may appeal an LFA's rate decision to the Commission. CPST rates are regulated directly by the Commission upon receipt of a valid complaint from an LFA.

3. In the Third Report and Order, the Commission held, that without the tier consistency requirement:

an operator could retier its services and place its most expensive programming on the tier regulated by a cost-of-service determination. The operator would then be allowed to charge a per channel rate for the low cost tier based on the benchmark (which is an averaged rate) that actually exceeds its cost for that tier (and, thus, the rate it would be able to charge under a cost-of-service showing). At the same time, the operator may be able to charge a higher-than-benchmark rate for the other tier through a cost-of-service showing, based on its higher costs for that tier. The end result would be rates that exceed the reasonableness standard set forth in the 1992 Cable Act.

4. The Commission upholds the requirement of the Third Report and Order that the same methodology for determining rates on all regulated tiers shall be used in the initial rate setting process. The Commission sees no reason to conclude that the concerns referred to in the preceding paragraph have dissipated. In addition, because these concerns do not dissipate one year after an operator initially becomes subject to regulation, on its own motion, the Commission removes the provision that limits the required use of consistent methodologies to the one year period beginning on the date an operator initially becomes subject to rate regulation, and thereby extend the requirement so that consistent methodologies must be used whenever an operator has more than one tier subject to rate regulation. This requirement will remain effective until such time as the Commission finds that theuse of the same rate regulatory method on all rate regulated tiers is not necessary to prevent operators from charging rates above that which the rate regulations contemplate. This provision effectuates the Commission's statutory mandate to protect consumers from unreasonable rates.

5. Use of the same rate regulatory method for all rate regulated tiers does not hamper an operator's ability to charge fully compensatory rates. The Commission provides a cost of service option as an alternative to the benchmark formula for operators that believe the benchmark would not enable them to recover costs reasonably incurred in the provision of regulated cable service. As of the effective date of this Order, operators must use consistent rate regulatory methods on all rate regulated tiers whenever the operator is required to justify its rates on any rate regulated tier.

Final Regulatory Flexibility Analysis

6. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RAF), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92–266, 58 FR 29736 ("Report and Order"). The Commission sought written public comments on the proposals in the Report and Order including comments on the IRFA, and addressed these responses in the Third Report and Order. No IRFA was attached to the Third Report and Order because the Third Report and Order only adopted final regulations and did not propose regulations. This FRFA thus addresses the impact of regulations on small entities only as adopted or modified in this action and not as adopted or modified in earlier stages of this rulemaking proceeding. The Commission's Final Regulatory Flexibility Analysis (FRA) conforms to the RAF, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law No. 104–121, 110 Stat. 847. Subtitle II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 610 et seq. (1996).

7. Need and Purpose for Action: This action is being taken in accordance with the Commission's decision, as set forth in the Third Report and Order, to revisit the issues discussed herein, and to carry out the Commission's statutory mandate to insure that cable rates are reasonable.

8. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: There were no comments received in response to the Initial Regulatory Flexibility Analysis. A single commenter petitioned the Commission for reconsideration of the requirements contained in the Third Report and Order, but this petition was ultimately withdrawn. The petitioner was not a small entity, and no reply comments to the petition were received.

9. Certification of No Significant Economic Impact on a Substantial number of Small Entities: We do not believe that the final rule adopted in the Order will have a significant impact on small entities as defined by the Small Business Administration (SBA), by statute, or by our rules. The Communications Act at 47 U.S.C. 543 (m)(2) defines a small cable operator as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is
not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." Under the Communications Act, at 47 U.S.C. 543(m)(1), a small cable operator is not subject to the rate regulation requirements of Sections 543 (a), (b) and (c) on cable programming service tiers ("CPSTs") in any franchise area in which it serves 50,000 or fewer subscribers. The rule adopted in this Order requires that the same rate regulatory methodology be used across the basic service tier ("BST") and CPSTs. Thus, the rule adopted in this Order only applies to operators that are rate regulated on both the BST and CPST, and would therefore not apply to a small cable operator in any franchise area in which it serves 50,000 or fewer subscribers.

10. Section 623(i) of the Communications Act, 47 U.S.C. § 543(i), requires that the Commission design rate regulation methodologies in such a way as to reduce the administrative burdens and the cost of compliance for cable systems with 1,000 or fewer subscribers. The Commission introduced a form of rate regulation known as the small system cost-of-service methodology. This approach is more streamlined than the standard cost-of-service methodology available to cable operators that are not small cable systems owned by small cable companies. In addition, the small system rules include substantive differences from the standard cost-of-service rules to take account of the proportionately higher costs of providing service faced by small systems. This rate adjustment methodology is an alternative to the standard rate adjustment methodologies which are the subject of this Order. In designing this alternative methodology, the Commission extended the small system relief required by Section 623(i) of the Communications Act to cable systems with 15,000 or fewer subscribers owned by cable companies serving 400,000 or fewer subscribers over all of their cable systems. Because of the utilization of this alternative rate adjustment methodology by small cable operators, we do not believe that this Order, which does not concern this alternative methodology, will have any significant economic impact on a substantial number of small cable companies as defined by the Commission's rules.

11. The SBA, at 13 CFR Part 121.201 (as of July 25, 1996), defines a small cable business concern as a cable business, including its affiliates, that has $11 million or less in annual receipts. The Commission, in defining a small system as a cable system with 15,000 or fewer subscribers owned by a cable company serving 400,000 or fewer subscribers, stated that $100 million in annual regulated revenues equates to approximately 400,000 subscribers. We therefore believe that many cable operators that are within this SBA definition will also be within the Commission's definition of small cable operator, and will not experience significant economic impact for the reasons described in the preceding paragraph. If, however, a cable operator has $11 million or less in annual receipts, but does not fall within the class of small cable companies entities to small system rate relief under the Commission's rules, we believe that such a company would fall under the Communications Act at 47 U.S.C. 543(m)(1), which states that a small cable operator is not subject to the rate regulation requirements of Sections 543 (a), (b) and (c) on CPSTs in any franchise area in which it serves 50,000 or fewer subscribers. If $100 million in annual regulated revenues equates to approximately 400,000 subscribers, then 50,000 subscribers, expressed in terms of dollars, should meet or exceed the $11 million in annual receipts from the SBA definition of a small cable business concern. Using this same approach, we likewise believe that the SBA definition of a cable business concern will fall within the one percent of United States subscribers from the Communications Act definition of a small cable operator, because the Commission has determined that there are approximately 61,700,000 subscribers in the United States. We believe that small cable business concerns as defined by the SBA will fall within the Communications Act's definition of a small cable operator and the Act's provision of CPST rate deregulation for small cable operators that serve 50,000 or fewer subscribers.

12. The SBA, at 5 U.S.C. Section 601 (Vol. 5), states that small governmental jurisdictions are "[g]overnments of cities, counties, towns, townships, villages, school districts or special districts with populations of less than 50,000." Under the Commission's rules, if a local governmental jurisdiction has elected to rate regulate the BST, a cable operator must submit rate justifications to the local government on FCC Forms. We do not believe that a substantial number of small governmental jurisdictions will face a significant economic impact due to this Order for the following reasons. First, we do not know of any cable operators that are currently using inconsistent rate setting methods on their rate regulated tiers, and that would therefore have to switch to consistent methods as a result of this Order. If such an operator did exist, the operator would not be required to use consistent rate regulatory methods until the next time the operator was required to justify rates on a rate regulated tier. Thus, the requirement would not generate an increased number of rate reviews by a local franchising authority. Even in this instance, an operator may elect to change its CPST ratemaking methodology in order to conform to the rule as opposed to its BST ratemaking methodology. Such a change would not affect small governmental jurisdictions because the CPST rate is regulated by the Commission, and not by small governmental jurisdictions.


Procedural Provisions

14. Ex parte Rules—Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally, 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

15. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before October 6, 1996, and reply comments on or before November 8, 1996. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you would like each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.
Ordering Clauses

16. Accordingly, it is ordered that, pursuant to the authority granted in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 303(r) and 543, the requirements set forth in the Third Report and Order are amended to provide that the use of the same rate regulatory methodology will be required for all rate regulated tiers for the entire period in which an operator is subject to rate regulation on more than one tier.

17. It is further ordered that the requirements established in this section shall become effective September 30, 1996.

18. It is further ordered that, the Secretary shall send a copy of this Memorandum Opinion and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public Law No. 96±354, with paragraph 603(a) of the Regulatory Counsel for Advocacy of the Small Flexibility Analysis, to the Chief including the Final Regulatory Memorandum Opinion and Order, September 30, 1996.

The equipment charges as specified in § 76.923, will be accepted as in compliance. The maximum monthly charge per subscriber for a tier of regulated programming services offered by a cable system shall consist of a permitted per channel charge multiplied by the number of channels on the tier, plus a charge for franchise fees. The maximum monthly charges for regulated programming services shall not include any charges for equipment or installations. Charges for equipment and installations are to be calculated separately pursuant to § 76.923. The same rate-making methodology (either the benchmark methodology found in paragraph (b) of this section, or a cost-of-service showing) shall be used to set initial rates on all rate regulated tiers, and shall continue to provide the basis for subsequent permitted charges.


ACTION: Final rule.

SUMMARY: This document amends Standard No. 108, the Federal motor vehicle standard on lighting, to adopt new photometric requirements for motorcycle headlamps. The requirements will improve the objectivity of the aiming of their upper beam. The new photometric requirements are those of Society of Automotive Engineers (SAE) Standard J584 OCT93, added as a new Figure 32 to Standard No. 108. They will exist simultaneously with the current photometric requirements of SAE J584 April 1964 until September 1, 2000, when it becomes mandatory.

Petitions for reconsideration must be filed not later than October 15, 1996.

DATES: The final rule is effective October 15, 1996. Conformance with its requirements is optional until September 1, 2000, when it becomes mandatory.

ADDRESSES: Petitions for reconsideration must refer to Docket No. 95–87; Notice 2 and be submitted to: Administrator, NHTSA, 400 Seventh Street, SW, Washington, DC 20590.


SUPPLEMENTARY INFORMATION: Background

Motor Vehicle Safety Standard No. 108, Lamps, Reflective Devices, and Associated Equipment, specifies requirements for motorcycle headlamps. Principally, these are the specifications of SAE Standard J584 April 1964, which have been incorporated by reference into Standard No. 108.

Petition for Rulemaking

The Motorcycle Industry Council (MIC) petitioned for rulemaking to amend Standard No. 108 to allow SAE Standard J584 OCT93 as an alternative to SAE J584 April 1964. According to MIC, motorcycle headlamps designed to conform to SAE J584 April 1964 have difficulty in providing sufficient lower beam illumination directly in front of the motorcycle, a need met by SAE J584 OCT93. Further, adoption of the 1993 requirements would allow manufacturers to install the same headlamp design on motorcycles sold in the United States as are currently being installed on motorcycles sold in 50 other countries.

The Notice of Proposed Rulemaking (NPRM)

In response to MIC’s petition, NHTSA published a notice of proposed rulemaking (NPRM) on February 21, 1996 (61 FR 6616). NHTSA noted in the NPRM that, although it had granted MIC’s petition, SAE J584 OCT93 is inappropriate for incorporation in full into Standard No. 108 because J584 OCT93 contains three sets of photometric specifications for five different classes of motorcycles. Standard No 108, on the other hand (J584 April 1964), contains two sets of photometric specifications, applicable to motorcycles and to motor driven cycles, i.e., motorcycles with 5 horsepower or less.
The specifications of SAE J584 OCT93 that did appear appropriate to NHTSA for inclusion in Standard No. 108 were the photometric requirements of Table 2, essentially refinements of those contained in the 1964 SAE standard applicable to motorcycles and to motor driven cycles. The primary differences are that both the maxima and minima candelas are increased in J584 OCT93. Further, specifications are added for seven new test points on the lower beam (five for motor driven cycles), and seven on the upper beam (one for motor driven cycles). This increase in performance over that provided by the 1964 specifications promises better visibility for the operator and detectability by other motorists. This could reduce crashes for motorcyclists. Because of this potential to enhance safety, NHTSA tentatively concluded that the photometric requirements of Table 2 J584 OCT93 should become mandatory. In NHTSA's view, the permanent co-existence of two SAE standards, which prescribe different minima for the same test points, would undermine efforts to enforce the new, higher set of requirements.

However, because SAE J584 OCT93 prescribes higher test point minima than Standard No. 108's J584 Apr 1964, current motorcycle headlamps cannot be certified to meet the new SAE specifications. Consequently, NHTSA stated that it would be willing to allow a period of time in which the two specifications would co-exist as options until industry could retool for compliance with the newer ones. The agency was uncertain as to the time needed for headlamp redesign. For this reason, it proposed that the new requirements (contained in proposed Figure 31) become mandatory not earlier than two years and not later than four years after publication of the final rule, with optional compliance permitted beginning 30 days after publication. NHTSA requested comments on the appropriate lead time to make the proposed changes to motorcycle headlamp photometry.

On its own initiative, the agency reviewed the new and old SAE requirements to determine if there were other areas in which motorcycle headlamp performance could be enhanced. It found one such area. The April 1964 version of SAE J584 allows the upper headlamp beam to be aimed photoelectrically.  Because a Federal motorcycle headlamp standard by definition must be "objective", NHTSA tentatively concluded that a requirement for photoelectric aim of the upper beam would improve the objectivity of Standard No. 108, and assist manufacturers in their determinations of compliance for certification purposes. Therefore, it proposed that this method of aiming be used in testing headlamps to the photometrics of Figure 31.

In summary, the agency stated that the two amendments would be effectuated as follows. The amendments would be added to Standard No. 108 thirty days after publication of the final rule. At that time, a manufacturer would have the choice of continuing to conform to the 1964 photometrics and visual determination of upper beam compliance, or to conform to the photometrics of Figure 31 and photoelectric determination of upper beam compliance. As of a date two to four years after publication of the final rule, the manufacturer would be required to conform to Figure 31 and photoelectric determination.

Finally, NHTSA proposed to place all requirements pertaining to the performance of motorcycle headlamps in S7, Headlighting requirements, which currently incorporates all such requirements for motor vehicles other than motorcycles. New paragraph S7.9 would accomplish this purpose. Paragraphs S5.1.1.23, S5.1.1.24, and S5.6 (headlamp modulation systems) would become paragraphs S7.9.3, S7.9.5, and S7.9.4, respectively.

Comments on the NPRM

Comments were received from MIC, Stanley Electric Co. Ltd. (Stanley), Koito Manufacturing Co. Ltd. (Koito), American Suzuki Motor Corporation (Suzuki), and American Honda Motor Co. (Honda). Four principal issues were raised.

Leadtime. All commenters supported a leadtime of 4 years for mandatory compliance with the requirements proposed by the NPRM, some saying that it was "appropriate" and others that it was the "minimum" required. A typical comment was that of Suzuki, which said that in some cases, a leadtime of less than 4 years could require costly headlamp redesign for motorcycles shortly before they are replaced with new models. On the other hand, allowance of a 4-year lead time would be adequate to modify existing product lines and incorporate the new requirements in a cost effective manner.

NHTSA has heeded these comments. Given the support for the maximum leadtime proposed, and the likelihood that manufacturers will phase in compliance with the new requirements before that time, as they replace existing models, mandatory compliance with the final rule will be required as of September 1, 2000.

Photometric Requirements. Koito and Suzuki opposed some of the values proposed. Specifically, they requested that the maximum intensity for upper beam headlamps at test point 4D-V be increased from 7,500 cd to 12,000 cd, and that the 75,000 cd maximum at any point be removed, or replaced with a maximum of 112,500 cd. It supported its position with the rationale that mainstream motorcycles in the United States are equipped with two-lamp headlamp systems and that each lamp is photometered separately. Then the values at the test points are added. Also, Figure 17A of Standard No. 108 allows a value of 12,000 cd at 4D-V, and a two-lamp system often exceeds a 7,500 cd value.

These comments appear based upon a misunderstanding of Standard No. 108. When a motorcycle is equipped with a two-lamp headlamp system, there is no summing of test point values when determining compliance. Each headlamp for use on a motorcycle must comply with specified photometrics for a single lamp, and not as a system of two headlamps. Thus, the maximum values apply to a single headlamp, and not the system of two headlamps as the commenters appear to believe.

Therefore, there is no reason to increase the values in the final rule from those originally proposed. Conversely, should a motorcycle be equipped with a single headlamp incorporating dual light sources to achieve either the upper or lower beam, the headlamp must be tested for photometric compliance with both light sources energized simultaneously, and the lamp must be designed to comply in this manner.

Aftermarket Replacement Headlamps. MIC is concerned that lamp manufacturers will be required to discontinue production of lamps for the replacement aftermarket that do not conform to the new standard. In its view, this could support a phase-in period longer than 4 years in order to provide proper replacement lighting for older, in-use motorcycles.

NHTSA understands MIC's concern. The agency has reviewed paragraph S5.8 Replacement Equipment of Standard No. 108. As a general rule, lighting equipment intended to replace original equipment must "be designed to conform to this standard," meaning Standard No. 108 as in effect on the date the replacement equipment is manufactured. Subparagraphs of S5.8 provide exceptions to the general rule, and allow turn signal lamps, taillamps, and stop lamps to meet the SAE
standard that applied to the original equipment they are intended to replace, as an alternative to meeting the SAE requirements specified for new vehicles in Tables I and III of Standard No. 108. It is to be noted that motorcycle headlamps and all other required lamps and reflectors are not among the exceptions. With respect to headlamps, NHTSA notes that the replacement equipment provisions were adopted when the only headlamps available were a limited number of sealed beam types that were intended to be universal replacements.

Because Standard No. 108 allows certain items of replacement lighting equipment to meet either current specifications or those in effect when the original lighting equipment was manufactured, NHTSA has tentatively concluded that this alternative should be extended to all items of lighting equipment, including headlamps. While the idea of enhancing safety through upgrades in replacement equipment is intuitively attractive, in some instances upgraded equipment may be incompatible with the electrical systems of older vehicles. In addition, many lamp designs are vehicle-specific, and it is costly to lamp manufacturers to have to design lamps of identical dimensions to two different performance requirements. An owner should not be denied the chance to buy replacement equipment that is suitable for his or her vehicle. At a minimum, this is a replacement equipment equivalent to the performance of the original equipment certified by the vehicle manufacturer's certification of compliance. The owner should also be offered the opportunity to purchase upgraded replacement equipment if it is available for use on his or her vehicle.

Accordingly, NHTSA intends to propose in the near future an amendment to §5.8 sufficient to allow all replacement lighting equipment to be designed to comply with either the requirements that applied to original equipment, or to requirements for such equipment that are in effect at the time the replacement is manufactured. However, because an amendment of this nature was not proposed in the NPRM to this final rule, NHTSA cannot proceed to a direct amendment in this document.

**Request To Delete the Out-of-Focus Test Requirement**

Suzuki asked for removal of the out-of-focus test, saying that it represents an outdated and unnecessary requirement mandated by SAE and technological advances. It submits in support of its request the fact that the out-of-focus test no longer appears in the current versions of SAE J584 and J575. Koito requested that motorcycle headlamps equipped with bulbs either specified in SAE J1577 “Replaceable Motorcycle Headlamp Bulbs” or listed in part 564’s Docket No. 93–11 be excluded from the out-of-focus test specified in SAE J584 April 1964. The reason for this request is that these bulbs have specified filament tolerance dimensions. Further, it argued that this test is not required in most other countries and contradicts international harmonization.

The issue of excluding certain types of bulbs from the out-of-focus test was not raised in the NPRM, but NHTSA wishes to discuss it here.

In brief, Standard No. 108 requires that headlamps designed to comply with motorcycle photometrics meet the out-of-focus test specified in Paragraph K of SAE Standard J575d “Tests for Motor Vehicle Lighting Devices and Components” August 1967. Paragraph K requires that photometric tests be conducted for each of four out-of-focus filament positions, except that the complete distribution may be omitted. Headlamps designed for use on motor vehicles other than motorcycles are also required to comply with the photometric performance requirements when equipped with any complying bulb. This means compliance at 100 percent of the allowable filament tolerances in any possible combination. Such a test is needed to ensure that photometric requirements are achievable with the marketplace replaceable headlamp bulb. Additionally, NHTSA notes that, while not referenced in Standard No. 108, the current version of SAE J1383 JUN90 “Performance Requirements for Motor Vehicle Headlamps” has an out-of-focus test. The first issue presented concerns SAE J577. NHTSA notes that this standard about motorcycle light sources has not been proposed for incorporation or incorporated into Standard No. 108. In fact, there are no specifications at all in Standard No. 108 for motorcycle headlamp light sources. The standard simply specifies the photometrics that must be met by motorcycle headlamps.

The second issue that Koito raises in essence concerns the use of a bulb in a motorcycle headlamp that was designed for vehicles other than motorcycles. The filament tolerance range of such bulbs is specified in part 564, to be sure, but only for non-motorcycle applications. In the absence of any specifications for motorcycle headlamp light sources, NHTSA notes that the out-of-focus test must be retained, even for those non-motorcycle headlamp light sources which may be acceptable for use in vehicles other than motorcycles.

These performance requirements associated with photometric performance and filament location (through compliance with the out-of-focus test) have been in effect since January 1, 1969, the date on which Standard No. 108 became effective for motorcycles. The fact that many other countries may not have similar procedures reflects the difference between NHTSA’s self-certification scheme and the type approval system of those countries. Under the laws of these countries, it may be a violation to manufacture, sell, or install a bulb if it has not been approved by the government. Because lamp performance cannot be assured without either an out-of-focus test, or direct regulation of the bulb, the out-of-focus test cannot be deleted without a corresponding change adding discrete types of motorcycle headlamp bulbs.

In summary, today in the United States, photometric compliance is achieved with marketplace replaceable light sources whose filament locations are not subject to Federal rules. This offers significant design freedom in the marketplace which would be lost if the dimensions of each existing and new bulb had to be regulated. NHTSA has no present intention of engaging in rulemaking that would regulate the dimensions of motorcycle headlamp light sources. Clarification. Paragraph S6.1 states that, unless otherwise stated in Standard No. 108 and with the exceptions noted in S6.1, the SAE Standards and Recommended Practices referenced in Standard No. 108 are those in the 1970 SAE Handbook. One of the exceptions is that “[f]or headlamps, unless otherwise specified in this standard, the version of SAE Standard J575 is DEC88”. NHTSA wishes to clarify that this does not include motorcycle headlamps, and that the version of J575 that applies to motorcycle headlamps is that of the 1970 Handbook (SAE J575d, August 1967). The final rule, therefore, contains an appropriate amendment of S6.1.

**Effective Dates**

In order to allow compliance with an optional requirement at the earliest possible time, it is hereby found, for good cause shown, that an effective date earlier than 180 days after issuance of the final rule is in the public interest. Accordingly, the final rule is effective 45 days after its publication in the Federal Register.

Because the commenters indicated that a 4-year headlight is the earliest...
practicable date upon which they can meet a mandatory standard, good cause is shown for an effective date later than one year after issuance of the final rule, and compliance with the photometric requirements of the final rule becomes mandatory on September 1, 2000.

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures. This rulemaking action was not reviewed under Executive Order 12866. Further, it has been determined that the rulemaking action is not significant under Department of Transportation regulatory policies and procedures. NHTSA currently anticipates that the costs of the final rule will be so minimal as not to warrant preparation of a full regulatory evaluation. Headlamps are changed as part of styling: as long as adequate leadtime is allowed, no costs should be incurred. However, for comments on this assumption, NHTSA asked for comments on the costs and other impacts associated with a two to four-year leadtime for mandatory compliance with a final rule, and said that if the comments received indicate that the impacts are more than minimal, NHTSA would prepare a full regulatory evaluation before issuing a final rule. MIC stated that if the costs of compliance were amortized over a minimum implementation period of four years, the impact would be sufficiently reduced so as to support the agency not preparing a full regulatory evaluation. The agency is providing a compliance period of four years in the final rule.

National Environmental Policy Act. NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. It is not anticipated that the final rule will have a significant effect upon the environment. The composition of motorcycle headlamps will not change from those presently in production.

Regulatory Flexibility Act. The agency has also considered the impacts of this rulemaking action in relation to the Regulatory Flexibility Act. For the reasons stated above and below, I certify that this rulemaking action will not have a significant economic impact upon a substantial number of small entities. Accordingly, no regulatory flexibility analysis has been prepared. Manufacturers of motorcycles and their headlamps, those affected by the rulemaking action, are generally not small businesses within the meaning of the Regulatory Flexibility Act. The agency does not anticipate that the cost of headlamps will increase as a result of this rulemaking action.

Executive Order 12612 (Federalism). This rulemaking action has also been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and NHTSA has determined that this rulemaking action does not have significant federalism implications to warrant the preparation of a Federalism Assessment.

Civil Justice. The final rule will not have any retroactive effect. Under 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a state may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, 49 CFR part 571 is amended as follows:

1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

2. Section 571.108 is amended by:

(a) Removing and reserving paragraphs S5.1.1.23, S5.1.1.24, S5.6, S5.6.1 and S5.6.2;
(b) Revising the penultimate sentence of paragraph S6.1 to read as follows;
(c) Adding new paragraphs S7.9, S7.9.1 through S7.9.4, S7.9.4.1, S7.9.4.2, S7.9.4.3, S7.9.4.4 and S7.9.5 to read as follows;
(d) Adding in numerical order paragraph S7.9.5.1 through S7.9.5.2 and
(e) Amending Table III by revising the text immediately following the Table heading and by revising the entry for headlamps, to read as follows:


* * * * *
S5.1.1.23 [Reserved]
S5.1.1.24 [Reserved]
* * * * *
S5.6 [Reserved]
S5.6.1—S5.6.2 [Reserved]
* * * * *
S6 Subreferenced SAE Standards and Recommended Practices
S6.1 * * * For headlamps other than motorcycle headlamps, unless otherwise specified in this standard, the version of SAE Standard J575 is DEC88, and the version of SAE Standard J602 is OCT80.

S7.9 Headlighting requirements.

* * * * *
S7.9.1 Motorcycle headlamps shall be equipped with a headlighting system designed to conform to the following requirements.

(a) A headlighting system designed to conform to SAE Standard J584 Motorcycle Headlamps April 1964, or to SAE Standard J584 April 1964 with the photometric specifications of Figure 32 and the upper beam aimability specifications of paragraph S7.9.3; or
(b) One half of any headlighting system specified in S7.1 through S7.6 which provides both a full upper beam and full lower beam. Where more than one lamp must be used, the lamps shall be mounted vertically, with the lower beam as high as practicable.

S7.9.2 A motorcycle manufactured on or after September 1, 2000, shall be equipped with—

(a) A headlighting system designed to conform to SAE Standard J584 Motorcycle Headlamps April 1964 with the photometric specifications of Figure 32 and the upper beam aimability specifications of paragraph S7.9.3; or
(b) A headlighting system that conforms to S7.9.1(b).

S7.9.3 The upper beam of a multiple beam headlamp designed to conform to the photometric requirements of Figure 32 shall be aimed photoelectrically during the photometric test in the manner prescribed in SAE Standard J584 OCT93 Motorcycle Headlamps.

S7.9.4 Motorcycle headlamp modulation system.

S7.9.4.1 A headlamp on a motorcycle may be wired to modulate either the upper beam or the lower beam from its maximum intensity to a lesser intensity, provided that:

(a) The rate of modulation shall be 240 ± 40 cycles per minute.
(b) The headlamp shall be operated at maximum power for 50 to 70 percent of each cycle.
(c) The lowest intensity at any test point shall be not less than 17 percent of the maximum intensity measured at the same point.
(d) The modulator switch shall be wired in the power lead of the beam filament being modulated and not in the ground side of the circuit.
(e) Means shall be provided so that both the lower beam and upper beam...
remain operable in the event of a modulator failure.

(f) The system shall include a sensor mounted with the axis of its sensing element perpendicular to a horizontal plane. Headlamp modulation shall cease whenever the level of light emitted by a tungsten filament light operating at 3000° Kelvin is either less than 270 lux (25 foot-candles) of direct light for upward pointing sensors or less than 60 lux (5.6 foot-candles) of reflected light for downward pointing sensors. The light is measured by a silicon cell type light meter that is located at the sensor and pointing in the same direction as the sensor. A Kodak Gray Card (Kodak R-27) is placed at ground level to simulate the road surface in testing downward pointing sensors. The test profile shown in Figure 9, of the standard after completion of the test profile shown in Figure 9,

(g) When tested in accordance with the test profile shown in Figure 9, the voltage drop across the modulator when the lamp is on at all test conditions for 12 volt systems and 6 volt systems shall not be greater than .45 volt. The modulator shall meet all the provisions of the standard after completion of the test profile shown in Figure 9.

(h) Means shall be provided so that both the lower and upper beam function at design voltage when the headlamp control switch is in either the lower or upper beam position when the modulator is off.

S7.9.4.2(a) Each motorcycle headlamp modulator not intended as original equipment, or its container, shall be labeled with the maximum wattage, and the minimum wattage appropriate for its use. Additionally, each such modulator shall comply with S7.9.4.1 (a) through (g) when connected to a headlamp of the maximum rated power and a headlamp of the minimum rated power, and shall provide means so that the modulated beam functions at design voltage when the modulator is off.

(b) Instructions, with a diagram, shall be provided for mounting the light sensor including location on the motorcycle, distance above the road surface, and orientation with respect to the light.

S7.9.5 Each replaceable bulb headlamp that is designed to meet the photometric requirements of paragraph S7.9.1(a) or paragraph S7.9.2(a) and that is equipped with a light source other than a replaceable light source meeting the requirements of paragraph S7.7, shall have the word “motorcycle” permanently marked on the lens in characters not less than 0.114 in. (3 mm) in height.

* * * * *

**FIGURE 32—MOTORCYCLE AND MOTOR-DRIVEN CYCLE HEADLAMP PHOTOMETRIC REQUIREMENTS**

<table>
<thead>
<tr>
<th>Test Points (deg.)</th>
<th>Motorcycle (candela)</th>
<th>Motor-Driven Cycle (candela)</th>
<th>Motor-Driven Cycle with Single Lamp System (candela)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lower Beam</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.5U</td>
<td>1R to R</td>
<td>1400-MAX</td>
<td>1400-MAX</td>
</tr>
<tr>
<td>1.5U</td>
<td>1R to 3R</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1U</td>
<td>1.5L to L</td>
<td>700-MAX</td>
<td>700-MAX</td>
</tr>
<tr>
<td>0.5U</td>
<td>1.5L to L</td>
<td>1000-MAX</td>
<td>1000-MAX</td>
</tr>
<tr>
<td>0.5D</td>
<td>1R to 3R</td>
<td>2700-MAX</td>
<td>2700-MAX</td>
</tr>
<tr>
<td>1.5D</td>
<td>9L and 9R</td>
<td>700-MIN</td>
<td>700-MIN</td>
</tr>
<tr>
<td>2D</td>
<td>0.0R</td>
<td>4000-MIN</td>
<td>4000-MIN</td>
</tr>
<tr>
<td>2D</td>
<td>3L and 3R</td>
<td>1500-MIN</td>
<td>1500-MIN</td>
</tr>
<tr>
<td>2D</td>
<td>6L and 6R</td>
<td>700-MIN</td>
<td>700-MIN</td>
</tr>
<tr>
<td>2D</td>
<td>12L and 12R</td>
<td>800-MIN</td>
<td>800-MIN</td>
</tr>
<tr>
<td>3D</td>
<td>6L and 6R</td>
<td>2000-MIN</td>
<td>2000-MIN</td>
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<tr>
<td>4D</td>
<td>0.0R</td>
<td>2000-MIN</td>
<td>2000-MIN</td>
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<tr>
<td>4D</td>
<td>4R</td>
<td>12500-MAX</td>
<td>12500-MAX</td>
</tr>
<tr>
<td><strong>Upper Beam</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2U</td>
<td>0.0R</td>
<td>1000-MIN</td>
<td>1000-MIN</td>
</tr>
<tr>
<td>1U</td>
<td>3L and 3R</td>
<td>2000-MIN</td>
<td>2000-MIN</td>
</tr>
<tr>
<td>0.0U</td>
<td>0.0R</td>
<td>12500-MIN</td>
<td>12500-MIN</td>
</tr>
<tr>
<td>0.5D</td>
<td>0.0R</td>
<td>20000-MIN</td>
<td>20000-MIN</td>
</tr>
<tr>
<td>0.5D</td>
<td>9L and 9R</td>
<td>10000-MIN</td>
<td>10000-MIN</td>
</tr>
<tr>
<td>0.5D</td>
<td>12L and 12R</td>
<td>3000-MIN</td>
<td>3000-MIN</td>
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<tr>
<td>0.5D</td>
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<td>800-MIN</td>
</tr>
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<td>17500-MIN</td>
</tr>
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<td>0.0R</td>
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<td>5000-MIN</td>
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<td>9L and 9R</td>
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<tr>
<td>3D</td>
<td>12L and 12R</td>
<td>1500-MIN</td>
<td>1500-MIN</td>
</tr>
<tr>
<td>4D</td>
<td>0.0R</td>
<td>7500-MIN</td>
<td>7500-MIN</td>
</tr>
<tr>
<td>ANYWHERE</td>
<td>ANYWHERE</td>
<td>75000-MAX</td>
<td>75000-MAX</td>
</tr>
</tbody>
</table>

* * * * *
TABLE III—Required Motor Vehicle Lighting Equipment

<table>
<thead>
<tr>
<th>Item</th>
<th>Passenger cars, multipurpose passenger vehicles, trucks, and buses</th>
<th>Trailers</th>
<th>Motorcycles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Headlamps</td>
<td>See S7</td>
<td>None</td>
<td>See S7.9</td>
</tr>
</tbody>
</table>

* * * * *
Issued on: August 23, 1996.

Ricardo Martinez,
Administrator.
[FR Doc. 96–22058 Filed 8–28–96; 8:45 am]
BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
50 CFR Part 32
RIN 1018–AD77
Addition of Ten National Wildlife Refuges to the List of Open Areas for Hunting and/or Sport Fishing in Arkansas, Illinois, Indiana, Louisiana, Missouri, Mississippi, and Nebraska
AGENCY: Fish and Wildlife Service, Interior.
ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) adds the following National Wildlife Refuges (NWRs), to the list of areas open for hunting and/or sport fishing, along with pertinent refuge-specific regulations for such activities: Bald Knob NWR, AR; Cossatot NWR, AR; Emiquon NWR, IL; Potoka NWR, IN; Big Branch Marsh NWR, LA; Grand Cote NWR, LA; Mandalay NWR, LA; Big Muddy NWR, MO; Tallahatchie NWR, MS and Boyer Chute NWR, NE. The Service determines that such use is compatible with the purposes for which these refuges were established. The Service further determines that this action is in accordance with the provisions of all applicable laws, is consistent with principles of sound fish and wildlife management, and is otherwise in the public interest by providing additional recreational opportunities at national wildlife refuges.

EFFECTIVE DATE: This rule is effective August 29, 1996.


SUPPLEMENTARY INFORMATION: The Service generally closes national wildlife refuges to hunting and sport fishing until opening them by rulemaking. The Secretary of the Interior (Secretary) may open refuge areas to hunting and/or fishing upon a determination that such uses are compatible with the purpose(s) for which the refuge was established. The action also must be in accordance with provisions of all laws applicable to the areas, must be consistent with the principles of sound fish and wildlife management, and otherwise must be in the public interest. This rulemaking opens Bald Knob NWR, AR; Big Branch Marsh NWR, LA; Big Muddy NWR, MO; Cossatot NWR, AR; Emiquon NWR, IL; Potoka River NWR, IN to hunting migratory game birds, upland game, big game, and sport fishing. This rulemaking also opens Boyer Chute NWR, NE; Grand Cote NWR, LA; Mandalay NWR, LA and Tallahatchie NWR, MS to sport fishing.

Text in this final rule is different than that used in the proposed rules because it reflects conformity to plain English writing standards. In the June 21, 1996, issue of the Federal Register (61 FR 31888–31910), the Service published ten (10) proposed rulemakings containing a description of the refuges and their proposed hunting and/or fishing programs and invited public comment. Each of these rulemakings was assigned a separate rule identification number (RIN) number in the proposed rulemakings as follows: Bald Knob NWR, AR, RIN 1018-AD80; Cossatot NWR, AR, RIN 1018-AD78; Emiquon NWR, IL, RIN 1018-AD85; Potoka NWR, IN, RIN 1018-AD86; Big Branch Marsh NWR, LA, RIN 1018-AD79; Grand Cote NWR, LA, RIN 1018-AD77; Mandalay NWR, LA, RIN 1018-AD82; Big Muddy NWR, MO, RIN 1018-AD88; Tallahatchie NWR, MS, RIN 1018-AD81 and Boyer Chute NWR, NE, RIN 1018-AD89.

The Service combined the proposed rules into this single final rule (RIN 1018-AD77). A description of the refuges and their proposed hunting and/or fishing programs was provided in the proposed rules.

The National Rifle Association (NRA) supports opening designated refuges including Cossatot NWR to migratory game bird, upland game, and/or big game hunting. They note that while hunting at Cossatot is to be permitted in accordance with the State of Arkansas' regulations and licensing requirements, the Service is imposing several exceptions. In cases where the Service is departing from state rules and regulations, it would be helpful to the public for the Service to provide a brief explanation as to why it is posing those exceptions. They would appreciate having the rationale for the listed exceptions included as part of the final rule.

In the case of Cossatot NWR, and several other refuges, the Service requires a refuge specific permit to hunt. This requirement normally exceeds state fish and game regulations, but is employed as a management tool, it: (1) Controls the total number of hunters permitted to be hunting at any one time on the refuge; (2) provides a method for the hunter to receive a copy and understand the refuge specific regulations, which usually contain a hunting area map; and (3) provides special notice of any change to the regulations during the season and (4) assists in lost hunter identity and law enforcement issues.

Several individuals provided comments opposing additional hunting on national wildlife refuges. It is the policy of the Fish and Wildlife Service to provide wildlife-dependent recreational opportunities on a national wildlife refuge when compatible with the purposes for which that specific refuge was established.

This rule is final upon publication. The Service has determined that any
Further delay in the implementation of these refuge hunting and sport fishing regulations would not be in the public interest in that it would hinder the effective planning and administration of the hunting and fishing programs. The Service received public comment on these proposals during the Environmental Assessment planning phase as well as the 30-day comment period for these ten rules. Delay of an additional 30 days would jeopardize the hunts this year, or shorten their duration and thereby lessen the management effectiveness of this regulation. Therefore, the Service finds good cause to make this rule effective upon publication (5 U.S.C. 553(d)(3)).

Statutory Authority

The National Wildlife Refuge System Administration Act (NWRSAA) of 1966, as amended (16 U.S.C. 668dd), and the Refuge Recreation Act of 1962 (16 U.S.C. 668k) govern the administration and public use of national wildlife refuges. Specific to Section 4(d)(1)(A) of the NWRSAA authorizes the Secretary of the Interior to permit the use of any area within the Refuge System for any purpose, including but not limited to, hunting, fishing and public recreation, accommodations and access, when he determines that such uses are compatible with the major purpose(s) for which the area was established. The Refuge Recreation Act (RRA) authorizes the Secretary to administer areas within the Refuge System for public recreation as an appropriate incidental or secondary use only to the extent that it is practicable and not inconsistent with the primary purpose(s) for which the areas were established. The NWRSAA and the RRA also authorize the Secretary to issue regulations to carry out the purposes of the Acts and regulate uses.

The Service develops hunting and sport fishing plans for each existing refuge prior to opening it to hunting or fishing. In many cases, the Service develops refuge-specific regulations to ensure the compatibility of the programs with the purposes for which the refuge was established. The Service ensured initial compliance with the NWRSAA and the RRA for hunting and sport fishing on newly acquired refuges through an interim determination of compatibility made at the time of acquisition. This process ensures the determinations required by these acts are made prior to the addition of refuges to the lists of areas open to hunting and fishing in 50 CFR part 32. The Service ensures continued compliance by the development of long-term hunting and sport fishing plans and by annual review of hunting and sport fishing programs and regulations.

The Service determines that this action is in accordance with the provisions of all applicable laws, is consistent with principles of sound fish and wildlife management, helps implement Executive Order 12962 (Recreational Fisheries), and is otherwise in the public interest by providing additional recreational opportunities at national wildlife refuges. Sufficient funds are available within the refuge budgets to operate the hunting and/or sport fishing programs as proposed.

Paperwork Reduction Act

The Service examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements.

Economic Effect

Service review revealed that this rulemaking will increase hunter and fisherman visitation to the surrounding area of these refuges before, during or after recreational uses, compared to closing the refuge to these recreational uses. When the Service acquired these lands, all public use ceased under law until opened to the public in accordance with this rulemaking.

These refuges generally are distant from large metropolitan areas. Businesses in the area of the refuges consist primarily of small family-owned stores, restaurants, gas stations and other small commercial enterprises. In addition, there are several small commercial and recreational fishing and hunting camps and marinas in the general areas. This final rule has a positive effect on such entities, however, the amount of revenue generated is not large.

Many area residents enjoy a rural lifestyle that includes frequent recreational use of the abundant natural resources of the area. A high percentage of the households enjoy hunting, fishing, and boating in area wetlands, rivers and lakes. Refuge lands generally were not available for public use prior to government acquisition; however, friends and relatives of the landowners fish and hunted there and some lands operated under commercial hunting and fishing leases. Many nearby residents also participate in other forms of nonconsumptive outdoor recreation such as hiking, biking, camping, birdwatching, canoeing, and other outdoor sports.

The Service calculates economic impacts of refuge fishing and hunting programs on local communities from average expenditures in the "1991 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation." In 1996, the Service projects that 42 million U.S. residents 16 years old and older hunted and/or fished. More specifically, 37 million fished and 14.5 million hunted. Those who both fished and hunted account for the 9.5 million average. Nationwide expenditures by sportsmen totalled $42 billion. Trip-related expenditures for food, lodging, and transportation were $16 billion or 37 percent of all fishing and hunting expenditures; equipment expenditures amounted to $19 billion, or 46 percent of the total; other expenditures such as those for magazines, membership dues, contributions, land leasing, ownership, licenses, stamps, tags, and permits accounted for $6.9 billion, or 16 percent of all expenditures. Overall, anglers spent an average of $41 per day. For each day of hunting, big game hunters averaged spending $40, small game hunters $20, and migratory bird hunters $30.

Applying these national averages to projected visitation at these ten refuges results in the following: 26,500 fishermen are expected to spend $1,081,700 annually in pursuit of their sport, while an estimated 4,300 hunters will spend $159,900 annually hunting on the refuges. While many of these hunters and fisherman already made expenditures prior to the refuge opening, additional expenditures directly are due to these new recreational opportunities provided by the land now open to the general public. The proposed rules for these ten refuges listed each economic contribution separately, and the final rule combines these contributions.

This rulemaking was not subject to Office of Management and Budget review under Executive Order 12866. A review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) reveals that although the rulemaking would increase visitation and expenditures in the surrounding area of the refuge, it would not have a significant effect on a substantial number of small entities in the area, such as businesses, organizations and governmental jurisdictions.

Environmental Considerations

Pursuant to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), the Service prepared environmental assessments for nine refuge openings. At Cossatot NWR, the Service did not prepare an environmental assessment but invoked a categorical exclusion as provided by 516
DM6 Appendix 1 with respect to this opening. Based upon the remaining Environmental Assessments, the Service issued a Finding of No Significant Impact with respect to the remaining nine openings. The Service conducted a Section 7 evaluation pursuant to the Endangered Species Act on all refuges and determined that these actions will not affect any Federally listed or proposed for listing threatened or endangered species or their critical habitats. These documents are on file at the offices of the Service and available for review by contacting the primary author.

Unfunded Mandates

The Service has determined and certifies pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities.

Civil Justice Reform

The Department has determined that these final regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Primary Author

Stephen R. Vehrs, Division of Refuges, U.S. Fish and Wildlife Service, Washington, DC 20240, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 32

Fishing, Hunting, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

Accordingly, Part 32 of Chapter I of Title 50 of the Code of Federal Regulations is amended as follows:

PART 32—[AMENDED]

1. The authority citation for Part 32 continues to read as follows:


§32.2 [Amended]

2. Section 32.2 List of refuge units open to hunting and/or fishing, is amended by alphabetically adding the listings “Bald Knob National Wildlife Refuge” and “Cossatot National Wildlife Refuge” to the State of Arkansas; “Emiquon National Wildlife Refuge” to the State of Illinois; “Patoka River National Wildlife Refuge and Management Area” to the State of Indiana; “Big Branch Marsh National Wildlife Refuge”, “Grand Cote National Wildlife Refuge”, and “Mandalay National Wildlife Refuge” to the State of Louisiana; “Big Muddy National Wildlife Refuge” to the State of Missouri; “Tallyahatchie National Wildlife Refuge” to the State of Mississippi; and “Boyer Chute National Wildlife Refuge” to the State of Nebraska.

3. Section 32.23 Arkansas is amended by adding the alphabetical listing of Bald Knob National Wildlife Refuge and Cossatot National Wildlife Refuge to read as follows:

§32.23 Arkansas.

  * * * * *

Bald Knob National Wildlife Refuge

A. Hunting of Migratory Game Birds. Hunters may hunt migratory game birds on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

D. Sport Fishing. Fishermen may fish and frog on designated areas of the refuge subject to the following conditions:

1. Fishermen must take turtles and crawfish in accordance with applicable state regulations.

2. Trotlines must be reset when exposed by receding water levels. Trotline ends must consist of a length of cotton line that extends from the point of attachment into the water.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen must restrict motorboats to slow speed/minimum wake.

5. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

List of Subjects in 50 CFR Part 32

Fishing, Hunting, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

Accordingly, Part 32 of Chapter I of Title 50 of the Code of Federal Regulations is amended as follows:

PART 32—[AMENDED]

1. The authority citation for Part 32 continues to read as follows:


§32.2 [Amended]

2. Section 32.2 List of refuge units open to hunting and/or fishing, is amended by alphabetically adding the listings “Bald Knob National Wildlife Refuge” and “Cossatot National Wildlife Refuge” to the State of Arkansas; “Emiquon National Wildlife Refuge” to the State of Illinois; “Patoka River National Wildlife Refuge and Management Area” to the State of Indiana; “Big Branch Marsh National Wildlife Refuge”, “Grand Cote National Wildlife Refuge”, and “Mandalay National Wildlife Refuge” to the State of Louisiana; “Big Muddy National Wildlife Refuge” to the State of Missouri; “Tallyahatchie National Wildlife Refuge” to the State of Mississippi; and “Boyer Chute National Wildlife Refuge” to the State of Nebraska.

3. Section 32.23 Arkansas is amended by adding the alphabetical listing of Bald Knob National Wildlife Refuge and Cossatot National Wildlife Refuge to read as follows:

§32.23 Arkansas.

  * * * * *

Bald Knob National Wildlife Refuge

A. Hunting of Migratory Game Birds. Hunters may hunt migratory game birds on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to the following condition:

1. Hunters must possess a refuge permit.

D. Sport Fishing. Fishermen may fish and frog on designated areas of the refuge subject to the following conditions:

1. Fishermen must take turtles and crawfish in accordance with applicable state regulations.

2. Trotlines must be reset when exposed by receding water levels. Trotline ends must consist of a length of cotton line that extends from the point of attachment into the water.

3. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.

4. Fishermen may fish, take frogs, turtles and crawfish on designated areas of the refuge subject to the following conditions:

1. Fishermen must possess a refuge permit.

B. Upland Game Hunting. Hunters may hunt upland game on designated areas of the refuge subject to posted conditions.

C. Big Game Hunting. Hunters may hunt big game on designated areas of the refuge subject to posted conditions.

D. Sport Fishing. Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may fish in all refuge waters during daylight hours from January 15, through October 15.

2. Fishermen must restrict motorboats to slow speed/minimum wake.

3. Fishermen must restrict motorboats to slow speed/minimum wake.
D. **Sport Fishing.** Fishermen may fish in designated waters of the refuge subject to posted regulations.

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6. Section 32.37 [Reserved].

**§ 32.37 Louisiana.**

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Big Branch Marsh National Wildlife Refuge

A. **Hunting of Migratory Game Birds.** Hunters may hunt ducks, coots, and snow geese on designated areas of the refuge subject to the following conditions:

1. Hunters must possess a refuge permit.
2. Hunters may hunt white-tailed deer on designated areas of the refuge subject to the following conditions:
   - 1. Hunters must possess a refuge permit.
   - 2. Boats may not be left on the refuge overnight.
   - 3. Fishermen may use yo-yos during daylight hours only.
   - 4. Fishermen may not use trotlines, slat traps or nets while fishing.
   - 5. Fishermen must not use air-thrust boats, motorized pirogues, go-devils, or mud boats in refuge waters.

* * * * *

Grand Cote National Wildlife Refuge

A. **Hunting of Migratory Game Birds.** [Reserved]

B. **Upland Game Hunting.** [Reserved]

C. **Big Game Hunting.** Hunters may hunt white-tailed deer on designated areas of the refuge subject to the following conditions:

1. Hunters must possess a refuge permit.
2. Hunters may hunt white-tailed deer on designated areas of the refuge subject to the following conditions:
   - 1. Hunters must possess a refuge permit.
   - 2. Boats may not be left on the refuge overnight.
   - 3. Fishermen may use yo-yos during daylight hours only.
   - 4. Fishermen may not take frogs.

* * * * *

Mandalay National Wildlife Refuge

A. **Hunting of Migratory Game Birds.** [Reserved]

B. **Upland Game Hunting.** [Reserved]

C. **Big Game Hunting.**[Reserved]

D. **Sport Fishing.** Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen must possess a "free" refuge permit.
2. All persons entering, using or occupying the refuge must abide by all terms and conditions set forth in the appropriate refuge permit and brochure.

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7. Section 32.43 [Reserved].

**§ 32.44 Missouri.**

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Tallahatchie National Wildlife Refuge

A. **Hunting of Migratory Game Birds.** [Reserved]

B. **Upland Game Hunting.** [Reserved]

C. **Big Game Hunting.** [Reserved]

D. **Sport Fishing.** Fishermen may fish in designated waters of the refuge subject to the following conditions:

1. Fishermen may not commercial fish.
2. Daylight use only.
3. The public may not camp.
4. Fishermen may use vehicles only on designated roads.
5. Fishermen must not litter on the refuge.
6. Fishermen must not build fires on the refuge.
7. Fishermen must not use all terrain vehicles on the refuge.
8. All State regulations governing seasons, licenses, and creel limits apply.
9. Fishermen must not use nets, seine, trot lines, or any similar device for taking fish.

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8. Section 32.44 [Reserved].

**§ 32.46 Nebraska.**

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Boyer Chute National Wildlife Refuge

A. **Hunting of Migratory Game Birds.** [Reserved]

B. **Upland Game Hunting.** [Reserved]

C. **Big Game Hunting.** [Reserved]

D. **Sport Fishing.** Designated areas of the refuge are open in accordance with State fishing regulations and the special conditions that follow:

1. Fishermen may hook and line fish during daylight hours with closely attended poles.
2. Fishermen may use only non-motorized vessels in the Chute, but must not leave vessels on the refuge overnight.
3. Fishermen must not use floating, limb, or trot lines on the refuge.
4. Fishermen must not use bow, crossbow, snagging devices, or spears while fishing.
5. Fishermen must not dig bait, net, frog, or collect mussels (clams).

* * * * *

Dated: August 13, 1996.

George T. Frampton, Jr.,
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 96-22041 Filed 8-28-96; 8:45 am]
BILLING CODE 4310-55-P

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[I.D. 080296B]

**Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel Closure; Correction**

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

**ACTION:** Correction to a Closure Notification.

**SUMMARY:** This document contains a correction to a closure notification (I.D. 080296B), which was published Thursday, August 8, 1996 (61 FR 41363).

**EFFECTIVE DATE:** 1200 hours, Alaska local time (A.l.t.), August 6, 1996, until 2400 hours, A.l.t., December 31, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mary Furuness, 907-586-7228.
Background

On August 8, 1996, NMFS published notification in the Federal Register announcing closure of the directed fishery for Atka mackerel in the Central Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI), which was intended to become effective on August 4, 1996, but, because it was not filed with the Office of the Federal Register in a timely manner, became effective on August 6, 1996. The action was necessary to prevent exceeding the total allowable catch of Atka mackerel in this area.

Need for Correction

The closure notification for the Atka mackerel directed fishery for Central Aleutian District inadvertently included the Bering Sea subarea of the BSAI in the announcement. The Bering Sea subarea and the Eastern Aleutian District of the BSAI were closed to directed fishing for Atka mackerel on August 2, 1996 (61 FR 41363, August 8, 1996), in a separate notification.

Correction of Publication

Accordingly, the publication on August 8, 1996, of the closure (I.D. 080296B), which was the subject of FR Doc. 96-20257, is corrected as follows:

On page 41363, in the second column, the first sentence of the Summary should read as follows:

NMFS is closing the directed fishery for Atka mackerel in the Central Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI).

On page 41363, in the second column, the EFFECTIVE DATE line of the preamble should read as follows:

EFFECTIVE DATE: 1200 hours, Alaska local time (A.l.t.), August 6, 1996, until 2400 hours, A.l.t., December 31, 1996.

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

Dated: August 23, 1996.

Richard H. Schaefer,
Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 96-22056 Filed 8-28-96; 8:45 am]
BILLING CODE 3510-22-F
Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

RIN 0563–AB50

Common Crop Insurance Regulations; Texas Citrus Tree Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes specific crop provisions for the insurance of Texas citrus trees. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured and to combine the current Texas Citrus Tree Endorsement with the Common Crop Insurance Policy for ease of use and consistency of terms.

DATES: Written comments, data, and opinions on this proposed rule will be accepted until close of business October 28, 1996 and will be considered when the rule is to be made final. The comment period for information collections under the Paperwork Reduction Act of 1995 continues through October 28, 1996.

ADDRESSES: Interested persons are invited to submit written comments to the Chief, Product Development Branch, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131. Written comments will be available for public inspection and copying in room 0324, South Building, USDA, 14th and Independence Avenue, S.W., Washington, D.C., 8:15 a.m.–4:45 p.m., EDT Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Louise Narber, Program Analyst, Research and Development Division, Product Development Branch, FCIC, at the Kansas City, MO, address listed above, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866 and Departmental Regulation 1512–1

This action has been reviewed under United States Department of Agriculture (USDA) procedures established by Executive Order No. 12866 and Departmental Regulation 1512–1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is November 1, 2000.

This rule has been determined to be not significant for the purposes of Executive Order No. 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Paperwork Reduction Act of 1995

The information collection requirements contained in these regulations were previously approved by OMB pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) under OMB control number 0563–0003 through September 30, 1998.

The amendments set forth in this proposed rule do not contain additional information collections that require clearance by OMB under the provisions of 44 U.S.C. chapter 35.

The title of this information collection is “Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Texas Citrus Tree Crop Insurance Provisions.” The information to be collected includes: a crop insurance application and acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies. Potential respondents to this information collection are producers of Texas citrus trees that are eligible for Federal crop insurance.

The information requested is necessary for the reinsured companies and FCIC to provide insurance and reinsurance, determine eligibility, determine the correct parties to the agreement or contract, determine and collect premiums or other monetary amounts, and pay benefits.

All information is reported annually. The reporting burden for this collection of information is estimated to average 16.9 minutes per response for each of the 3.6 responses from approximately 1,755,015 respondents. The total annual burden on the public for this information collection is 2,676,932 hours.

The comment period for information collections under the Paperwork Reduction Act of 1995 continues for the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information gathering technology.

Comments regarding paperwork reduction should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 and to Bonnie Hart, Advisory and Corporate Operations Staff, Regulatory Review Group, Farm Service Agency, P.O. Box 2145, Ag Box 0572, U.S. Department of Agriculture, Washington, D.C. 20013–2415, telephone (202) 690–2857. Copies of the information collection may be obtained from Bonnie Hart at the above address.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FCIC generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures of State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. When such a statement is needed for a rule, section
205 of the UMRA generally requires FGIC to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

**Executive Order No. 12612**

It has been determined under section 6(a) of Executive Order No. 12612, Federalism, that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions, or on the distribution of power and responsibilities among various levels of government.

**Regulatory Flexibility Act**

This regulation will not have a significant impact on a substantial number of small entities. Under the current regulations, a producer is required to complete an application and acreage report. If the trees are damaged or destroyed, the insured is required to give notice of loss and provide the necessary information to complete a claim for indemnity. This regulation does not alter those requirements. Therefore, the amount of work required of the insurance companies and Farm Service Agency (FSA) offices delivering and servicing these policies will not increase significantly from the amount of work currently required. This rule does not have any greater or lesser impact on the producer. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

**Federal Assistance Program**

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

**Executive Order No. 12372**

This program is not subject to the provisions of Executive Order No. 12372, which require 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.

**Executive Order No. 12778**

The Office of the General Counsel has determined that these regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778. The provisions of this rule will not have a retroactive effect prior to the effective date. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. The administrative appeal provisions in 7 CFR parts 11 and 780 must be exhausted before any action for judicial review may be brought.

**Environmental Evaluation**

This action is not expected to have a significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

**National Performance Review**

This regulatory action is being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicative regulations and improve those that remain in force.

**Background**

FCIC proposes to add to the Common Crop Insurance Regulations (7 CFR part 457), a new section, 7 CFR 457.106, Texas Citrus Tree Crop Insurance Provisions. The new provisions will be effective for the 1998 and succeeding crop years. These provisions will replace the current provisions for insuring Texas citrus trees found at 7 CFR 401.134 (Texas Citrus Tree Endorsement). Upon publication of the Texas Citrus Tree Crop Provisions as a final rule, the current provisions for insuring Texas citrus trees will be removed from §401.134 and that section will be reserved.

This rule makes minor editorial and format changes to improve the Texas Citrus Tree Crop Endorsement's compatibility with the Common Crop Insurance Policy. In addition, FCIC is proposing substantive changes in the provisions for insuring Texas citrus trees as follows:

1. **Section 1**—Added definitions for “bud union,” “days,” “deductible,” “FSA,” “good farming practices,” “interplanted,” “irrigated practice,” “scaffold limbs,” “type,” and “written agreement” for clarification purposes. Amend the definitions for “crop year,” “dehorning,” “freeze,” “non-contiguous land,” and “set out” for clarification.

2. **Section 2**—Added provisions to allow non-contiguous land for the production guarantee. Add section, equivalent, or FSA Farm Serial Number, or by non-contiguous land so that the unit structure is the same for both the Texas Citrus Tree Provisions and the Texas Citrus Fruit Provisions. The previous provisions only allowed basic units to be divided into more than one unit if the insured trees were located on non-contiguous land. The guidelines for optional unit division are consistent with many perennial crop provisions.

3. **Section 3**—Clarify that an insured may select a different coverage level for each type designated in the Special Provisions that the producer elects to insure. Also, clarify that if the insured trees planted at different population densities, the per acre amount of insurance for each population density must bear the same relationship (be the same percentage) to the maximum amount of insurance available for each population. In addition, add provisions for reporting the type and age, if applicable, of any interplanted perennial crop, its planting pattern, and any other information that the insurance provider requests in order to establish the yield upon which the production guarantee is based. If the insured fails to notify the insurance provider of any circumstance that may reduce the yield potential, the insurance provider will reduce the amount of insurance at any time the insurance provider becomes aware of the circumstance. This allows the insurance provider to limit liability based on the condition of the citrus trees at the time insurance attaches.

4. **Section 4**—Change the contract change date from February 28 to August 31 to correspond to the change made to the date that insurance attaches.

5. **Section 5**—Change the cancellation and termination dates from May 31 to November 20. This change eliminates the concerns that producers could wait until a loss is likely before purchasing insurance in the event of a pending hurricane prior to the sales closing date. Previously, insurance attached on June 1 unless the application was accepted after June 1. Insurance will now attach on November 21, except for producers who were insured in 1997 and do not cancel their insurance for the 1998 crop year.

6. **Section 6**—Added provisions to increase the amount of premium for the 1998 crop year for producers who were insured for the 1997 crop year and who do not cancel their insurance for the 1998 crop year. Due to the change in dates that insurance attaches and ends and to avoid a gap in coverage, these producers will have a 18 month policy in effect for the 1998 crop year. Therefore, a higher premium is required. For producers who were not insured for
the 1997 crop year but obtain insurance coverage prior to the sales closing date for the 1998 crop year, the premium will be determined in accordance with section 5 of the Basic Provisions (§ 457.8).

7. Section 7—Include the insurable citrus tree type designations in the Special Provisions rather than in the Texas Citrus Tree Crop Provisions. This will avoid the need to amend the Texas Citrus Tree Crop Provisions if it is later determined that additional types need to be added.

8. Section 8—Add a provision making interplanted citrus trees insurable if planted with another perennial crop, unless after an inspection, the insurance provider determines the citrus trees do not meet the requirements for insurability contained in the crop policy and FCIC approved procedures. This change will make insurance available to more producers.

9. Section 9—Change the beginning of the insurance period from June 1 to November 21 and the end of the insurance period from May 31 to November 20. For producers who were insured for the 1997 crop year and do not cancel their coverage for the 1998 crop year, however, the insurance period for the 1998 crop year only will begin on June 1, 1997, and end on November 20, 1998. This provision was changed because the June date corresponds with the beginning of the hurricane season and allowed producers to wait until a loss was likely before obtaining insurance. Provisions were also added to clarify the procedure for insuring acreage when an insurable share is acquired or relinquished after November 21, but on or before the acreage reporting date. Under the current Texas Citrus Tree Endorsement for acreage relinquished on or before the acreage reporting date but after coverage had attached, the premium would still be due from the insured even if the insured no longer had an insurable interest. In the same situation under these new provisions, insurance will not be considered to have attached so the premium will not be due unless a transfer of right to an indemnity was completed. The transferee must be eligible for crop insurance.

10. Section 10—Added a clause clarifying that failure of the irrigation water supply must be caused by an insured peril occurring during the insurance period.

11. Section 12—Removed those provisions that limit coverage to 50, 65, and 75 percent to allow for the computation of losses at additional coverage level computations if a decision is made to provide additional coverage levels.

12. Section 13—Added provisions for providing insurance coverage by written agreement. FCIC has a long standing policy of permitting certain modifications of the insurance contract by written agreement for some policies. This amendment allows written agreements in relation to this policy consistent with FCIC’s usual policy.

List of Subjects in 7 CFR Part 457

Crop insurance, Texas citrus tree.

Pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.), the Federal Crop Insurance Corporation hereby proposes to amend the Common Crop Insurance Regulations, (7 CFR part 457), effective for the 1998 and succeeding crop years, as follows:

PART 457—[Amended]

1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(1) and 1506(p).

2. 7 CFR part 457 is amended by adding a new § 457.106 to read as follows:

§ 457.106 Texas Citrus Tree Crop Insurance Provisions

The Texas Citrus Tree Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

United States Department of Agriculture

Federal Crop Insurance Corporation

Texas Citrus Tree Crop Provisions

If a conflict exists among the Basic Provisions (§ 457.8), these crop provisions, and the Special Provisions, the Special Provisions will control these crop provisions and the Basic Provisions, and these crop provisions will control the Basic Provisions.

1. Definitions

Bud union—The location on the tree trunk where a bud from one tree variety is grafted onto root stock of another variety.

Crop year—For the 1998 crop year only, a period of time that begins on June 1, 1997, and ends on November 20, 1998, provided the acreage was insured for the 1997 crop year and you do not cancel your coverage for the 1998 crop year. In all other instances, a period of time that begins on November 21 of the calendar year prior to the year the insured crop normally blooms, and ends on November 20 of the following calendar year. The crop year is designated by the year in which the insurance period ends.

Days—Calendar days.

Deductible—The amount determined by subtracting your coverage level percentage from 100 percent. For example, if you elected a 65 percent coverage level, your deductible would be 35 percent (100% – 65% = 35%).

Dehorning—Cutting one or more scaffold limbs to a length that is not greater than ¼ the height of the tree before such cutting.

Destroyed—Trees that are damaged to the extent that removal is necessary.

Excess wind—a natural movement of air which has sustained speeds in excess of 58 miles per hour recorded at the U.S. Weather Service recording station nearest to the crop at the time of crop damage.

 Freeze—The formation of ice in the cells of the trees caused by low air temperatures.

FSA—The Farm Service Agency, an agency of the United States Department of Agriculture or any successor agency.

Good farming practices—The cultural practices generally in use in the county for the trees to have normal growth and vigor and generally recognized by the Cooperative Extension Service as compatible with agronomic and weather conditions in the county.

Interplanted—Acreage on which more or less crops are planted in a manner that does not permit separate agronomic maintenance of the insured crop.

Irrigated practice—A method by which the normal growth and vigor of the insured trees is maintained by artificially applying adequate quantities of water during the growing season using appropriate systems at the proper times.

Non-contiguous land—Any two or more tracts of land whose boundaries do not touch at any point, except that land separated only by a public or private right-of-way, waterway or an irrigation canal will be considered as contiguous.

Scaffold limbs—Major limbs attached directly to the trunk.

Set out—Transplanting the tree into the grove.

Type—Classes of trees with similar characteristics that are grouped for insurance purposes as specified in the Special Provisions.

Written agreement—A written document that alters designated terms of a policy in accordance with section 13.

2. Unit Division

(a) A unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), will be divided into basic units by each type designated in the Special Provisions.

(b) Unless limited by the Special Provisions, these basic units may be divided into optional units if, for each optional unit you meet all the conditions of this section or if a written agreement to such division exists.

(c) Basic units may not be divided into optional units on any basis including, but not limited to, production practice, type, and variety, other than as described in this section.

(d) If you do not comply fully with these provisions, we will combine all optional units that are not in compliance with these provisions into the basic unit from which they were formed. We will combine the optional units at any time you discover that you have failed to comply with these provisions. If failure to comply with these provisions is determined to be inadvertent, and the optional units are combined into a basic unit, that portion of the premium paid...
for the purpose of electing optional units will be refunded to you for the units combined.

(e) All optional units established for a crop year must be identified on the acreage report for that crop year.

(f) Each optional unit must meet one or more of the following criteria as applicable:

(1) Optional Units by Section, Section Equivalent, or FSA Farm Serial Number:
Optional units may be established if each optional unit is located in a separate legally identified section in the absence of sections, we may consider parcels of land legally identified by other methods of measure including, but not limited to Spanish grants, railroad surveys, leagues, labors, or Virginia Military Lands, as the equivalent of sections for unit purposes. In areas that have not been surveyed using the systems identified above, or another system approved by us, or in areas where such systems exist but boundaries are not readily discernible, each optional unit must be located in a separate farm identified by a single FSA Farm Serial Number.

(2) Optional Units on Acreage Located on Non-Contiguous Land:
Instead of establishing optional units by section, section equivalent or FSA Farm Serial Number, optional units may be established if each optional unit is located on non-contiguous land.

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnity:

(a) In lieu of the requirement of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), that prohibits you from selecting more than one coverage level for each insured crop, you may select a different coverage level for each type designated in the Special Provisions that you elect to insure.

(b) In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8): (1) Crop planted at different population densities, the per acre amount of insurance for each population density must bear the same relationship (be the same percentage) to the maximum amount of insurance available for each population density as specified in the Actuarial Table. The amount of insurance for each population density must be multiplied by any applicable factor contained in section 3(b)(2).

(2) The amount of insurance per acre will be the product obtained by multiplying the amount of insurance that is shown in the Actuarial Table for the level of coverage you select and applicable population density by:
(i) Thirty-three percent (0.33) for the year of set out or the year following dehorning. (Insurance will be limited to this amount until trees that are set out are one year of age or older on the first day of the crop year);
(ii) Sixty percent (0.60) for the first growing season after being set out or the second year following dehorning;
(iii) Eighty percent (0.80) for the second growing season after being set out or the third year following dehorning;
(iv) Ninety percent (0.90) for the third growing season after being set out or the fourth year following dehorning.

(3) If there is more than one population density in the unit, or if more than one factor contained in section 3(b)(2) is applicable, the amount of insurance per acre for each population density or factor, as appropriate, will be multiplied by the applicable number of insured acres. These results will then be added together to determine the amount of insurance available for each optional unit.

(4) The amount of insurance will be reduced proportionately for any unit on which the stand is less than 90 percent, based on the original planting pattern. For example, if the amount of insurance you select is $2000 and the remaining stand is 85 percent of the original stand, the amount of insurance on which any indemnity will be based is $1700 ($2000 multiplied by 0.85).

(5) If any insurable acreage of trees is set out after the first day of the crop year, and you elect to insure such acreage during that crop year, you must report to us within 72 hours after set out is completed for the unit the following: acreage; type; number of trees; date set out is completed; and your share.

(b) Production reporting requirements contained in section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), are not applicable.

(c) You must report, by the sales closing date contained in the Special Provisions, by type:
(i) Any damage, removal of trees, change in practices, or any other circumstance that may reduce the expected yield below the yield upon which the amount of insurance is based, and the number of affected acres;
(ii) The number and type of trees on insured and uninsured acreage;
(iii) The date of original set out and the planting pattern;
(iv) The date of replacement or dehorning, if more than ten percent (10%) of the trees on any unit have been replaced or dehorned in the previous 5 years; and
(v) For the first year of insurance for acreage interplanted with another perennial crop, and anytime the planting pattern of such acreage is changed.

(A) The age of the interplanted crop, and type if applicable;

(B) The planting pattern; and

(C) Any other information that we request in order to establish your amount of insurance.

We will reduce the amount of insurance as necessary, based on our estimate of the effect of the following: interplanted perennial crop; removal of trees; damage; and change in practices and any other circumstance on the yield potential of the crop. If you fail to notify us of any circumstance that may reduce your yield potential, we will reduce your amount of insurance as necessary at any time we become aware of the circumstance.

4. Contract Changes
In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date is August 31 preceding the cancellation date.

5. Cancellation and Termination Dates
In accordance with section 2 (Life of Policy, Cancellation, and Termination) of the Basic Provisions (§ 457.8), the cancellation and termination dates are November 20.
acreage on the calendar date for the beginning of the insurance period.
(c) If you relinquish your insurable share on any insurable acreage of citrus trees on or before the acreage reporting date for the crop year, insurance will not be considered to have attached to, and no premium will be due, and no indemnity paid for such acreage for that crop year unless:
(1) A transfer of coverage and right to an indemnity, or a similar form approved by us, is completed by all affected parties;
(2) We are notified by you or the transferee in writing of such transfer on or before the acreage reporting date; and
(3) The transferee is eligible for crop insurance.
10. Causes of Loss
In accordance with the provisions of section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), insurance is provided only against the following causes of loss that occur within the insurance period:
(a) Excess moisture;
(b) Freeze; and
(c) Fire, unless weeds and other forms of undergrowth have not been controlled or pruning debris has not been removed from the grove;
(d) Excess wind;
(e) Flood; or
(g) Failure of the irrigation water supply, if caused by one of the causes of loss contained in (a) through (f) of this section that occurs during the insurance period.
11. Duties In The Event of Damage or Loss
In addition to the provisions of section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8), in case of damage or probable loss, if you intend to claim an indemnity on any unit, you must allow us to inspect all insured acreage before pruning, dehorning, or removal of any damaged trees.
12. Settlement of Claim
(a) In the event of damage covered by this policy, we will settle your claim on a unit basis by:
(1) Determining the actual percent of damage for any tree and for the unit in accordance with subsections 12 (b), (c), and (d) of these provisions;
(2) Subtracting your deductible from the percentage of damage for the unit;
(3) Subtracting any percentage of damage paid previously in the same crop year from the result of (2);
(4) Dividing the result of (3) by your coverage level percentage;
(5) Multiplying the result of (4) by the amount of insurance per acre;
(6) Multiplying the result of (5) by the number of insured acres; and
(7) Multiplying the result of (6) by your share;
(b) The percent of damage for any tree will be determined as follows:
(1) For damage occurring during the year of set out (trees that have not been set out for at least one year at the time insurance attaches):
(i) One-hundred percent (100%) whenever there is no live wood above the bud union.
(ii) Ninety percent (90%) whenever there is less than twelve (12) inches of live wood above the bud union; or
(iii) Zero percent (0%) (the tree will be considered undamaged) if more than twelve (12) inches of wood above the bud union is alive; or
(2) For damage occurring in any year following the year of set out, the percentage of damage will be determined by dividing the number of scaffold limbs damaged in an area from the trunk to a length equal to one-fourth (1/4) the height of the tree, by the total number of scaffold limbs before damage occurred. Whenever this percentage is over eighty percent (80%), the tree will be considered as one-hundred percent (100%) damaged.
(c) The percent of damage for the unit will be determined by computing the average of the determinations made for the individual trees.
(d) The percent of damage on the unit will be reduced by the percentage of damage due to uninsured causes.
13. Written Agreement
Designated terms of this policy may be altered by written agreement in accordance with the following:
(a) You must apply in writing for each written agreement no later than the sales closing date, except as provided in section 13(e);
(b) The application for written agreement must contain all terms of the contract between you and us that will be in effect if the written agreement is not approved;
(c) If approved, the written agreement will include all variable terms of the contract, including, but not limited to, crop type or variety, the guarantee, premium rate, and price election;
(d) Each written agreement will only be valid for one year. (If the written agreement is not specifically renewed the following year, insurance coverage for subsequent crop years will be in accordance with the printed policy); and
(e) An application for written agreement submitted after the sales closing date may be approved if, after a physical inspection of the acreage, it is determined that no damage has occurred and the crop is insurable in accordance with the policy and written agreement provisions.
Signed in Washington, D.C., on August 22, 1996.
Kenneth D. Ackerman,
Manager, Federal Crop Insurance Corporation.

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
14 CFR Part 39
[Docket No. 96–NM–125–AD]
RIN 2120–AA64
Airworthiness Directives; Boeing Model 757 and 767 Series Airplanes
AGENCY: Federal Aviation Administration, DOT.
ACTION: Notice of proposed rulemaking (NPRM).
SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 757 and 767 series airplanes. This proposal would require replacement of the thrust management computer (TMC) with a new TMC. This proposal is prompted by reports that, due to a defective relay within the TMC, an uncommanded advancement of the throttle levers occurred. The actions specified by the proposed AD are intended to prevent an uncommanded runaway of the autotrottle during flight or ground operations, which could distract the crew from normal operation of the airplane or lead to an unintended speed or altitude change.
DATES: Comments must be received by October 7, 1996.
ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–125–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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.
SUPPLEMENTARY INFORMATION:
Comments Invited
Interested persons are invited to participate in the making of the
The FAA has reviewed and approved Boeing Alert Service Bulletin 757-22A0052, dated May 30, 1996 (for Model 757 series airplanes), and Boeing Alert Service Bulletin 767-22A0097, dated May 30, 1996 (for Model 767 series airplanes). These service bulletins describe procedures for replacement of the TMC with a new TMC in the E1-3 shelf in the main equipment center. Accomplishment of the replacement will correct the previous problem with the relay and prevent a runaway condition of the autothrottle.

**Explanation of Requirements of Proposed Rule**

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require replacement of the TMC with a new TMC in the E1-3 shelf in the main equipment center. The actions would be required to be accomplished in accordance with the service bulletins described previously.

**Cost Impact**

There are approximately 1,339 Boeing Model 757 and 767 series airplanes (716 Model 757 series airplanes and 623 Model 767 series airplanes) of the affected design in the worldwide fleet. The FAA estimates that 558 Model 757 and 767 series airplanes (356 Model 757 series airplanes and 202 Model 767 series airplanes) of U.S. registry would be affected by this proposed AD. The proposed replacement would take approximately 3 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. The cost of the required parts would be nominal. Based on these figures, the cost impact of the replacement proposed by this AD on U.S. operators is estimated to be $100,440, or $180 per airplane.

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

**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. 106(g), 40113, 44701.

   § 39.13—[Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

   **Boeing:** Docket 96–NM–125–AD.

   **Applicability:** Model 757 series airplanes, having line positions 001 through 716, inclusive; and Model 767 series airplanes having line positions 001 through 556 inclusive, 556 through 587 inclusive, and 589 through 615 inclusive; certificated in any category.

   **Note 1:** This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance...
of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent runway of the autotrottle during flight or ground operations, which could distract the crew from normal operation of the airplane or lead to an unintended speed or altitude change, accomplish the following:

(a) Within 6 months after the effective date of this AD, replace the thrust management computer with a new thrust management computer in the E1-3 shelf in the main equipment center, in accordance with the Boeing Alert Service Bulletin 757–22A0052, dated May 30, 1996 (for Model 757 series airplanes), or Boeing Alert Service Bulletin 767–22A0097, dated May 30, 1996 (for Model 767 series airplanes), as applicable.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(c) 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 August 22, 1996.

Darrell M. Pederson,
Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

FOR FURTHER INFORMATION CONTACT: Ron Atmur, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

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.

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. 96–NM–135–AD. The postcard will be date stamped and returned to the commenter.

Discussion

The FAA has received reports of failure of the bolts that connect the lower web of the pylon of the number 2 tail engine to the number 4 banjo fitting on the rear spar of the vertical stabilizer on McDonnell Douglas Model DC–10 series airplanes. Such failures occurred on airplanes that had been operated for 10,300 to 16,000 total flight hours, and had made 4,400 to 7,000 landings. In addition, an operator found a crack in the aft flange of the number 4 banjo fitting; this airplane had been operated for 48,500 total flight hours and had made 10,418 landings. Such discrepancies have been attributed to higher than normal stresses on the airplane in this area of the number 4 banjo fitting, resulting from excessive maneuvers, excessive turbulence, and hard landings. Such discrepancies, if not corrected, could result in a reduction in the structural integrity of the number 4 banjo fitting and, ultimately, could lead to reduced controllability of the airplane during flight and ground operations.

14 CFR Part 39

[Docket No. 96–NM–135–AD]
Explanation of Relevant Service Information

The FAA has reviewed and approved McDonnell Douglas Service Bulletin DC10–54–096, Revision 03, dated February 6, 1996, which describes procedures for conducting repetitive high frequency eddy current (HFEC) inspections of the upper and lower surface of the aft flange of the number 4 banjo fitting on the rear spar of the vertical stabilizer; procedures for repairs; if necessary; and procedures for modification of the vertical stabilizer in the vicinity of such fitting. The repairs and modification entail trimming of parts; replacing angles, shields, and spacers; and modifying the fireseal. These actions will reduce the loads being transmitted from the pylon of the number 2 tail engine to the rear spar of the vertical stabilizer; such reduction of loads will minimize the possibility of bolt failure and cracking of the flange of the number 4 banjo fitting. Accomplishment of the repairs and modification eliminates the need for repetitive HFEC inspections of this area.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require repetitive HFEC inspections of the upper and lower surfaces of the aft flange of the number 4 banjo fitting on the rear spar of the vertical stabilizer. If cracks are detected, repairs and modification of the vertical stabilizer in the vicinity of the number 4 banjo fitting would be required; accomplishment of these actions would terminate the requirement for repetitive HFEC inspections. This AD also would require that the modification be installed eventually on all airplanes as terminating action for the repetitive HFEC inspections. These actions would be required to be accomplished in accordance with the service bulletin described previously.

Cost Impact

There are approximately 376 Model DC–10–10, –30 and –40 series airplanes and KC–10 (military) series airplanes of the affected design in the worldwide fleet. The FAA estimates that 230 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 2 work hours per airplane to accomplish each proposed inspection; the average labor rate is $60 per work hour. Based on these figures, the cost impact of the proposed inspection requirement on U.S. operators of airplanes is estimated to be $27,600, or $120 per airplane, per inspection.

It would take approximately 34 hours to accomplish the proposed modification that would terminate the requirement for repetitive HFEC inspections. Required parts to accomplish such modification would cost approximately $3,875 per airplane for “Group 1” airplanes, as listed in the service bulletin; and approximately $3,427 per airplane for “Group 2” airplanes, as listed in the service bulletin. Based on these figures, the cost impact of the proposed modification requirement on U.S. operators is estimated to be $5,915 per Group 1 airplane and $5,467 per Group 2 airplane.

The cost impact figures discussed above are 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. 106(g), 40113, 44701.

§ 39.13 [Amended]
2. Section 39.13 is amended by adding the following new airworthiness directive:

McDonnell Douglas: Docket 96–NM–135–AD.


Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent reduction in the structural integrity of the number 4 banjo fitting on the rear spar of the vertical stabilizer, which could result from reduction in the ability to control the airplane during flight and ground operations, accomplish the following:

(a) Prior to the accumulation of 5,000 total landings, or within 1,500 landings after the effective date of this AD, whichever occurs later, perform a high frequency eddy current (HFEC) inspection to detect cracks in the upper and lower surface of the aft flange of the number 4 banjo fitting on the rear spar of the vertical stabilizer, in accordance with McDonnell Douglas Service Bulletin DC10–54–096, Revision 03, dated February 6, 1996.

(1) If no crack is found, repeat the HFEC inspection thereafter at intervals not to exceed 1,500 landings.

(2) If any crack is found, prior to further flight, repair the crack and install the modification in accordance with the service bulletin.

(b) Within 5 years after the effective date of this AD, modify the vertical stabilizer in the area of the number 4 banjo fitting on the rear spar, in accordance with McDonnell Douglas Service Bulletin DC10–54–096, Revision 03, dated February 6, 1996. Accomplishment of this modification constitutes terminating action for the repetitive HFEC inspections required by paragraph (a)(1) of this AD.
(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(d) 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 August 22, 1996.

Darrell M. Pederson,
Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–22111 Filed 8–28–96; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 53
[Notice No. 836]

RIN 1512–AB49

Firearms and Ammunition Excise Taxes, Parts and Accessories

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend regulations in 27 CFR Part 53, relating to the manufacturers excise tax on firearms and ammunition. Pursuant to 26 U.S.C. 4181, a tax is imposed on the sale by the manufacturer, importer or producer of pistols, revolvers, firearms (other than pistols and revolvers) shells, and cartridges. The tax is 10 percent of the sale price for pistols and revolvers, 11 percent of the sale price for firearms (other than pistols and revolvers) and 11 percent of the sale price for shells and cartridges. Current regulations provide that no tax is imposed by section 4181 of the Internal Revenue Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately or when sold with a complete firearm. This notice proposes regulations to clarify which parts and accessories must be included in the sale price when calculating the tax on firearms.

DATES: Written comments must be received on or before November 27, 1996.

ADDRESSES: ATF, P.O. Box 50221, Washington, DC 20091–0221.

FOR FURTHER INFORMATION CONTACT: Tamara Light, Regulations Branch, 650 Massachusetts Avenue, NW, Washington, DC 20226, (202) 927–8210.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Alcohol, Tobacco and Firearms (ATF) is responsible for collecting the firearms and ammunition excise tax imposed by section 4181. The Pittman-Robertson Wildlife Restoration Act, 16 U.S.C. § 669 et seq., requires that an amount equal to all of the revenue collected under section 4181 be covered into the Federal aid to wildlife restoration fund. The fund is apportioned to the States for hunter safety programs, maintenance of public target ranges, and wildlife and wetlands conservation. It is important that the correct amount of Federal excise tax imposed by section 4181 be collected in order to fund these programs.

The current regulation provides that no tax is imposed by section 4181 of the Internal Revenue Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately or when sold with a complete firearm. This regulation was at issue in Auto-Ordnance Corp. versus United States, 822 F.2d 1566 (Fed. Cir. 1987). In this case a manufacturer of firearms sued to recover excise taxes paid on sights and compensator units sold with rifles it manufactured. The manufacturer claimed that these parts were nontaxable accessories which should not be included in the taxable sale price of the rifles. The Internal Revenue Service (IRS), the agency responsible for administering the tax on firearms at that time, contended that the sights and compensator units were component parts of the rifle which must be included in the taxable sale price.

The court noted that the position of the IRS that all component parts of a “commercially complete” firearm must be included in the sale price was a concept that was not found in the regulations. Since the regulations did not specify which parts are component parts of a firearm nor define the term “accessories,” the court found that it was appropriate to look beyond the language in the regulation. The court discussed several dictionary definitions of the term “accessories” as well as tariff and customs classification cases. The court then held that the sights and compensator units were nontaxable accessories, since they were readily removable and of secondary or subordinate importance to the function of the firearm.

After taking over the administration of the firearms and ammunition excise tax from the IRS in 1991, ATF has issued numerous rulings on parts and accessories. ATF has found it increasingly difficult to apply the regulations on parts and accessories as interpreted by the court in Auto-Ordnance. For example, the “secondary or subordinate importance” test is difficult to apply to parts which are essential for the safe operation of the firearm. Arguably, such parts are essential to the function of the firearm and should be included in the taxable sale price. However, if such parts are not needed to fire the firearm, it is possible that a Federal court, applying the rationale of Auto-Ordnance, would hold that such parts are nontaxable accessories.

ATF proposes to amend the regulations relating to parts and accessories to provide definitions for “component parts” which must be included in the taxable sale price and “nontaxable parts” and “nontaxable accessories” which are excluded from the taxable sale price. The purpose of these definitions is to reinstate the longstanding “commercial completeness” test of the IRS in a manner which will withstand judicial scrutiny. The effect of the proposed regulation will be to replace the readily removable/essential to the function test of the Auto-Ordnance case with a more objective, predictable standard to use in determining whether items sold with a firearm are includable in the tax basis.

It is possible that the proposed regulations will result in increased tax liability for some taxpayers. However, the more precise definitions should help taxpayers accurately calculate the taxable sale price of their firearms and avoid underpayments, penalties, and interest.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this notice of proposed rulemaking, because the proposed rule, if promulgated as a final rule, will not have a significant economic impact on a substantial number of small entities, or impose or otherwise cause, an increase in the reporting, recordkeeping or other compliance burdens on a
substantial number of small entities. Accordingly, it is hereby certified under
the provisions of Section 3 of the
Regulatory Flexibility Act (5 U.S.C.
605(b)) that this proposed rule, if
promulgated as a final rule, will not
have a significant economic impact on
a substantial number of small entities.
The factual basis for such certification is
that this notice of proposed rulemaking
does not impose any new reporting or
recordkeeping requirements. This notice
merely clarifies existing regulations. A
copy of this notice of proposed
rulemaking is being sent to the Small
Business Administration for comment
pursuant to 26 U.S.C. 7805(f).

Executive Order 12866

It has been determined that this
proposed regulation is not a significant
regulatory action as defined by
Executive Order 12866. Accordingly,
this proposal is not subject to the
analysis required by this Executive
Order.

Paperwork Reduction Act

The provisions of the Paperwork
511, 44 U.S.C. chapter 35, and its
implementing regulations, 5 CFR part
1320, do not apply to this notice of
proposed rulemaking because there are
no new reporting or recordkeeping
requirements.

Public Participation—Written
Comments

ATF requests comments from all
interested persons. Comments received
on or before the closing date will be
carefully considered. Comments
received after that date will be given
the same consideration if it is practicable
to do so, but assurance of consideration
cannot be given except as to comments
received on or before the closing date.
ATF will not recognize any material as
confidential. Comments may be
disclosed to the public. Any material
which the commenter considers to be
confidential or inappropriate for
disclosure to the public should not be
included in the comment. The name of
the person submitting the comment is
not exempt from disclosure. During the
comment period, any person may
request an opportunity to present oral
testimony at a public hearing. However,
the Director reserves the right, in light of
circumstances, to determine if a
public hearing is necessary.

Disclosure

Copies of this notice and the written
comments will be available for public
inspection during normal business
hours at: ATF Public Reading Room,
Room 6480, 650 Massachusetts Avenue,
NW, Washington, DC.

List of Subjects in 27 CFR Part 53

Administrative practice and
procedure, Arms and munitions,
Authority delegations, Exports,
Imports, Penalties, Reporting and
recordkeeping requirements.

Authority and Issuance

Accordingly, 27 CFR Part 53, entitled
"Manufacturers Excise Taxes—Firearms
and Ammunition" is proposed to be
amended as follows:

Paragraph 1. The authority citation for
27 CFR Part 53 continues to read as follows:

Authority: 26 U.S.C. 4181, 4182, 4216–
4219, 4221–4223, 4225, 6001, 6011, 6020,
6021, 6061, 6071, 6081, 6091, 6101–6104,
6109, 6151, 6155, 6161, 6301–6303, 6311,
6402, 6404, 6416, 7502.

Par 2. Section 53.61(b) is revised to
read as follows:

§ 53.61 Imposition and rates of tax.
* * * * *
(b) Parts or accessories.
(1) In general. No tax is imposed by
section 4181 of the Code on the sale of
parts or accessories of firearms, pistols,
revolvers, shells, and cartridges when
sold separately or when sold with a
complete firearm for use as spare parts or
accessories. The tax does attach,
however, to sales of completed firearms,
pistols, revolvers, shells, and cartridges,
and to sales of such articles which,
although in a knockdown condition, are
complete as all component parts. All
component parts for firearms are
includible in the tax basis.

(2) Component Parts. Component
parts are items which would ordinarily
be attached to a firearm during use and,
in the ordinary course of trade, are
packaged with the firearm at the time of
sale by the manufacturer or importer.

(3) Nontaxable Parts. Parts sold with
firearms which duplicate component
parts are not includible in the tax basis.

(4) Nontaxable Accessories. Items
which are not designed to be attached
to a firearm during use or which are not,
in the ordinary course of trade, provided
with the firearm at the time of sale by
the manufacturer or importer are not
includible in the tax basis.

(5) Separate sales. Tax is imposed on
component parts whether or not charges
for such parts are billed separately. If
taxable articles are sold by the
manufacturer, producer, or importer
thereof, without component parts, the
separate sale of the component parts to
the same vendee will be considered, in
the absence of evidence to the contrary,
to have been in connection with the
sale of the basic article, even though
the component parts are shipped
separately, at the same time, or on a
different date.

(6) Examples. (i) In general. The
following examples are provided as
guidelines and are not meant to be all
inclusive.

(ii) Component parts: Include items
such as a frame or receiver, breech
mechanism, trigger mechanism, a barrel,
a buttstock, a forestock, a handguard,
grips, buttplate, fore end cap, trigger
guard, a sight or set of sights (iron or
optical), a sight mount or set of sight
mounts, a choke, a flash hider, a muzzle
brake, a magazine, a set of slings, an
attachable ramrod for muzzle loading
firearms when provided by the
manufacturer or importer for use with
the firearm in the ordinary course of
commercial trade. Parts in a partially
completed state which can be readily
adapted for use. Any part or parts
provided with the firearm which would
affect the tax status of the firearm, such
as an attachable shoulder stock.

(iii) Nontaxable parts: Items such as
extra barrels, extra sights, optical sights
and mounts (in addition to iron sights),
spare magazines, spare cylinder, extra
chokes tubes, spare pins.

(iv) Nontaxable accessories: Items
such as cleaning equipment, slings, slip
on recoil pad (in addition to standard
buttplate), tools, gun cases for storage or
transportation, separate items such as
knives, belt buckles, medallions.
Optional items purchased by the
customer at the time of retail sale which
do not change the tax classification of
the firearm, such as telescopic sights
and mounts, recoil pad, slings, slings
swivels, chokes, flash hiders/muzzle
brakes of a type not provided by the
manufacturer or importer of the firearm
in the ordinary course of commercial
Trade.

* * * * *

Signed: May 29, 1996.

John W. Magaw,
Director.

Approved: June 12, 1996.

John P. Simpson,
Deputy Assistant Secretary (Regulatory, Tariff
and Trade Enforcement).

[FR Doc. 96–22044 Filed 8–28–96; 8:45 am]

BILLING CODE 4810–31–U
ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52
[WI69–01–7295b; FRL–5552–2]

Approval and Promulgation of Implementation Plan; Wisconsin; Site-Specific SIP Revision for the GenCorp Inc.-Green Bay Facility

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve a revision to the Wisconsin State Implementation Plan (SIP) for ozone that was submitted on November 17, 1995. This revision is an alternative control method for controlling volatile organic compound (VOC) emissions from storage tanks at the GenCorp Inc.-Green Bay facility. The EPA has approved Wisconsin's general rule for the storage of VOCs. The approved rule states that any deviation from the specifically required control methods found in the State's rule must be proven to be equivalent in controlling the VOC emissions before being approved into the SIP. Because GenCorp Inc. has chosen a different control method than those listed specifically in Wisconsin's rule, a site-specific SIP revision is required to evaluate the control method being used at the Green Bay facility.

In the final rules of this Federal Register, the EPA is approving this action as a direct final without prior proposal because EPA views this as a noncontroversial action and anticipates no adverse comments. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed 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 action. Any parties interested in commenting on this document should do so at this time.

DATES: Comments on this proposed action must be received by September 30, 1996.

ADDRESSES: Written comments should be sent to: Carlton T. Nash, Chief, Regulation Development Section, Air Programs Branch (AR–18), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the proposed SIP revision and EPA’s analysis are available for inspection at the U.S. EPA, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone Douglas Aburano at (312) 353–6960 before visiting the Region 5 Office.)


Authority: 42 U.S.C. 7401–7671q.

Dated: August 5, 1996.

Valdas V. Adamkus,
Regional Administrator.

[FR Doc. 96–21909 Filed 8–28–96; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 70
[AD–FRL–5559–2]

Clean Air Act Interim Approval of Operating Permits Program; South Coast Air Quality Management District, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes interim approval of the title V operating permits program submitted by the South Coast Air Quality Management District (South Coast or District) for the purpose of complying with federal requirements for an approvable state program to issue operating permits to all major stationary sources and to certain other sources. Today’s action also proposes approval of South Coast’s mechanism for receiving delegation of section 112 standards as promulgated.

In the final rules section of this Federal Register, EPA is promulgating interim approval of South Coast’s title V program as a direct final rule without prior proposal because EPA views this submittal as noncontroversial and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rulemaking. 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. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this action should do so at this time.

DATES: Comments on this proposed rule must be received in writing by September 30, 1996.

ADDRESSES: Written comments on this action should be addressed to: Ginger Vagenas, Operating Permits Section (A–5–2), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Copies of the District’s submittal, EPA’s Technical Support Document, and other supporting information used in developing the proposed approval are available for public inspection at EPA’s Region IX office during normal business hours.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas (telephone 415/744–1252), Operating Permits Section (A–5–2), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule of the same title which is located in the Rules section of this Federal Register.

Authority: 42 U.S.C. 7401–7671q.

Dated: August 14, 1996.

Felicia Marcus,
Regional Administrator.

[FR Doc. 96–21951 Filed 8–28–96; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 131
[FRL–5601–8]

Water Quality Standards for Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and request for comments.

SUMMARY: EPA is proposing water quality standards that would be applicable to waters of the United States in the Commonwealth of Pennsylvania. The proposed standards address aspects of Pennsylvania’s water quality standards that EPA disapproved in 1994. EPA is taking this action at this time pursuant to a court order. The proposed standards would establish an antidegradation policy, making available additional water quality protection than currently provided by Pennsylvania’s “Special Protection Waters Program.”

DATES: EPA will hold a public hearing on its proposed actions on October 16, 1996 from 1 PM to 4 PM. EPA will consider written comments on the proposed actions received by October 16, 1996.

ADDRESSES: Comments should be addressed to Evelyn S. MacKnight,
A. Potentially Affected Entities

Today's proposal would establish a Federal antidegradation policy applicable to waters of the United States in the Commonwealth of Pennsylvania. Entities potentially affected by this action are those dischargers (e.g., industries or municipalities) that may request authorization for a new or increased discharge of pollutants to waters of the United States in Pennsylvania. This list is not intended to be exhaustive, but rather a guide for readers regarding entities potentially affected by this action. Other types of entities not listed could also potentially be affected. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Background

Under section 303 (33 U.S.C. 1313) of the Clean Water Act (CWA), States are required to develop water quality standards for waters of the United States within the State. States are required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards. 33 U.S.C. 1313(c). States are required to submit the results of their triennial review of their water quality standards to EPA. EPA reviews the submittal and makes a determination whether to approve or disapprove any new or revised standards.

Minimum elements which must be included in each State's water quality standards regulations include: use designations for all waterbodies in the State; water quality criteria a sufficient to protect those designated uses, and an antidegradation policy consistent with EPA's water quality standards regulations (40 CFR 131.6). States may also include in their standards policies generally affecting the standards' application and implementation (40 CFR 131.13). These policies are subject to EPA review and approval (40 CFR 131.6(f), 40 CFR 131.13).

Today's proposed rule involves antidegradation. 40 CFR 131.12 requires States to adopt antidegradation policies that provide three levels of protection of water quality. Under 40 CFR 131.12(a)(1), referred to as Tier 1, existing instream water uses and the level of water quality necessary to protect the existing uses are to be maintained and protected. Existing uses are those uses that existed on or before November 28, 1975. Tier 1 represents the “floor” of water quality protection afforded to all waters of the United States. Under 40 CFR 131.12(a)(2), referred to as Tier 2 or High Quality Waters, where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and provide recreation in and on the water, that quality shall be maintained and protected unless the State finds, after public participation and intergovernmental review, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be no significant achievement or violation of the regulatory requirements for new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

Finally, under 40 CFR 131.12(a)(3), known as Tier 3 or Outstanding National Resource Waters (ONRWs), water quality standards are determined that high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and other exceptional recreational or ecological significance, that water quality shall be maintained and protected.

Section 303(c)(4) (33 U.S.C. 1313(c)(4)) of the CWA authorizes EPA to promulgate water quality standards for a State when EPA disapproves the State's water quality standards, or in any case where the Administrator determines that a new or revised water quality standard is needed in a State to meet the CWA's requirements. In June 1995, EPA Region 3 disapproved portions of Pennsylvania’s standards pursuant to Section 303(c) of the CWA and 40 CFR 131.21, including portions of the antidegradation policy, known in Pennsylvania as the Special Protection Waters Program, relating to protection of existing uses, criteria used to define High Quality Waters and protection afforded to Exceptional Value Waters as equivalent to ONRWs.

The Pennsylvania Environmental Protection (“Pennsylvania” or “the Department”) responded to EPA’s disapproval on September 2, 1994. In that letter, the Department made a commitment to consider enhancements to Pennsylvania’s High Quality Waters program through a public review and discussion process. At that time, the Department stated it did not intend to reconsider the protection of existing uses or the protection of ONRWs because it felt that existing authorities met the intent of EPA’s regulation. Since that time, the Department has initiated a regulatory negotiation process which is considering changes to all three tiers of Pennsylvania’s antidegradation policy. By letter dated October 5, 1994, EPA determined that Pennsylvania had not issued new or revised water quality standards that addressed its disapproval of the antidegradation policy elements.

Following a public meeting on January 11, 1995, and a public hearing on April 20, 1995, Pennsylvania offered to EPA a plan to reassess its antidegradation policy, or Special Protection Waters Program. Pennsylvania initiated a regulatory negotiation, or “reg-neg”, to involve stakeholders in the process. The reg-neg group began meeting in June 1995 and issued an interim report on April 1, 1996, recommending to Pennsylvania officials how some provisions of the Commonwealth’s regulation should be changed. EPA has participated in the reg-neg process in an advisory capacity and informed the reg-neg group of this rulemaking action.

Based on these negotiations, the Department announced in the Pennsylvania Bulletin, May 4, 1996, the availability of proposed changes to the antidegradation provisions of the Commonwealth’s water quality standards. The Department also held a public hearing on June 18, 1996, to seek comment on those regulations. EPA is continuing to work with Pennsylvania in reviewing any proposed or final changes to Pennsylvania regulations. The reg-neg group met on August 1, 1996 to discuss its final recommendations. The group decided to reorganize the reg-neg group would submit separate reports to the Department to offer.
recommendations in the Commonwealth’s regulation. On April 18, 1996, concerned with the time that had elapsed since EPA’s disapproval, the United States District Court for the Eastern District of Pennsylvania ordered EPA to prepare and publish proposed regulations setting forth revised or new water quality standards for the Commonwealth’s antidegradation provisions disapproved in June 1994. Raymond Proffitt Foundation v. Browner, Civil Docket No. 95–0861 (E. D. Pa). The court stated that EPA was not to delay its rulemaking anymore to accommodate the Commonwealth’s schedule. Consistent with the Court’s order, this Federal Register notice proposes standards related to Pennsylvania’s antidegradation policy. EPA’s long-standing practice in the water quality standards program has been to suspend adoption of Federal rules if a State adopts appropriate rules and EPA approves them during the Federal promulgation process. In addition, if a State adopts rules that are approved by EPA following a final Federal promulgated rule, EPA’s practice is to withdraw the Federal rule. Thus, notwithstanding today’s proposal, EPA strongly encourages the Commonwealth to pursue its on-going effort to adopt appropriate standards which will make Federally promulgated standards unnecessary.

C. Proposed Standards

1. Ensuring That Existing Uses Will Be Maintained and Protected as Required Under 40 CFR 131.12(a)(1)

In June 1994, EPA, Region 3, disapproved Pennsylvania’s water quality standards at 25 PA Code §§ 93.1, 93.4 and 93.9 because those provisions taken together do not ensure full consistency with the broad protection required by Tier 1 of the Federal antidegradation requirements, which requires that existing uses shall be maintained and protected. See 40 CFR 131.12(a)(1).

Pennsylvania’s definition of existing uses in 25 PA Code 93.1 is consistent with Federal regulations and was approved by EPA in June 1994. However, Pennsylvania’s regulations in 25 PA Code § 93.4(d)(1) make the application of that existing use definition inconsistent with Federal requirements. Pennsylvania regulation at 25 PA Code § 93.4 explicitly protects existing uses only through Pennsylvania’s designated use process. Specifically, Pennsylvania’s regulation at 25 PA Code § 93.4(d)(1) provides that when an evaluation of technical data establishes that a waterbody attains the criteria for an existing use that is more protective of the waterbody than the current designated use, that waterbody will be protected at its existing use until the conclusion of a rulemaking action. After the rulemaking action the waterbody will be protected only at its designated use.

In some cases the designated use will not adequately protect the existing use. For instance, Pennsylvania regulation requires that the waterbody attain the criteria for the more protective designated use as a condition of upgrading to that more protective use. In cases where the existing use is not protected by the current (lower) designated use, and the waterbody does not attain criteria necessary for the higher designated use, the existing uses may not be adequately protected. Even where the Department has identified that an existing use merits additional protection and where the technical evaluation of water quality allows for an upgraded designated use, there is no requirement that the Commonwealth permanently protect the existing use. The overall effect of Pennsylvania’s regulation is that if the Commonwealth, in its rulemaking proceeding, does not revise its designated use to protect the existing use, that existing use would not thereafter be afforded adequate protection.

Pennsylvania’s September 2, 1994 response to EPA’s disapproval expressed the view that its approach to the protection of existing uses is substantially equivalent to the Federal regulation, and is actually preferable to the EPA approach because of its technical justification requirements and public participation requirements. Although EPA believes that Pennsylvania’s regulatory procedure to compare use designations with existing uses is an appropriate step in updating use designations, Federal regulations do not allow existing use protection to be removed as could occur through Pennsylvania’s use designation rulemaking. EPA’s guidance interprets the Tier 1 antidegradation policy to require that “[n]o activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State’s water quality standards.” See EPA’s “Questions & Answers on: Antidegradation” August 1985, page 3. The purpose of Tier 1 of the antidegradation policy is to maintain and protect the existing uses and the waterbody does not attain criteria necessary for the higher designated use, the existing uses will be protected at its existing use until upgrading to that more protective use.

In order to afford equivalent protection to that afforded by Tier 2 of the Federal policy set forth in 40 CFR § 131.12(a)(2), Pennsylvania has developed a Special Protection Waters Program which utilizes the designational approach, i.e., designates specific waters as High Quality. The High Quality Waters Policy is set forth in 25 PA Code §§ 93.3, 93.9 & 95.1, and the Department’s Special Protection Waters Handbook (November 1992). High Quality Waters are defined in Pennsylvania’s water quality standards as “[a] stream or watershed which has excellent quality waters and environmental or other features that require special water quality protection”. 25 PA Code § 93.3. Once designated as High Quality, those waters are afforded a level of protection consistent with EPA’s Tier 2. In June 1994, EPA disapproved a portion of Pennsylvania’s High Quality Waters Policy because the policy requires that a stream must possess “excellent quality waters and environmental or other features * * *” to receive Special Protection. That definition may exclude waters that...
would be protected under the Federal Tier 2 policy. The Federal policy provides Tier 2 protections to all waters with water quality exceeding levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. In contrast, Pennsylvania's High Quality Waters Policy also requires such waters to include "environmental or other features that require special water quality protection."

Pennsylvania's 1994 305(b) report indicates that Pennsylvania's more restrictive policy can be under protective. Of the 24,947 stream miles assessed (out of 53,962 total miles), 20,307 fully support Pennsylvania's designated stream uses; in contrast, Pennsylvania's current program only protects approximately 13,000 stream miles as High Quality and 1300 as Exceptional Value. In addition, various Department Special Protection water quality reports cite water quality data showing that specific waters had excellent water quality but still did not receive High Quality protection because of a lack of other environmental, recreational or special amenities.

The proposed Federal rule makes available Federal Tier 2 protection for Pennsylvania waters on the basis of water quality alone. EPA is proposing to accomplish that by promulgating the language in 40 CFR 131.12(a)(2). This promulgation would have the effect of making Tier 2 protection available to all waters whose quality "exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."

Another option for accomplishing this would be simply to promulgate the definition of High Quality Water from 25 Pa Code § 93.3 but without the phrase "and environmental or other features which require special criteria." EPA seeks comments on each of these options.

Under either option, the current State process for reviewing proposals to lower water quality would be unchanged; the only effect of the Federal promulgation would be to require that waters whose quality exceeds water quality standards not be prevented from being protected at the High Quality designation because they lack "environmental or other features".

In Pennsylvania's September 2, 1994 response to EPA's disapproval, the Department indicated that it would consider enhancements to its High Quality Waters program. However, due to the potential effects of such a change, Pennsylvania wanted to provide an opportunity for public review and discussion of alternatives prior to proposing regulatory changes. As discussed above, the Department convened a group of interested stakeholders representing conservationists, the regulated community and government (including EPA) in a regulatory negotiation process. The group discussed a variety of options for drafting a new High Quality Waters regulation, including revising the High Quality Waters definition to delete the requirements for "and environmental or other features." See 25 Pennsylvania Bulletin 2131–32 (May 4, 1996). If Pennsylvania were to finalize this proposal prior to the completion of the Federal rulemaking, it may make the Federal promulgation unnecessary.

3. Ensuring That Pennsylvania's Highest Quality Waters May Be Provided a Level of Protection Fully Equivalent to Tier 3 of the Federal Policy

Pennsylvania considers its Exceptional Value Waters designation as part of the Special Protection Waters Program to be equivalent to Tier 3. The Exceptional Value Policy is set forth in 25 PA Code §§ 93.3, 93.7, 93.9 & 95.1, and the Department's Special Protection Handbook, which contains implementation procedures for Exceptional Value protection. The Code and the Handbook must be read together to understand the effect of the Exceptional Value policy.

As described in the Handbook, Pennsylvania requires Exceptional Value Waters to be protected at their existing quality to the extent that no adverse measurable change in existing water quality would occur as a result of a point source permit. A change is considered measurable "if the long-term average in-stream concentration of the parameter of concern can be expected, after complete mix of stream and wastewater, to differ from the mean value established from historical data describing background conditions in the receiving stream" or at selected Pennsylvania reference sites.

This level of protection accorded to Exceptional Value Waters is not sufficient to assure that water quality shall be maintained and protected as required by the Federal Tier 3 requirement at 40 CFR 131.12(a)(3). For example, it may only protect against lowering of water quality when point sources are involved. 40 CFR 131.12 requires that water quality be maintained and protected; the pollutant source is not a determining factor. In addition, prohibited changes in water quality that are tolerable instream concentrations. For many pollutants, especially those bioaccumulative ones, using measurable instream concentration to detect change would not be appropriate because detection levels can be substantially higher than the instream concentrations and, in some cases, the criteria. In such circumstances, significant lowering of water quality, including exceedances of criteria, could occur without "measurable" instream concentrations changing as defined by Pennsylvania's rule. In such instances, control of discharge concentrations, rather than measurable instream concentrations, is appropriate.

Moreover, Pennsylvania's rule defines measurable change as based on a long-term average instream concentrations compared to mean historical data. In practice this can lead to significantly increased discharges and pollutant loads. Also, the concentration difference is determined "after complete mix of stream and wastewater". Depending on mixing characteristics, this "mixing zone" can be substantial and could constitute a large portion of the designated segment where significant lowering of water quality can occur. Any new or increased mixing zone will lower water quality in at least a portion of the waterbody. Finally, discharge permits for sewage treatment facilities handling less than 1000 gallons per day (gpd) and for storm water are exempt from the Exceptional Value requirements.

EPA disapproved the Commonwealth's Exceptional Value designation on June 6, 1994 because it does not fully satisfy Federal requirements for Tier 3 in 40 CFR 131.12(a)(3). While the Exceptional Value category is an excellent vehicle to provide protection to important waters in the Commonwealth, for the reasons above Pennsylvania's implementation of it is not entirely consistent with the requirements of 40 CFR 131.12(a)(3).

EPA's recommendation that no new or expanded discharges should be permitted to Tier 3 waters, except for those discharges anticipated to be short-term or temporary in nature, reflects the fact that, based on the reasons above, in many circumstances "no new or increased discharge" is the only method to assure that water quality is fully maintained and protected in ONRWs.

In response to EPA's disapproval, Pennsylvania stated in its September 2, 1994 letter that it believed that EPA lacked the legal authority to compel the Commonwealth to adopt a "no discharge" approach. EPA's October 5, 1994, response to Pennsylvania explained that the provisions prohibiting discharges to ONRWs, while not specified in EPA's regulation, is the
recommended and most effective approach for ensuring that existing water quality is maintained.

EPA believes that, in practice, Pennsylvania’s policy of “no adverse measurable change” could allow potentially significant discharges and loading increases from point and nonpoint sources. At the same time, Pennsylvania has been successful in designating approximately 1300 stream miles in the Commonwealth as Exceptional Value, often with significant controversy. EPA recognizes that this success might not have occurred if new discharges were strictly prohibited.

In light of this situation, EPA is proposing language that will create a new level of antidegradation protection in Pennsylvania, a level of protection above that afforded by the Exceptional Value designation. This proposal will provide Pennsylvania the opportunity to designate appropriate Pennsylvania waters as ONRWs, to which no new or expanded discharges would be allowed. This ONRW provision is not intended to replace or supplant the Exceptional Value category and designations already in place in Pennsylvania, but rather to supplement them. It would give the citizens of the Commonwealth the opportunity to request the highest level of protection be afforded to particular waters where appropriate. EPA would not designate waters as ONRWs; that would be the Commonwealth’s prerogative.

EPA is proposing to accomplish this by promulgating language derived from 40 CFR 131.12(a)(3). The proposed language would state that where waters are identified by the Commonwealth as ONRWs, their water quality shall be maintained and protected. Consistent with the recommended interpretation in its National guidance, EPA Water Quality Standards Handbook at 4-8 (2nd ed. 1994), EPA would interpret that provision to prohibit, in waters identified by the Commonwealth as ONRWs, new or increased dischargers, aside from limited activities which have only temporary or short-term effects on water quality.

EPA notes that there may be other formulations that meet the requirements of 40 CFR 131.12(a)(3) and which provide a level of protection substantially equivalent to today’s proposed rule. Pennsylvania’s reg-neg group discussed this issue but did not reach an agreement to recommend that Pennsylvania create a new Tier 3 ONRW category of protection. If Pennsylvania adopts the EPA’s recommended interpretation or such an alternative formulation, and it is approved by EPA as meeting the requirements of 40 CFR 131.12(a)(3), EPA would expect to propose to withdraw this portion of its rule.

EPA is seeking comment on its proposal to create a new category of protection for Pennsylvania waters, which would give the Commonwealth a mechanism to provide protection from new or increased discharges.

**D. Relationship of This Rulemaking to the Great Lakes Water Quality Guidance**

On March 23, 1995, pursuant to section 118(c)(2) of the CWA, EPA published Final Water Quality Guidance for the Great Lakes System (60 FR 15366), which applies to the Great Lakes System, including a small portion of Pennsylvania waters. The Guidance includes water quality criteria, implementation procedures and antidegradation policies, which are intended to provide the basis for consistent, enforceable protection for the Great Lakes System. In particular, the antidegradation requirements are more specific than those set out in 40 CFR 131.12. Pennsylvania and the other Great Lakes States and Tribes must adopt provisions into their water quality programs which are consistent with the Guidance, or EPA will promulgate the provisions for them.

Today’s rulemaking, which is being undertaken pursuant to section 303 of the Act, is independent of, and does not supersede, the Guidance. Regardless of the outcome of today’s rulemaking, Pennsylvania must still adopt an antidegradation policy for its waters in the Great Lakes Basin consistent with the Guidance, or EPA will promulgate such provisions for them. At that time, EPA will withdraw any portion of today’s rule which is inconsistent with such Great Lakes provisions and which applies to Pennsylvania waters within the Great Lakes basin.

**E. Endangered Species Act**

Pursuant to section 7 of the Endangered Species Act (16 U.S.C. 1666 et seq.), Federal agencies must assure that their actions are unlikely to jeopardize the continued existence of listed threatened or endangered species or adversely affect designated critical habitat of such species. Today’s proposal would extend antidegradation protection for waters that presently may be unprotected or under-protected by Commonwealth-adopted standards potentially improving the protection afforded to threatened and endangered species. This action is consistent with comments made by the U.S. Fish and Wildlife Service (FWS) regarding EPA’s disapproval in June 1994.

EPA initiated section 7 informal consultation under the Endangered Species Act with the FWS regarding this rulemaking, and requested concurrence from the FWS that this action is unlikely to adversely affect threatened or endangered species. On July 31, 1996, the FWS sent a letter to EPA indicating that they could not concur with a finding of no adverse affect to threatened or endangered species. EPA may need to initiate formal consultation with the FWS if further discussions do not result in concurrence. The FWS has proposed five options that would allow it to make a “not likely to adversely affect” determination. Those options can be found in the FWS July 31, 1996 letter, and are included as part of the administrative record available at ADDRESSES above. EPA is also seeking comments on the five options that the FWS has proposed.

**F. Executive Order 12866**

Under Executive Order 12866 (58 FR 51735, October 4, 1993) the Agency must determine whether today’s proposed regulatory action is “significant” and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs of the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Because the annualized cost of this proposed rule would be significantly less than $100 million and would meet none of the other criteria specified in the Executive Order, it has been determined that this rule is not a “significant regulatory action” under the terms of Executive Order 12866.

**G. Executive Order 12875, Enhancing the Intergovernmental Partnership**

In compliance with Executive Order 12875, Enhancing the Intergovernmental Partnership
governments in the development of this rule. Prior to this rulemaking action, EPA participated with the Pennsylvania Department of Environmental Protection and a group of stakeholders, which included governmental agencies, conservation groups, public interest groups and the regulated community, in a fourteen month regulatory negotiation (reg-neg) process. The reg-neg group was charged to recommend program modifications to Pennsylvania’s regulations on anti-degradation. The reg-neg process touched on many issues relevant to today’s proposal, including a comprehensive discussion on the nature and intent of the Federal regulation. In preparing for today’s proposal, EPA has also consulted with the Department extensively and informed them and the reg-neg group of our rulemaking process. EPA has scheduled a public hearing on the proposed action for October 16, 1996.

H. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) provides that, whenever an agency is required under 5 U.S.C. 553 to publish a general notice of rulemaking for any proposed rule, an agency must prepare an initial regulatory flexibility analysis unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 & 605. The purpose of the RFA is to establish procedures that ensure that Federal agencies solicit and consider alternatives to rules that would minimize their potential impact on small entities.

EPA has determined that any costs imposed by this rule would not impose a significant impact on a substantial number of small entities. Therefore, for the reasons discussed in more detail below, no regulatory flexibility analysis has been prepared. Despite these conclusions, however, EPA has considered the potential effects of this rule on small entities to the extent that it can, and has included that analysis in the administrative record of this rulemaking. EPA specifically invites public comment on its determination.

First, the proposed changes with respect to Tier 3, ONRWs, in Pennsylvania will have no predictable economic impact on current dischargers who may be small entities.

Promulgation of the proposed provision will merely result in an opportunity for the Commonwealth to provide a higher level of protection than presently available under the State regulation. By itself, this rule does not impose any burdens on dischargers. Any economic impact on small entities in Pennsylvania would arise only as the result of future decisions by the Commonwealth which are not attributable to EPA’s rulemaking action here. Furthermore, any economic impact is dependent on two unknown variables. The first is whether the Commonwealth, in fact, will choose to reclassify any Commonwealth waters as ONRWs. The second is whether, in the event of reclassification, any current, small entity discharger that wished to increase its discharges would need to install additional wastewater treatment in order to comply with ONRW limits. Because this rule does not impose any predictable impacts, EPA believes that no RFA analysis is required.

Second, with respect to Tier 2, High Quality Waters, this rule similarly does not impose any predictable impacts with the one exception described below. It is true that EPA’s proposal would likely require the Commonwealth of Pennsylvania to increase the number of waters that are classified as High Quality Waters. However, any economic consequences that would flow from this are largely uncertain because they are wholly dependent on discretionary State decisions and the activities of individual dischargers.

Thus, in the event that some waters received Tier 2 protections as a result of today’s rule, a discharger wishing to increase its discharge with a resulting degradation of a High Quality Water could request Pennsylvania to authorize the discharge (and a resulting lowering of the water quality for the affected waters). If Pennsylvania granted the request, there would be no economic cost to the discharger other than the cost of its request to Pennsylvania. In the event Pennsylvania denied the request, the discharger would bear the cost of whatever additional controls are required to meet the standards for High Quality Water. Thus, depending on further action by the Commonwealth of Pennsylvania, there could be some or no economic consequences flowing from adoption of EPA’s proposal. Given these facts, EPA cannot predict with any certainty the economic consequences of EPA’s action, and consequently, concludes for purposes of this rulemaking, that no RFA analysis is required.

As noted, this proposal could increase the number of dischargers (and presumably small entity dischargers) having to supply the necessary documentation. Therefore, EPA requests a discharge that would lower water quality for new Tier 2 High Quality Waters in Pennsylvania. EPA did examine the costs of making such submittals and concluded that, relying on conservative assumptions, this cost would not impose a significant economic impact on a substantial number of small entities.

Third, with respect to Tier 1, the proposal will not have a significant impact on a substantial number of small entities. Because of a number of factors, it is difficult to predict what, if any, effect the Tier 1 proposal would have on small entities. There is uncertainty whether any waterbodies will have existing uses not protected by current use designation. EPA expects this to be a rare occurrence. Since 1993, EPA has reviewed dozens of Pennsylvania stream redesignations and has identified only three streams where the fishery designation would not fully protect the existing use; even in those cases, Pennsylvania adequately protected those fisheries as existing uses by changing the designation. Based on this information, EPA concludes that the Tier 1 proposal would not have a significant impact on a substantial number of small entities.

Accordingly, pursuant to section 605(b) of the RFA, the Administrator is certifying that today’s proposal, if promulgated, will not have a significant economic impact on a substantial number of small entities. EPA solicits public comment on EPA’s analysis and conclusions conducted pursuant to the Regulatory Flexibility Act.

I. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective
or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

As noted above, this rule is limited to antidegradation designations within the Commonwealth of Pennsylvania. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. EPA has also determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

J. Paperwork Reduction Act

This proposed action requires no information collection activities subject to the Paperwork Reduction Act, and therefore no Information Collection Request (ICR) will be submitted to the Office of Management and Budget (OMB) for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards.

Dated: August 22, 1996.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 131 of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

Subpart D—[Amended]

2. Section 131.32 is added to read as follows:

§ 131.32 Pennsylvania.

(a) Antidegradation policy. This antidegradation policy shall be applicable to all waters of the United States within the Commonwealth of Pennsylvania, including wetlands.

(1) Existing in-stream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Commonwealth finds, after full satisfaction of the inter-governmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Commonwealth shall assure water quality adequate to protect existing uses fully. Further, the Commonwealth shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources.

(3) Where high quality waters are identified as constituting an outstanding National resource, such as waters of National and State parks and wildlife refuges and water of exceptional recreational and ecological significance, that water quality shall be maintained and protected.

(b) (Reserved)

[FR Doc. 96-21945 Filed 8-28-96; 8:45 am]
BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 4100

[WO-330–1020–00–24 1A]

RIN 1004–AB89

Grazing Administration, Exclusive of Alaska; Development and Completion of Standards and Guidelines; Implementation of Fallback Standards and Guidelines

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rulemaking.

SUMMARY: The Department of the Interior (Department) proposes to amend the livestock grazing regulations of the Bureau of Land Management (BLM) to allow the Secretary of the Interior (Secretary) discretion to postpone implementation of the fallback standards and guidelines beyond February 12, 1997, but not to exceed the six month period ending August 12, 1997. The amendment would allow the Secretary to provide additional time for the BLM to collaborate with resource advisory councils (RACs) and the public to develop State or regional standards and guidelines. Without this proposed change to the regulations, fallback standards and guidelines would go into effect on February 12, 1997, despite the fact that work on State or regional standards and guidelines might be nearly complete.

DATES: Comments on the proposed rule must be received by September 30, 1996 to be assured of consideration.

Comments received or postmarked after this date may not be considered in the preparation of the final rule.

ADDRESSES: Comments should be sent to: Director (420), Bureau of Land Management, Room 401 LS, 1849 C Street, NW, Washington, DC 20240, or the Internet address: WoComment@WO0033wp.wo.blm.gov. [For Internet, include “Attn: AB89”, and your name and return address.] You may also hand deliver comments to the Bureau of Land Management Administrative Record, Room 401, 1620 L Street, NW, Washington, DC. Comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except Holidays.

FOR FURTHER INFORMATION CONTACT: Tim Salt, (202) 208-4896.
SUPPLEMENTARY INFORMATION:

I. Introduction

The current regulations at 43 CFR § 4180.2 require the BLM State Director to develop State or regional standards and guidelines. These standards and guidelines are being developed at the State or regional level, in consultation with affected RACs to reflect local resource conditions and management practices. These standards and guidelines will reflect properly functioning, or those conditions which must be met to ensure sustainability and healthy productive ecosystems and outline best management practices to achieve standards. They will provide the basis for evaluation of rangeland health and subsequent corrective actions. The regulations further provide that in the event State or regional standards and guidelines are not completed and in effect by February 12, 1997, fallback standards and guidelines described in the regulations will go into effect.

The proposed amendment to 43 CFR 4180.2(f) would give the Secretary discretion to postpone the implementation of the fall back standards and guidelines for up to six months. The regulation currently provides that the fallback standards and guidelines automatically go into effect on February 12, 1997, if State or regional standards and guidelines are not completed and in effect by that date. The Department promulgated this provision after receiving comments proposing various timeframes, ranging up to 24 months, for the completion of standards and guidelines. The Department concluded in the final environmental impact statement that 18 months was "an ambitious but realistic" timeframe. The Department of the Interior and Department of Agriculture, Rangeland Reform '94, Final Environmental Impact Statement 56 (1994). Similarly, the Department stated in the preamble to the Final Rule that existing information and NEPA tiering procedures would enable BLM State Directors to complete the standards and guidelines within 18 months. The Department is proposing this change now because it has become apparent that development of State or regional standards and guidelines might, in some instances, require longer than the 18-month period provided in the regulation.

This discretion to grant up to a six-month extension would ensure that BLM State Directors, working with RACs and the public, will have adequate time to develop appropriate State or regional standard and guidelines. In developing this proposed amendment, the Department considered the benefits of efficient rangeland administration, effective public participation and possible impacts resulting from a minor delay. The Department believes that six months is an appropriate maximum period of extension. The Department seeks comment on whether this is a sufficient period of time or if additional time should be made available. Postponing implementation of the fallback standards and guidelines will enhance the efficient administration and promote the long-term health of public rangelands for two primary reasons. First, where locally developed standards and guidelines are nearly complete, implementation of the more general fallback standards and guidelines on a short term interim basis would likely be to create confusion and increase administrative costs. Second, postponing implementation of the fallback measures will allow the Department of the Interior to improve public land management through a collaborative process that utilizes RACs recommendations, local public input and consideration of State or regional public rangelands issues.

The Department expects that the amendment will not have a significant impact on the environment since postponement of the fallback standards and guidelines would be for a limited period up to six months. Furthermore, the Department does not anticipate that every BLM State Director would need a postponement.

In determining whether to grant a postponement, the Secretary would evaluate whether the requested postponement would promote administrative efficiencies and long-term rangeland health. The Secretary might consider such factors as the scheduled timing for completion of the State or regional standards and guidelines, whether the delay would promote the efficient administration, use and protection of the public rangelands, or other factors the Secretary deems relevant. The proposed rule would permit the Secretary the flexibility to postpone implementation of the fallback standards and guidelines when the State or regional standards and guidelines are far from completion or when a postponement would not promote long-term rangeland health.

II. Procedural Matters

National Environmental Policy Act

The BLM is analyzing the impacts of this proposed rule in accordance with section 102(2)(C) of the National Environmental Policy Act of 9169 (NEPA) [42 U.S.C. 4332(C)]. The BLM anticipates the proposed rule will not have a significant impact on the quality of the human environment, and therefore, preparation of an Environmental Impact Statement would not be necessary. The final rule will be accompanied by the appropriate NEPA documentation.

Executive Order 12630

The BLM has analyzed the takings implications and concluded that this proposed rule does not present a risk of a taking of constitutionally protected private property rights.

Executive Order 12866

The BLM has determined that this proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order.

Regulatory Flexibility Analysis

The proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act [5 U.S.C. 601 et seq.].

Federal Paperwork Reduction Act

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

Author

The principal author of this proposed rule is Tim Salt, Western Rangelands Team, BLM.

List of Subjects in 43 CFR Part 4100

Administrative practice and procedure, Grazing lands, Livestock, Penalties, Range management, Reporting and recordkeeping requirements.

For the reasons stated in the preamble and under the authority of 43 U.S.C. 1740, subpart 4100, part 4100, group 4100, subchapter D of title 43 of the Code of Federal Regulations is proposed to be amended as set forth below:
PART 410—GRAZING ADMINISTRATION—EXCLUSIVE OF ALASKA

1. The authority citation for part 4100 continues to read as follows:


Subpart 4180—Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration

2. Section 4180.2(f) introductory text is revised to read as follows:

§ 4180.2 Standards and guidelines for grazing administration.

(f) In the event that State or regional standards and guidelines are not completed and in effect before February 12, 1997, and until such time as State or regional standards and guidelines are developed and in effect, the following standards provided in paragraph (f)(1) of this section and guidelines provided in paragraph (f)(2) of this section shall apply and will be implemented in accordance with paragraph (c) of this section. However, the Secretary may grant, upon referral by the BLM of a formal recommendation by a resource advisory council, a postponement of the February 12, 1997, fallback standards and guidelines implementation date, not to exceed the six-month period ending August 12, 1997. In determining whether to grant a postponement, the Secretary will consider, among other factors, long-term rangeland health and administrative efficiencies.

Dated: August 15, 1996.

Sylvia V. Baca,
Acting Assistant Secretary, Land and Minerals Management.

[FPC Doc. 96–21994 Filed 8–28–96; 8:45 am]

BILLING CODE 4310–84–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76
[CS Docket No. 96–157; FCC 96–316]

Cable Pricing Flexibility

AGENCY: Federal Communications Commission.

ACTION: Proposed Rule.

SUMMARY: In this Notice of Proposed Rulemaking ("NPRM"), the Commission proposes to modify its current ratemaking rules in order to allow operators greater flexibility in pricing their regulated tiers of cable service while continuing to protect subscribers from unreasonable rates. Specifically, the Commission proposes to permit a cable operator that has established rates for its regulated service tiers to decrease the rate for its basic service tier ("BST"), and then take a corresponding increase in the rate for its cable programming services tiers ("CPSTs"), as long as the combined rate for the two tiers does not generate revenues for the operator that exceed what would otherwise be permitted under our rules. The Commission tentatively concludes that this proposal would remove an unnecessary restriction on an operator's pricing strategy, while maintaining effective constraints on the overall rates paid by subscribers, thus resulting in pricing which more nearly simulates that of a competitive market. The Commission seeks comment on this proposal which was adopted concurrently with a Report and Order requiring operators to use the same methodology when calculating rates for their BST and their CPST. That Memorandum Opinion and Order is summarized elsewhere in this issue of the Federal Register.

DATES: Comments are due on or before October 6, 1996, and reply comments are due on or before November 8, 1996.


FOR FURTHER INFORMATION CONTACT: Cable Services Bureau, (202) 418–7200.


Synopsis of the Notice of Proposed Rulemaking

1. An operator wishing to use the proposed pricing methodology first would establish rates for its regulated service tiers using the same methodology for both tiers. The resulting rate for the BST would be the cap for that tier. The operator then would determine the amount by which it was willing to decrease the BST rate and calculate the total revenue loss derived from the reduction. The operator would then divide this amount by the total number of CPST subscribers in order to calculate the rate increase for the CPST. The BST rate decrease would be reflected on the cable bill of every subscriber because subscription to the BST is required in order to have access to any other tier of service. Because subscription to CPST is optional, the pool of CPST subscribers is usually smaller than the BST subscriber pool. The total loss in BST revenue, therefore, when spread over the smaller CPST subscriber base, would generate a CPST rate increase that exceeded the amount of the BST rate decrease. As a result, BST–CPST subscribers (i.e., all CPST subscribers) would see a net increase in rates. This increase should be minimal if the operator has a high penetration rate on the CPST. Industry data available to us indicate that, for the most highly penetrated CPST on a system, the average penetration rate approaches or exceeds 90% and the median penetration rate exceeds 95%. The Commission seeks comment on these estimates and, more generally, on the likely impact on CPST rates if the proposal is implemented.

2. The Commission believes that individual consumers would be either substantially better off, or subject to only minor rate increases, were the Commission to adopt the proposal. BST–only subscribers would be better off because their rates would decrease with no diminution in service. Although CPST subscribers could experience a minor rate increase, all CPST subscribers are also BST subscribers for whom the increase in CPST rates would be substantially offset by the decrease in BST rates. However, because the Commission seeks to ensure that increases to CPST subscribers be minimized, the Commission seeks comment on whether to limit the amount of increase a CPST subscriber must pay or to otherwise limit the amount by which the BST and CPST rates may be adjusted. As noted, any increase to CPST subscribers would be minimal because of the high penetration rate of CPSTs.

3. In addition to lowering rates for current BST–only subscribers, this proposal should make the BST more affordable to some consumers who currently do not subscribe to cable at all. The Commission believes that its proposal presents other benefits as well. This proposal would provide cable operators with a rate structure flexibility enjoyed by providers of video services that are, or soon will be, attempting to compete with traditional cable operators in the video marketplace, including providers of direct broadcast satellite ("DBS") service, multichannel multipoint distribution service, and
open video systems. These video competitors offer, or will offer, consumers an alternative to conventional cable service. Because these competitors are not subject to the type of rate regulation imposed upon cable operators by the Communications Act, they have greater flexibility to restructure their pricing as well as the services they offer consumers. The Commission tentatively concludes that the proposed rate adjustment mechanism may enhance a cable operator's ability to compete with these alternative providers. For example, while currently a cable operator can attempt to become more competitive by simply dropping the rate of its BST, this proposal gives the operator an additional incentive to do so in that BST revenues that otherwise would be lost due to the rate decrease can be recovered on the CPST, even though no subscriber would see a significant rate increase.

4. The Commission further concludes that a less expensive BST service might assist system operators in increasing customer access and penetration, in preparation for the developing marketplace in which access to nonvideo services, such as telephony or enhanced services, is becoming increasingly important.

5. To ensure that these goals can be accomplished while continuing to protect consumers, the Commission believes that the proposed mechanism must be subject to several conditions. As stated, an operator electing this approach first would set rates for its BST and CPST tiers in accordance with our existing rules. After lowering its BST rate and increasing its CPST rate in the manner described, the operator would have a continuing obligation to keep track of what its maximum permitted rate would be for each tier had it not made the adjustment. An operator would continue to maintain records of these "underlying rates" so that an LFA, or the Commission, could verify that the operator had made the adjustment properly. In particular, the LFA must be able to ensure that the operator prices its BST rate at no more than what our rules otherwise permit. The Commission invites comment on this aspect of its proposal.

6. Further, the Commission proposes that systems offering more than one CPST would be able to allocate the amount deducted from the BST rate among the CPSTs in any manner, so long as the combined rate increase for the CPSTs is revenue neutral to the cable operator. To the extent described above, to ensure that any CPST rate increase is minimized, the Commission seeks comment on whether to limit the amount of such increase.

7. With respect to timing issues, the Commission believes that an operator should be permitted to use the proposed adjustment mechanism only when it has the opportunity to adjust rates under our existing rules. Thus, if an operator has chosen to adjust rates on an annual basis, it would be able to implement the adjustment mechanism proposed herein only at the time of, and as part of, an annual rate adjustment. This restriction would ensure that our proposal does not increase the number of times subscribers experience rate adjustments. The Commission does not intend to require that the operator make a standard rate adjustment at the time it uses the proposed mechanism (unless it is otherwise required to do so), only that it have the choice to make such an adjustment.

8. For LFAs, this proposal should generate no additional burdens. An LFA will engage in the same rate review process as conventional system operators. The Commission seeks comment on how to simplify further the rate review process.

9. The proposal would add another step to the Commission's review of a CPST complaint. This is because an operator that elects the proposed option may have a CPST rate that exceeds what normally would be permitted by our rules. To determine whether the CPST rate is nonetheless reasonable, the Commission will have to consider not just the CPST rate, but also the combined BST - CPST rate. Our consideration of the combined BST - CPST rate under this proposal will be for the sole purpose of determining whether the CPST rate is reasonable. BST rate review will remain the province of LFAs. The Commission invites comment as to the interaction of this extra step in the Commission's review of CPST rates and the Commission's statutory mandate to ensure that CPST rates are not unreasonable.

10. The Commission also seeks comment regarding how this proposed adjustment should work in cases where the cable operator is subject only to CPST rate regulation, such as where the LFA has not exercised authority to regulate the BST. Upon submission of a complaint invoking its jurisdiction, the Commission is obligated to determine whether the new CPST rate is not unreasonable. One option in this circumstance would be to analyze the operator's rates as if its BST were regulated and then permit the operator to increase its CPST rate by the amount necessary to recover revenue lost due to a rate decrease on the unregulated BST. The Commission seeks comment on the extent of these circumstances and the merits of this suggestion, and invite commenters to recommend means by which a rate review should be conducted. In addition, the Commission solicits comment on an operator's ability to rescind a recently implemented rate adjustment, and whether this would cause subscriber confusion, particularly if reversing the adjustment reflects rates the operator intended to charge absent this alternative.

11. As indicated above, when the Commission initially proposed approaches to rate regulation under the 1992 Cable Act, it considered a pricing mechanism somewhat similar to that which the Commission proposes here, the object of which was to encourage or require a low-cost "bare bones" BST. In the Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 58 FR 29736, ("Rate Order"), the Commission rejected this idea and adopted the "tier neutrality" requirement. The Commission determined that the public interest would best be served by basing rates for all rate-regulated channels of cable services on common principles, rather than forcing BST rates down through a rate-setting approach applicable only to that tier. The Commission was concerned that suppressing BST rates in this manner would result in operators simply moving channels off the BST to other tiers that would generate more revenues. The Commission concluded that it was preferable to adopt a tier-based framework that resulted in a slightly higher-cost BST that had more programming. In addition, the Commission determined that applying a single methodology to all regulated tiers reduced administrative burdens and confusion for operators, LFAs, and the Commission.

The current proposal differs from the proposal the Commission rejected in the Rate Order in two fundamental respects. First, the current proposal is not a forced reduction in the price of the BST. Rather, it simply permits operators to reduce the price of the BST as part of an overall marketing strategy. Second, it does not require any reduction in the number of channels on the BST. The current proposal preserves the benefits of the tier neutrality approach since the operator can make the adjustment proposed above only after establishing rates for its tiers in accordance with the tier neutrality principle. The current proposal also preserves the ability of the Commission to accommodate market changes. The Commission believes this adjustment is
consistent with our approach to modify
and improve the existing rules
continually as the market changes and
more information becomes available,
while protecting consumers from more
than a minimal rate increase.

Initial Regulatory Flexibility Analysis
for the Notice of Proposed Rulemaking

13. Pursuant to Section 603 of the
Regulatory Flexibility Act, the
Commission has prepared the following
initial regulatory flexibility analysis
(“IRFA”) of the expected impact of
these proposed policies and rules on
small entities. Written public comments
are requested on the IRFA. These
comments must be filed in accordance
with the same filing deadlines as
comments on the rest of the NPRM but
they must be have a separate and
distinct heading designating them as
responses to the regulatory flexibility
analysis. The Secretary shall cause a
copy of this NPRM to be sent to the
Chief Counsel for Advocacy of the Small
Business Administration in accordance
with Section 603(a) of the Regulatory
Flexibility Act, Public Law No. 96–354,
94 Stat. 1164, 5 U.S.C. Section 601 et

14. Reason for Action and Objectives
of the Proposed Rule. The Commission
has determined that our cable rules do
not permit cable operators to lower rates
for the BST and to then recover lost
revenues on the CPST. The proposal
contained in this NPRM will allow
operators to offer a better price to BST
subscribers while continuing to protect
all subscribers from unreasonable rates.
The proposal contained in this NPRM,
if adopted, would be an optional step
for a cable operator in ratemaking,
offering rate regulated operators more
flexibility in cable pricing. This
proposal will provide a cable operator
with the ability to price services in a
manner which duplicates market driven
rates while continuing to offer
consumers protections in the absence of
effective competition.

15. Legal Basis. The authority for the
action as proposed for this rulemaking
is contained in Section 623 of the
Communications Act of 1934, as
amended, 47 U.S.C. § 543, and Section
303(r) of the Communications Act of

Description and Number of Small
Entities Affected

16. Small Cable Entities: The
Communications Act contains a
definition of a small cable system
operator, which is “a cable operator
that, directly or through an affiliate,
serves in the aggregate fewer than 1
percent of all subscribers in the United
States and is not affiliated with any
entity or entities whose gross annual
revenues in the aggregate exceed
$250,000,000.” (47 U.S.C. § 543(m)(2)).
The Commission has determined that
there are 61,700,000 subscribers in the
United States. Therefore, the
Commission found that an operator
serving fewer than 617,000 subscribers
is deemed a small operator, if its annual
revenues, when combined with the total
annual revenues of all of its affiliates,
do not exceed $250 million in the aggregate
(47 CFR § 76.1403(b)). Based on
available data, the Commission finds
that the number of cable operators
serving 617,000 subscribers or less totals
1,450. Although it seems certain that
some of these cable system operators are
affiliated with entities whose gross
annual revenues exceed $250,000,000,
the Commission is unable at this time to
estimate with greater precision the
number of cable system operators that
would qualify as small cable operators
under the definition in the
Communications Act. The Commission
is likewise unable to estimate the
number of these small cable operators
that serve 50,000 or fewer subscribers in
a franchise area.

17. The Commission has developed
its own definition of a small cable
system operator for the purposes of rate
regulation. Under the Commission’s
rules, a “small cable company,” is one
serving fewer than 400,000 subscribers
nationwide (47 CFR § 76.901(e)). Based
on our most recent information, the
Commission estimates that there were
1,439 cable operators that qualified as
small cable system operators at the end
of 1995. Since then, some of those
companies may have grown to serve over
400,000 subscribers, and others
may have been involved in transactions
that caused them to be combined with
other cable operators. Consequently, the
Commission estimates that there are
fewer than 1,439 small entity cable
system operators that may be affected
by the proposal adopted in this NPRM.

18. SBA has developed a definition of
small entities for cable and other pay
television services, which includes all
such companies generating less than
$11 million in revenues annually. This
definition includes cable systems
operators, closed circuit television
services, direct broadcast satellite
services, multipoint distribution
systems, satellite master antenna
systems and subscription television
services. According to the Census
Bureau, there were 1,323 such cable and
other pay television services generating
less than $11 million in revenue that
were in operation for at least one year

19. Municipalities: The term “small
governmental jurisdiction” is defined as
“governments of . . . districts, with a
population of less than fifty
thousand.” (5 U.S.C. § 601(5)). Based on
most recent census data, there are
85,006 governmental entities in the
United States. This number includes
such entities as states, counties, cities,
utility districts and school districts. The
Commission notes that any official
actions with respect to cable operators’
BST will typically be undertaken by
LFAs, which primarily consist of
counties, cities and towns. Of the 85,006
governmental entities, 38,978 are
counties, cities and towns. The
remainder are primarily utility districts,
school districts, and States, which
typically are not LFAs. Of the 38,978
counties, cities and towns, 37,566 or
96%, have populations of fewer than
50,000.

Steps taken to Minimize Significant
Economic Impact on Small Entities and
Significant Alternatives Rejected

20. Small Cable Entities: The
Communications Act contains a
definition of a small cable system
operator, which is “a cable operator
that, directly or through an affiliate,
serves in the aggregate fewer than 1
percent of all subscribers in the United
States and is not affiliated with any
entity or entities whose gross annual
revenues in the aggregate exceed
$250,000,000.” (47 U.S.C. § 543(m)(2)).
Under the Communications Act, at 47
U.S.C. 543(m)(1), a small cable operator
is not subject to the rate regulation
requirements of Sections 543 (a), (b) and
(c) on CPSTs in any franchise area in
which it serves 50,000 or fewer
subscribers. The proposed rule adopted
in this NPRM would give a rate
regulated operator the option to lower
rates on its BST and to raise rates on its
CPST in order to recover lost revenues
from the BST reduction. The CPST rate
increase would be reviewed by the
Commission. Because this proposed rule
would not affect operators that are not
rate regulated on CPSTs, there would be
no impact on small cable operators that,
according to the Communications Act,
are not subject to rate regulation on
CPSTs.
21. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide, and a small cable system is a cable system with 15,000 or fewer subscribers owned by a cable company serving 400,000 or fewer subscribers over all of its cable systems (47 C.F.R. § 76.901(e)). SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually.

22. To the extent that any of these operators are rate regulated on CPSTs, the Commission emphasizes that the proposal would provide an optional rate adjustment methodology for rate regulated operators in order to provide for greater flexibility in cable pricing, and would not impose a mandatory requirement on cable operators. If the Commission did not modify its rules, a regulated cable operator would not be able to recover, on its CPST, lost revenues for rate decreases to the BST. The Commission believes that allowing for such an adjustment could give operators more flexibility to respond to competition in the marketplace. Municipalities: The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand." (5 U.S.C. § 601(5)). The Commission does not believe that the proposal contained in this NPRM would have a significant economic impact on a substantial number of these small governmental jurisdictions. A small governmental jurisdiction that regulates the BST would continue its current practice of reviewing an operator's maximum permitted per channel rate on the BST. Any rate increase by an operator opting to use the proposal contained in this NPRM would occur on the CPST and would therefore be reviewed by the Commission.

24. Reporting, Recordkeeping and other Compliance Requirements. Our current methodology for calculating maximum permissible rates will need to be amended to account for the additional optional rate calculation step proposed in this NPRM. The proposed rule is optional, and would not be a requirement for any cable operator that does not want to utilize the proposed option. An operator wishing to use the proposed pricing methodology first would establish rates for its regulated service using the same methodology for both tiers. The resulting rate for the BST would be the cap for that tier. The operator then would determine the amount by which it was willing to decrease the BST rate and calculate the total revenue loss derived from the reduction. The operator would then divide this amount by the total number of CPST subscribers in order to calculate the rate increase for the CPST. After lowering its BST rate and increasing its CPST rate in the manner described, the operator would have a continuing obligation to keep track of what its maximum permitted rate would be for each tier had it not made the adjustment. An operator would continue to maintain records of these "underlying rates" so that an LFA, or the Commission, could verify that the operator had made the adjustment properly. In the NPRM, the Commission seeks comment on the specific method of implementation of the proposal. The rule as proposed would not require any additional special skills beyond any which are already needed in the cable rate regulatory context.

25. Significant Alternatives to Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives. In the NPRM, the Commission examines the current rule that prohibits a rate-regulated cable operator from justifying an increase in its CPST rate on the basis of a corresponding decrease in the BST rate. The Commission tentatively concludes that eliminating this aspect of our current rules would give cable operators greater pricing flexibility to respond to their growing competition while continuing to protect consumers. If, in the alternative, the Commission did not modify its rules, a regulated cable operator would not be able to recover, on its CPST, lost revenues for rate decreases to the BST. The Commission believes that allowing for such an adjustment could give operators more flexibility to respond to competition in the marketplace. This is consistent with the issues raised in the body of the NPRM. As explained above, the Commission does not believe the proposal creates a significant burden for small entities. The proposed rule change would be purely optional for cable operators, and local franchising authorities would not be subject to additional rate regulatory burdens as a result of adoption of the proposal.

Federal Rules which Overlap, Duplicate or Conflict with these Rules—None

26. Ex parte Rules—Non-Restricted Proceeding. This is a non-restricted notice or comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Act period, provided that they are disclosed as provided in the Commission's rules. See generally, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

27. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before October 6, 1996, and reply comments on or before November 8, 1996. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you would like each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

Ordering Clauses

28. It is ordered that, pursuant to Sections 4(i), 4(j), 623(a), 623(b), and 623(c), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 543(a), 543(b), and 543(c), NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposal, discussions, and statement of issues in this NPRM of Proposed Rulemaking, that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

29. It is further ordered that, the Secretary shall send a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

Paperwork Reduction Act

This NPRM may contain either proposed or modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM. Comments should address:

(a) whether the proposed collection of
II. Agency Proposal To Eliminate Non-Statutory Certification Requirements

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) is publishing a Notice of Proposed Rulemaking to amend the Department of Energy Acquisition Regulation (DEAR) to eliminate all non-statutorily imposed contractor and offeror certification requirements.

DATES: Written comments on the proposed rulemaking must be received on or before October 28, 1996.


FOR FURTHER INFORMATION CONTACT: John R. Bashista (202) 586–8192 (telephone); (202) 586–0545 (facsimile); john.bashista@hq.doe.gov (electronic mail).

SUPPLEMENTARY INFORMATION:

I. Background

Section 4301(b)(1)(B) of the Federal Acquisition Reform Act of 1996 (FARA), Pub. L. 104–106, requires agencies that have procurement regulations containing one or more certification requirements for contractors and offerors that are not specifically imposed by statute to issue for public comment a proposal to amend their regulations to remove the certification requirements. Such certification requirements may be omitted from the agency proposal if (i) the senior procurement executive for the executive agency provides the head of the executive agency with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and (ii) the head of the executive agency approves in writing the retention of such certification requirement.

This proposed rule constitutes DOE's proposal for the elimination of all non-statutorily imposed contractor and offeror certification requirements from the DEAR pursuant to section 4301(b)(1)(B) of FARA. DOE has not identified any regulatory certification requirement contained in the DEAR which it has determined should be proposed for retention. Consequently, the Department is not pursuing approval from the Secretary of Energy to retain any certification requirement that is not specifically imposed by statute. The Department invites public comment on its proposal to eliminate all regulatory certification requirements from the DEAR and on its determination that there are no certification requirements which should be proposed for retention.

II. Agency Proposal To Eliminate Non-Statutory Certification Requirements

The following is the Department's proposal pertaining to each contractor and offeror certification requirement contained in the DEAR.

1. 952.204–73—Foreign Ownership, Control, or Influence (FOCI) Over Contractor

Section 952.204–73 will be amended to remove the certification requirement for offerors to certify that FOCI data submitted to the Department is accurate, complete and current and that the disclosure is made in good faith; and to remove the requirement for offerors to certify that FOCI information previously submitted to DOE for a facility security clearance is accurate, complete and current. The disclosure requirement at DEAR 904.7003, however, will remain. In addition, technical and conforming amendments to the DEAR are proposed to 904.7003, 904.7005 and 904.7103.

Prior to issuance of a final rule pertaining to the proposed amendment of subsection 952.204–73 herein, DOE will issue for public comment a separate proposed rule which will amend the policies currently set forth in the DEAR to be consistent with this rule. The separate rulemaking will implement the requirements of Executive Order 12829, “National Industrial Security Program,” and recent amendments to the Federal Acquisition Regulation (61 FR 31617) reflecting the Governmentwide applicability of the National Industrial Security Program Operating Manual.

3. 952.209–70—Organizational Conflicts of Interest—Disclosure or Representation

Section 4304 of FARA repealed section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789), and section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918) which formed the basis for DOE's organizational conflicts of interest (OCI) policies and procedures set forth in Subpart 909.5 of the DEAR. With the repeal of the statutory basis for DOE's OCI program, the Department is now subject to the regulatory OCI program set forth in Subpart 9.5 of the Federal Acquisition Regulation (FAR). Based on an internal review comparing the current DOE program to the FAR program, the Department has determined that there are several important elements of the current DOE program which should be retained.

DOE published a separate proposed rule in the Federal Register on August 6, 1996 to codify and make mandatory DOE's new program in the DEAR. This separate rule will provide for the elimination of the certification currently contained in section 952.209–70.

Section 952.226–73 will be amended to remove the certification language requiring offerors to certify as to their status as one of the designated target groups under section 3021 of the Energy Policy Act of 1992. This provision will be amended to require a representation from offerors regarding their status instead of a certification. In addition, technical and conforming amendments to the DEAR are proposed to subsection 926.7007 pursuant to the amendment of subsection 952.226–73.


Section 952.227–13, paragraph (el)(3) of the DEAR will be amended to remove the certification requirements for contractors in the interim and final reports pertaining to the disclosure of all inventions developed under the subject contract. Contractors will still be required to submit interim and final reports and to disclose all inventions developed under the subject contract.

6. 952.227–80—Technical Data Certification

Section 952.227–80 will be deleted from the DEAR including the certification requirement for offerors to certify that they have not delivered or are not obligated to deliver to the Government under any other contract or subcontract the same or substantially the same technical data as included in their offer to the Department. The Department will use the provision at FAR 52.227–15 entitled, "Representation of Limited Rights Data and Restricted Computer Software", instead of DEAR 952.227–80. A technical and conforming amendment of the prescription contained at DEAR 952.227–83 is also made pursuant to the proposed removal of DEAR 952.227–80.

7. 952.227–81—Royalty Payments Certification

Section 952.227–81 will be deleted from the DEAR including the certification requirement for offerors to disclose whether their contract price includes an amount representing the payment of royalty by the offeror to others in connection with contract performance and, if so, identifying pertinent information about the royalty. The Department will use DEAR 952.227–9, Refund of royalties (FEB 1995) instead of 952.227–81.

8. 970.5204–57—Certification Regarding Workplace Substance Abuse Programs at DOE Facilities

Section 970.5204–57 will be amended to remove the requirement for offerors to certify that they will provide to the contracting officer within 30 days after either notification of selection for award or award of a contract, their written workplace substance abuse program consistent with the requirements of 10 CFR 707. Instead, offerors will be required to agree to provide a drug-free workplace in accordance with 41 U.S.C. 701(a)(1) as a condition of responsibility prior to contract award. This amendment will implement section 4301(a)(3) of FAR which eliminates the statutory certification requirement in section 5152 of the Drug-Free Workplace Act of 1988. In addition, technical and conforming amendments to the DEAR are also proposed for sections 909.104, 923.570–2, 923.570–3, 970.2305–4 and 970.2305–5 pursuant to the amendment of section 970.5204–57.

III. Public Comments

DOE invites interested persons to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this proposed rule. Three copies of written comments should be submitted to the address indicated in the ADDRESSES section of this rule. All comments received will be available for public inspection during normal work hours. All written comments received by the date indicated in the DATES section of this notice will be carefully assessed and fully considered prior to the effective date of these amendments as a final rule. Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to its determination in accordance with 10 CFR 1004.11.

IV. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), DOE has determined that this proposed rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

C. Review Under the Paperwork Reduction Act

To the extent that new information collection or record keeping requirements are imposed by this rulemaking, they are provided for under Office of Management and Budget paperwork clearance package No. 1910–0300. No new information collection is proposed by this rule.

D. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. This proposed rule would eliminate any compliance costs on small businesses associated with the administrative aspects of providing the express certifications proposed for elimination from the Department of Energy Acquisition Regulation. The Department certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

E. Review Under Executive Order 12612

Executive Order 12612 entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. DOE has determined that this proposed rule will not have a substantial direct effect on the institutional interests or traditional functions of States.
F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulations: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of Energy has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

G. Public Hearing Determination

DOE has concluded that this proposed rule does not involve any significant issues of law or fact. Therefore, consistent with 5 U.S.C. 553, DOE has not scheduled a public hearing.

List of Subjects in 48 CFR Parts 904, 909, 923, 926, 952 and 970

Government procurement.

Issued in Washington, D.C. on August 26, 1996.

Richard H. Hopf,
Deputy Assistant Secretary for Procurement and Assistance Management.

For the reasons set forth in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below.

1. The authority citations for parts 904, 909, 923 and 926 continue to read as follows:


PART 904—ADMINISTRATIVE MATTERS

2. Section 904.7003 is amended by revising paragraph (d) to read as follows:

904.7003 Disclosure of foreign ownership, control, or influence.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contract subject to this subpart, or approve or consent to a subcontract subject to this subpart unless:

(1) The contractor provides the information required by the solicitation provision at 48 CFR 952.204–73; and

(2) The contracting officer has made a positive determination in accordance with 48 CFR 904.7004.

3. Section 904.7005 is amended by revising paragraph (a) to read as follows:

904.7005 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 48 CFR 952.204–73, Foreign Ownership, Control or Influence over Contractor, in all solicitations for contracts subject to 48 CFR 904.7001.

4. Section 904.7103 is amended by revising paragraph (a) to read as follows:

904.7103 Solicitation provision and contract clause.

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require access to proscribed information shall include the provision at 48 CFR 952.204–73 with its Alternate I.

PART 905—CONTRACTOR QUALIFICATIONS

5. Section 909.104–1 is amended by revising paragraph (h) to read as follows:

909.104–1 General Standards. (DOE coverage—paragraph (h))

(h) For solicitations for contract work subject to the provisions of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, the prospective contractor must agree, in accordance with 48 CFR 970.5204–57, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, to provide the contracting officer with its written workplace substance abuse program in order to be determined responsible and, thus, eligible to receive the contract award.
10. Section 952.204–2 is amended by revising paragraphs (a) and (b) of the clause to read as follows:

952.204–2 Security requirements.

* * * * *

Security (XXX 19XX)

(a) Responsibility. It is the contractor’s duty to safeguard all classified information, special nuclear material, and other DOE property. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information and protecting against sabotage, espionage, loss or theft of the classified documents and material in the contractor’s possession in connection with the performance of work under this contract. Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor’s control in connection with performance of this contract. If retention by the contractor of any classified matter is required after the completion or termination of the contract, the contractor shall identify the items and types or categories of matter proposed for retention, the reasons for the retention of the matter, and the proposed period of retention. If the retention is approved by the contracting officer, the security provisions of the contract shall continue to be applicable to the matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(b) Regulations. The contractor agrees to comply with all security regulations and requirements of DOE in effect on the date of award.

* * * * *

11. Section 952.204–73 is amended by removing the certification language following the list of questions at the end of paragraph (c) and preceding paragraph (d), and revising paragraph (e) to read as follows:

952.204–73 Foreign ownership, control, or influence over contractor (Representation)

* * * * *

Foreign Ownership, control or influence over contractor (XXX 19XX)

* * * * *

(c) * * *

(d) * * * * *

(e) The offeror shall require any subcontractors having access to classified information or a significant quantity of special nuclear material to provide responses to the questions in paragraph (c) of this provision directly to the DOE contracting officer.

* * * * *

12. Section 952.226–73 is amended by revising the introductory text to paragraph (a) of the provision to read as follows:


* * * * *

Energy Policy Act target group representation (XXX 19XX)

(a) The offeror is:

* * * * *

13. Section 952.227–13 is amended by revising paragraph (e)(3) of the clause to read as follows:


* * * * *

Patent rights-acquisition by the Government (XXX 19XX)

* * * * *

(e) Invention identification, disclosures, and reports.

* * * * *

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing all subject inventions during that period, and including a statement that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by paragraph (e)(1) of this clause.

(ii) A final report, within 3 months after completion of the contracted work listing all subject inventions or containing a statement that there were no such inventions, and listing all subcontracts at any tier containing a patent rights clause or containing a statement that there were no such subcontracts.

* * * * *

952.227–80 and 952.227–81 [Removed]


15. Section 952.227–83 is amended by revising the prescription to read as follows:

952.227–83 Rights in technical data solicitation representation.

Pursuant to 48 CFR 927.7004–1 and 927.7004–2, include this provision and the legend at FAR 52.215–12 in solicitations which may result in contracts for research, development, or demonstration work or contracts for supplies in which delivery of required technical data is contemplated.

* * * * *

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

16. The authority citation for part 970 continues to read as follows:


17. Subsection 970.2305–4 is amended by revising paragraph (a) to read as follows:

970.2305–4 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 48 CFR 970.5204–57, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

* * * * *

18. Subsection 970.2305–5 is amended by revising paragraph (b)(2) to read as follows:

970.2305–5 Suspension of payments, termination of contract, and debarment and suspension actions.

* * * * *

(b) * * *

(1) * * *

(2) The contractor has failed to comply with the terms of the provision at 48 CFR 970.5204–57;

* * * * *

19. Subsection 970.5204–57 is amended by revising the section and provision heading, removing paragraph (d) of the provision, and revising paragraphs (b) and (c) of the provision to read as follows:

970.5204–57 Agreement regarding workplace substance abuse programs at DOE facilities.

* * * * *

AGREEMENT REGARDING WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (XXX 19 XX)

* * * * *

(b) By submission of its offer, the offeror agrees to provide to the contracting officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program consistent with the requirements of 10 CFR part 707.

(c) Failure of the offeror to agree to the condition of responsibility set forth in paragraph (b) of this provision, renders the offeror unqualified and ineligible for award.
SUMMARY: NMFS announces that the Caribbean Fishery Management Council (Council) has submitted the Fishery Management Plan for Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands (FMP) for review, approval, and implementation by NMFS. Written comments are requested from the public.

DATES: Written comments must be received on or before October 18, 1996.

ADDRESSES: Comments must be mailed to the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Requests for copies of the FMP, which includes a regulatory impact review, an initial regulatory flexibility analysis, a social impact assessment, and a final environmental impact statement, should be sent to the Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, PR 00918-2577, telephone 787-766-5926, FAX 787-766-6239.

FOR FURTHER INFORMATION CONTACT: Georgiä Cranmore, 813-570-5305.

SUPPLEMENTARY INFORMATION: The Magnuson Fishery Conservation and Management Act (Magnuson Act) (16 U.S.C. 1801 et seq.) requires that each regional fishery management council submit any fishery management plan or amendment it prepares to NMFS, on behalf of the Secretary of Commerce for review. The Magnuson Act also requires that NMFS, upon receiving the plan or amendment for review, immediately make a preliminary evaluation of whether the amendment is sufficient to warrant continued review and publish a notice that the plan or amendment is available for public review and comment. NMFS will consider the public comments received during the comment period in determining whether to approve the plan or amendment.

Amendment 5, if approved, would: (1) Close a 9 mi² (23.31 km²) site to mobile fishing gear and partially close the site to non-mobile gear for an 18-month period, and (2) temporarily exempt certain vessels from fishing regulations.

Day 1 of Amendment 5 is August 22, 1996. Proposed regulations to implement this amendment are scheduled to be published in the Federal Register within 15 days of this date.

SUMMARY: NMFS announces that the New England Fishery Management Council (Council) has submitted Amendment 5 to the Fishery Management Plan for the Atlantic Sea Scallop Fishery (FMP) for Secretarial review and is requesting comments from the public. Amendment 5 would: (1) Require project equipment for the limited area to support a scallop aquaculture research project. The intended effect of the closure would be to prevent conflicts between fishing gear and project equipment for the limited duration of the research project.

DATES: Comments must be received on or before October 21, 1996.
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. 96–059–1]

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 field testing of an unlicensed veterinary biological product. A risk analysis, which forms the basis for the environmental assessment, has led us to conclude that field testing this unlicensed veterinary biological product 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.

ADDRESS: 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 and publication date of this notice, as well as the first two words of the product name, 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, 4700 River Road Unit 148, Riverdale, MD 20737–1237; telephone (301) 734–8400; fax (301) 734–8910; or E-mail: jgreenberg@aphis.usda.gov.

SUPPLEMENTARY INFORMATION: Under the Virus-Serum-Toxin Act (21 U.S.C. 151 et seq.), a veterinary biological product 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 veterinary biological 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 the unlicensed veterinary biological product referenced in this notice, APHIS conducted a risk analysis to assess the potential effect of this product 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 field testing this unlicensed veterinary biological product 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 a finding of no significant impact have been prepared for field testing the following unlicensed veterinary biological product:

<table>
<thead>
<tr>
<th>Requester</th>
<th>Product</th>
<th>Field test locations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oxford Veterinary Laboratories, Inc</td>
<td>Feline Rhinotracheitis Vaccine, Modified Live Virus</td>
<td>California, Colorado, Illinois, Iowa, Kansas, Nebraska.</td>
</tr>
</tbody>
</table>

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’ NEPA Implementing Procedures (7 CFR part 372).

Unless substantial environmental issues are raised in response to this notice, APHIS intends to authorize the shipment of the above product and the initiation of the field tests on September 12, 1996.

Done in Washington, DC, this 22nd day of August 1996.

A. Strating,
Acting Administrator, Animal and Plant Health Inspection Service.
[FR Doc. 96–22108 Filed 8–28–96; 8:45 am]

BILLING CODE 3410–34–P

[Docket No. 96–064–2]

Procedures for Importing Animals Through the Harry S. Truman Animal Import Center

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice; Correction.

SUMMARY: The Animal and Plant Health Inspection Service is correcting the telephone number of the person listed under for further information contact in a notice that was published in the Federal Register on August 23, 1996 (61 FR 43521). The notice announced the date and location of the lottery for authorization of the use of the Harry S Truman Animal Import Center in calendar year 1997, and also the period during which applications must be received to be included in the lottery.

FOR FURTHER INFORMATION CONTACT: Ms. Joan Montgomery, Staff Specialist, Import-Export Animals Staff, National Center for Import-Export, VS, APHIS, Suite 3B30, 4700 River Road Unit 39,
Riverdale, MD 20737-1231, (301) 734-8364.

Done in Washington, DC, this 23rd day of August 1996.

Richard R. Kelly,

[FR Doc. 96-22035 Filed 8-28-96; 8:45 am]
BILLING CODE 3410-34-P

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Natural Resources Conservation Service

Finding of No Significant Impact for Limestone-Graveyard Creeks Watershed Bent and Prowers Counties, CO

Introduction

The Limestone-Graveyard Creeks Watershed is a federally assisted action authorized for planning under Public Law 83-566, the Watershed Protection and Flood Prevention Act. An environmental assessment was undertaken in conjunction with the development of the watershed plan. This assessment was conducted in consultation with local, state, and federal agencies as well as interested organization and individuals. Data developed during the assessment are available for public review at the following location: U.S. Department of Agriculture, Natural Resources Conservation Service, 655 Parlet Street, Suite E200C, Lakewood, CO 80215-5517.

Recommended Action

The recommended plan is composed of management and enduring conservation practices to reduce deep percolation, runoff and irrigation induced erosion which will improve water quality of both surface and groundwater, the Arkansas river, as well as protect the resource base. It is expected that 108 long-term land treatment contracts will be written during the project’s life. Approximately 26,700 acres will be treated through project action.

The primary purposes are: (1) (Watershed protection)—protect the soil resource base from excessive irrigation induced erosion and sedimentation and reduce negative water quality impacts to surface and groundwater, including the Arkansas River from selenium, sediment, salts, and nitrate loading. (2) (Agricultural water management)—improve application uniformity.

Effects of Recommended Action

Overall improved surface and groundwater quality, improved human health and safety, significant sediment and erosion reduction, improved water quality in the Arkansas River, improved wetlands and fisheries from improved water quality, improved wildlife habitat, reduced irrigation labor costs, reduced irrigation system operation and maintenance, and improved irrigation systems and management results in increased available water supply on and offsite.

The proposed action will reduce selenium, sediments, salts, nitrates, and other pollutants, in groundwater and the Arkansas River, thereby improving the water quality. It will also protect the watershed resource base by reducing irrigation induced erosion.

Significant negative effects to wetlands are not expected. However, if mitigation is necessary, it will be accomplished on a value for value basis.

A slight improvement of the upland wildlife habitat is expected due to an increase in forage and water quality.

The proposed project will encourage and promote the agricultural enterprises in the watershed through education and accelerated technical and financial assistance. This will help maintain agriculture as a significant component in the area economy.

A list of the cultural resource sites within the watershed has been obtained from the State Historic Preservation Officer (SHPO). Their relationship to planned conservation measures was evaluated. The survey concludes that no significant adverse impacts will occur to known cultural resources in the watershed should the plan be implemented. If however, during construction of enduring measures a new site is identified, construction will stop and the (SHPO) will be notified.

There is no wilderness areas in the watershed.

There are no threatened or endangered species known to exist in the watershed. However, prairie dog towns which could provide habitat for the black-footed ferret, will not be disturbed during project action.

As stated above, the primary objective of the project is to reduce the selenium entering the Arkansas River and groundwater. Land treatment measures will reduce selenium levels to within State and EPA standards.

Wildlife habitat may be temporarily disturbed in areas where enduring measures are implemented. They will however, return to at least their previous value within a short period of time.

The fishery in the Arkansas River will be impacted to a lesser degree by selenium after the project is complete.

No significant adverse environmental impacts will result from the installation of conservation measures. Some short-term habitat disturbances may occur during construction of small erosion control structures, but they will heal quickly.

Alternatives

The planned action is the most practical means of reducing the selenium, salts, and sediment entering the Arkansas River and groundwater, thus protecting the resource base in the watershed. Since no significant adverse environmental impacts will result from installation of the measures and no other alternatives could meet the tests of completeness, effectiveness, efficiency, and acceptability, this alternative becomes the only viable candidate plan. The no action alternative was used for comparison purposes.

Consultation—Public Participation

The Bent and Prowers Soil Conservation Districts requested in March, 1989, that the watershed be considered for a PL566 watershed project. A field review was made on March 23, 1989. The review team found that significant irrigation water management, water quality, and watershed protection treatment was needed. The Soil Conservation District and the NRCS Field Office decided that detailed information collection would be the first priority. Data on water quantity, quality, and practice needs were gathered. Ninety percent of the landowners expressed an interest in this project. Significant resource problems were found and the sponsors made an application for PL566 planning assistance June 16, 1989.

The State Soil Conservation Board formally accepted the application on September 6, 1989. The Soil Conservation Services’ West National Technical Center (WNTC) made a field reconnaissance October 25, 1989. They met with the irrigation company personnel, field offices, and conservation district officials. It was decided further data was needed to quantify the off-site effects from project action. In January 1993, the NRCS Field Office, area staff and state staff developed a schedule to complete a preauthorization plan and plan of work.

On June 24, 1993, a public scoping meeting was held to discuss the problems, needs, and possible effects from a project. Federal, State, and local agencies, and the general public were invited. This group gave direction to the NRCS planners. A public response analysis was completed.
on the responses. A summary of those responses is shown on Table C.

An environmental evaluation meeting was also held on June 24, 1993, to identify environmental concerns and issues and discuss how best to address those concerns.

Numerous newspaper articles, newsletters, and radio public service announcements have been aired to provide public information. Public meetings with the news media in attendance were held to gain input and inform the public.

A public meeting in the morning and a sponsors meeting in the afternoon were held December 2, 1993, to determine the desirability of pursuing a planning authorization and to review the preliminary plan. The sponsors felt that cost shared management practices were essential to get adequate water quality improvement. Potential alternatives and the responsibilities of each sponsor and NRCS were stressed in discussions. The SCDs have the right of eminent domain under authority established by state law. If needed, they are willing to fulfill their agreements to see that a plan is formulated and implemented.

The public and sponsors encouraged NRCS to go forth with the request for planning. Potential practices and alternatives were reviewed to identify what may be needed. A revised application was developed and approved by the sponsors to slightly change the watershed size and sponsors in January 1994.

The sponsors reviewed the preauthorization report in March 1994 and concurred with the report. However, the sponsors requested cost share on management practices. NRCS, agreed to pursue cost sharing for management practices. The preauthorization report was transmitted to the WNTC in Portland for technical review in April 1994. A review by the WNTC was completed on June 30, 1994. Comments were incorporated, and on July 28, 1994, the SCD boards reviewed WNTC comments on the Preauthorization Plan, and agreed to continue their support of the plan even though cost sharing for management practices were not approved.

The SCD boards have met regularly and provided positive leadership to the furthering of conservation and improvement of the watershed. Ongoing water quality, quantity and management practices are being installed by a combination of landowner, district and state funds. The two district boards cooperated in getting a 319 demonstration project approved in February 1994, to show the value of surge irrigation and irrigation water management on six fields in the watershed area.

On September 26, 1994 the watershed was approved for planning. A meeting was held in December 1994 with field and area staffs, the State Water Resources Planning staff, and sponsors to review the Plan of Work and develop assignments to complete the watershed plan. A scoping meeting and environmental assessment meeting was held at this time.

The Watershed Plan was developed and reviewed with the sponsors at their board meetings in May, 1995. They requested that NRCS have a public meeting to present the plan to all interested publics. On June 1, 1995, a public meeting was held in Lamar, Colorado. It was the consensus of those present to move forward into interagency review.

Specific consultation was conducted with the State Historic Preservation Officer concerning cultural resources in the watershed.

Public meetings were held throughout the planning process to keep all interested parties informed of the study progress and to obtain public input to the plan and environmental evaluation. Agency consultation and public participation to date has shown no unresolved conflicts related to the project plan.

Conclusion

The Environmental Assessment summarized above indicates that this federal action will not cause significant local, regional, or national impact on the environment. Therefore, based on the above findings, I have determined that an environmental impact statement for the Limestone-Graveyard Creeks Watershed Plan is not required.

Dated: August 19, 1996.
Stuart N. Simpson
Assistant State Conservationist.

Environmental Impact Statement

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Regulations (40 CFR Part 1500); and the NRCS Regulations (7 CFR Part 650); the NRCS, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Limestone-Graveyard Creeks Watershed, Bent and Prowers Counties, Colorado.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:
The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these finds, Duane L. Johnson, State Conservationist, has determined that the preparation and review of an environmental impact statement is not needed for this project.

The project purpose is a plan for watershed protection. The planned works of improvement include accelerated technical assistance for implementing land treatment with water quality conserving practices such as conservation tillage, irrigation water management and enduring practices to reduce deep percolation to improve water quality.

The Notice of Finding of No Significant Impact (FONSI), has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Stuart N. Simpson.

No administrative action on implementation of the proposal will be taken until 30 days after the date of this publication in the Federal Register. (This activity is listed in the Catalog of Federal Domestic under No. 10.904, Watershed Protection and Flood Prevention and is subject to the provisions of Executive Order 12372, which required intergovernmental consultation with State and local officials.)

Dated: August 19, 1996.
Stuart N. Simpson,
Assistant State Conservationist.

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the California Advisory Committee to the Commission will convene at 2:00 p.m.
and adjourn at 5:00 p.m. on Wednesday, September 11, 1996, at the Embassy Suites (The Board), 8425 Firestone Boulevard, Downey, California. The purpose of the meeting is to discuss release and dissemination of a report and the Commission hearing in Los Angeles and to plan future Advisory Committee activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Dr. Fernando Hernandez, 310–696–0104, or Philip Montez, Director of the Western Regional Office, 213–894–3437 (TDD 213–894–3435). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting. The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, August 21, 1996.
Carol Lee Hurley, Chief, Regional Programs Coordination Unit. [FR Doc. 96–22038 Filed 8–28–96; 8:45 am] BILLING CODE 6335–01–F

Agenda and Notice of Public Meeting of the Oklahoma Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Oklahoma Advisory Committee to the Commission will convene at 6:30 p.m. and adjourn at 8:30 p.m. on Monday, September 23, 1996, at the Doubletree Hotel, 616 West 7th Street, Tulsa, Oklahoma 74127. The purpose of the meeting is to plan future projects.

Persons desiring additional information, or planning a presentation to the Committee, should contact Melvin L. Jenkins, Director of the Central Regional Office, 913–551–1400 (TDD 913–551–1414). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, August 22, 1996.
Carol Lee Hurley, Chief, Regional Programs Coordination Unit. [FR Doc. 96–22037 Filed 8–28–96; 8:45 am] BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).


Agency Approval Number: NA. Type of Request: New collection. Burden: 266,000 hours. Number of Respondents: 130,000. Avg Hours Per Response: 2.2 hours. Needs and Uses: The economic census is the major source of data about the structure and functioning of a large segment of the United States’ economy and features unique industry and geographic detail. It provides essential information for many users, including the government, industry, business and the general public. The Census of Construction (CCI) collects information from contractors of all types of construction—more than 2.3 million establishments classified in the North American Industry Classification System (NAICS). The construction industry sector of the economic census comprises establishments primarily engaged in the construction of buildings and other structures, additions, alterations, reconstruction, installation, and maintenance and repairs.

The economic census will produce basis statistics by industry for number of establishments, value of construction work done, payroll, employment, selected costs, depreciable assets, and capital expenditures. It also will yield a variety of subject statistics, including estimates of type of construction work done, kind of business activity and other industry-specific measures.

Among the important statistics produced by the CCI are estimates of the value of construction work done during the covered year. The Federal Government uses the information from the economic censuses as an important part of the framework for the national accounts, input–output measures, key economic indexes, and other estimates that serve as the factual basis for economic policy making, planning and administration. State governments rely on the economic censuses for comprehensive economic data on geographical areas in order to make decisions concerning policy making, planning and administration. Finally, industry, business and the general public use data from the economic censuses for economic forecasts, market research, benchmarks for their own sample-based surveys, and business and financial decision making.

Affected Public: Businesses or other for-profit institutions.
Frequency: One time.
Respondent’s Obligation: Mandatory. OMB Desk Officer: Jerry Coffey, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, Acting DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Jerry Coffey, OMB Desk Officer, Room 10201, New Executive Office Building, Washington, DC 20503.

Dated: August 26, 1996.
Linda Engelmeier, Acting Departmental Forms Clearance Officer, Office of Management and Organization. [FR Doc. 96–22116 Filed 8–28–96; 8:45 am] BILLING CODE 3510–16–M

Foreign-Trade Zones Board

[Docket 64–96]

Foreign-Trade Zone 72—Indianapolis, IN: Application for Subzone Status, Fujitsu Ten Corporation of America Plant (Automotive Audio Products and Electronic Components), Rushville, IN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Indianapolis Airport Authority, grantee of FTZ 72, requesting special-purpose subzone status for the automotive audio products and electronic components manufacturing plant of Fujitsu Ten Corporation of America (FTCA), located in Rushville, Indiana. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on August 19, 1996. The FTCA plant (95,000 sq. ft. On 32 acres) is located at 616 Conrad Harcourt Way in Rushville (Rush County), Indiana, some 40 miles east of Indianapolis. The plant (354 employees) is used to produce (1) automotive audio products, including electronic tuning
AM/FM radios, AM/FM radio/cassette units, cassette deck units, power amplifiers, and front end AM/FM receiver modules; and (2) automotive electronic components, including relay integration modules (i.e., warning indicators, light dimmers) and security systems with remote keyless entry, for the U.S. market and export. As part of this application, FTZ authority is also being requested for other automotive electronic components which may be manufactured in the future, including air bag controllers, speed control systems, fuel injection systems, seat controls, anti-lock brake units, automatic windshield wipers, heated seat modules, indicator sensors, and vehicle navigation systems. The production process involves assembly, testing, and warehousing. Components purchased from abroad (about 76% of total unit material value) include: self-adhesive plastic plates/film, labels, copper and steel fasteners, steel springs, other articles of copper, flywheels and pulleys, electric motors, electronic parts (transformers, inductors, capacitors, resistors, diodes, transistors, LED’s, insulators), liquid crystal displays, integrated circuits, PC boards, electrical switches, other electrical and audio parts (duty rate range: free—12.5%, 40/ unit, 7/kg). The application indicates that 26 percent of all components (by value) will be purchased from U.S. suppliers within three years after approval of subzone status.

FTZ procedures would exempt FTCA from Customs duty payments on the foreign components used in the export production (11% of total shipments). On its domestic sales, the company would be able to choose the duty rates that apply to finished automotive audio products and automotive electronic components (duty free—8.5%) for the foreign inputs noted above. The motor vehicle duty rate (2.5%) could apply to the finished audio and electronic products that are shipped to U.S. motor vehicle assembly plants with subzone status for inclusion into finished motor vehicles under FTZ procedures. Under the FTZ Act, certain merchandise in FTZ status is exempt from ad valorem inventory-type taxes. The application indicates that subzone status would help improve the plant’s international competitiveness.

In accordance with the Board’s regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board’s Executive Secretary at the address below. The closing period for their receipt is October 28, 1996. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to November 12, 1996).

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

- U.S. Export Assistance Center, Penwood One, Suite 106, 11405 N. Pennsylvania Street, Carmel, IN 46032
- Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 3716, 14th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20230–0002

Dated: August 19, 1996.

John J. Da Ponte, Jr.,
Executive Secretary.

[FR Doc. 96–22124 Filed 8–28–96; 8:45 am]
BILLING CODE 3510–DS–P

[Docket 65–96–]
Foreign-Trade Zone 38—Spartanburg County, South Carolina Application for Expansion

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the South Carolina State Ports Authority, grantee of Foreign-Trade Zone 38, requesting authority to expand its zone in Spartanburg County, South Carolina, within the Greenville/Spartanburg, South Carolina Customs port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on August 21, 1996.

FTZ 38 was approved on May 4, 1978 (Board Order 131, 43 FR 20256, 5/12/78) and expanded on November 9, 1994 (Board Order 715, 59 FR 59992, 11/21/94). The zone project currently consists of three sites in Spartanburg County: Site 1 (20 acres)—U.S. Highway 29 Industrial Park, Welford; Site 2 (111 acres)—International Transport Center, Greer; and Site 3 (111 acres)—Highway 290 Commerce Park, Duncan.

The applicant is now requesting authority to further expand the general-purpose zone to include a site (Proposed Site 4) which would encompass the Wingo Corporate Park (473 acres), a private industrial park located some 5 miles northwest of Spartanburg, South Carolina, on New Cut, Blackstock, and Mt. Zion Roads in Spartanburg County. No specific manufacturing requests are being made at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board’s regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board’s Executive Secretary at the address below. The closing period for their receipt is October 28, 1996. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to November 12, 1996).

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

- Office of the Port Director, U.S. Customs Service, 150–A West Phillips Road, Greer, SC 29650
- Office of the Executive Secretary, Foreign-Trade Zones Board, Room 3716, U.S. Department of Commerce, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230

Dated: August 23, 1996.

John J. Da Ponte, Jr.,
Executive Secretary.

[FR Doc. 96–22125 Filed 8–28–96; 8:45 am]
BILLING CODE 3510–DS–P

[Order No. 836]
Grant of Authority; Establishment of a Foreign-Trade Zone Olympia, Washington, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order.

Whereas, an Act of Congress was enacted June 18, 1934, an Act “To provide for the establishment of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Port of Olympia (the Grantee) has made application to the Board (FTZ Docket 95–95, 60 FR 10352, 2/24/95) requesting the establishment of a foreign-trade zone at sites in the four-county area of Thurston, Lewis, Mason, and Kitsap Counties, Washington...

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.


Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instruments, for the purposes for which the instruments are intended to be used, is being manufactured in the United States.

University of Massachusetts; Notice Decision on Application for Duty-Free Entry of Scientific Instrument

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89-651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 AM and 5:00 PM in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.


Advice received from: National Institutes of Health, July 23, 1996.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instruments, for the purposes for which the instruments are intended to be used, is being manufactured in the United States.

Frank W. Creel, Director, Statutory Import Programs Staff. [FR Doc. 96-22119 Filed 8-28-96; 8:45 am] BILLING CODE 3510-DS-P
Live Swine From Canada; Final Results of Changed Circumstances
Countervailing Duty Administrative Review, and Partial Revocation
AGENCY: Import Administration, International Trade Administration, Department of Commerce.
ACTION: Final Results of Changed Circumstances Countervailing Duty Administrative Review, and Revocation In Part of Countervailing Duty Order.

SUMMARY: On May 29, 1996, the Department of Commerce (the Department) published a notice of initiation and preliminary results of changed circumstances countervailing duty administrative review with intent to revoke the order, in part, we are now revoking this order, in part, with respect to slaughter sows and boars and weanlings from Canada, because this portion of the order is no longer of interest to domestic parties.

EFFECTIVE DATE: August 29, 1996.
FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Brian Albright, Office of CVD/AD Enforcement, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20220; telephone: (202) 482-2786.

SUPPLEMENTARY INFORMATION:
Background
On August 15, 1985, the Department published in the Federal Register (50 FR 32880) the countervailing duty order on live swine from Canada. On December 11, 1995, petitioners requested the partial revocation of the order on live swine from Canada with respect to slaughter sows and boars and weanlings due to lack of interest, effective April 1, 1991. We determined that petitioner's affirmative statement of no interest constitutes changed circumstances sufficient to warrant partial revocation of this order. Therefore, the Department is partially revoking the order, effective April 1, 1991, on live swine from Canada, with respect to slaughter sows and boars and weanlings (as defined in the scope section of this notice) in accordance with the provisions of 19 CFR 355.25(d)(1).

The Department will instruct the U.S. Customs Service to liquidate, without regard to countervailing duties, all unliquidated entries of slaughter sows and boars and weanlings (as defined in the scope section of this notice) from Canada entered, or withdrawn from warehouse, for consumption on or after April 1, 1991, in accordance with 19 CFR 355.25(d)(5). We will also instruct the Customs Service to refund with interest any estimated countervailing duties collected with respect to unliquidated entries of these slaughter sows and boars and weanlings made on or after April 1, 1991, in accordance with section 778 of the Act.

This changed circumstances administrative review, and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. section 1675(a)(1)) and 19 C.F.R. section 355.22(h), and 355.25(d) of the Department regulations.

Dated: August 22, 1996.
Robert S. LaRussa,
Acting Assistant Secretary for Import Administration.

SUPPLEMENTARY INFORMATION:
Scope of the Order
Due to the changed circumstances review, the merchandise now covered by this order is live swine, except U.S. Department of Agriculture certified purebred breeding swine, slaughter sows and boars, and weanlings (weanlings are swine weighing up to 27 kilograms or 59.5 pounds) from Canada. Such merchandise is classifiable under the Harmonized Tariff Schedule (HTS) item numbers 0103.91.00 and 0103.92.00. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Applicable Statute and Regulations
Unless otherwise indicated, all citations to the statute, are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act ("URAA") effective January 1, 1995 ("the Act").

Final Results of the Review; Partial Revocation of Countervailing Duty Order
The affirmative statement of no interest by petitioners in this case constitutes changed circumstances sufficient to warrant partial revocation of this order. Therefore, the Department is partially revoking the order, effective April 1, 1991, on live swine from Canada, with respect to slaughter sows and boars and weanlings (as defined in the scope section of this notice) in accordance with the provisions of 19 CFR 355.25(d)(1).

The Department will instruct the U.S. Customs Service to liquidate, without regard to countervailing duties, all unliquidated entries of slaughter sows and boars and weanlings (as defined in the scope section of this notice) from Canada entered, or withdrawn from warehouse, for consumption on or after April 1, 1991, in accordance with 19 CFR 355.25(d)(5). We will also instruct the Customs Service to refund with interest any estimated countervailing duties collected with respect to unliquidated entries of these slaughter sows and boars and weanlings made on or after April 1, 1991, in accordance with section 778 of the Act.

This changed circumstances administrative review, and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. section 1675(a)(1)) and 19 C.F.R. section 355.22(h), and 355.25(d) of the Department regulations.

C-559-001
Certain Refrigeration Compressors From the Republic of Singapore; Preliminary Results of Countervailing Duty Administrative Review
AGENCY: International Trade Administration/Import Administration/Department of Commerce.
ACTION: Notice of Preliminary Results of Countervailing Duty Administrative Review.

SUMMARY: In response to a request by the petitioner, Tecumseh Products Company (Tecumseh), the Department of Commerce (the Department) is conducting an administrative review of the agreement suspending the countervailing duty investigation on certain refrigeration compressors from the Republic of Singapore. This review covers the Government of the Republic of Singapore (GOS), Matsushita Refrigeration Industries (Singapore) Pte. Ltd. (MARIS), and Asia Matsushita Electric (Singapore) Pte. Ltd. (AMS). GOS was the sole exporter of the subject merchandise to the United States during the period of review (POR) April 1, 1994, through March 31, 1995. We preliminarily determine that the signatories have complied with the terms of the suspension agreement during the POR.

Interested parties are invited to comment on these preliminary results. Parties who submit arguments in this proceeding are requested to submit with their argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: August 29, 1996.

APPLICABLE STATUTE: Unless otherwise indicated, all citations to the statute and to the Department's regulations are in reference to the provisions as they existed on or after January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Tariff Act) in accordance with the Uruguay Round Agreements Act (URAA).

SUPPLEMENTARY INFORMATION:
Background
On November 1, 1995, the Department published in the Federal Register (60 FR 55540) a notice of "Opportunity to Request an Administrative Review" of the agreement suspending the countervailing duty investigation on certain refrigeration compressor from...
the Republic of Singapore. On November 30, 1995, the petitioner, Tecumseh, requested an administrative review of the agreement suspending the countervailing duty investigation on certain refrigeration compressors from the Republic of Singapore (48 FR 51167, November 7, 1983). We initiated the review, covering the period April 1, 1994, through March 31, 1995, on December 15, 1995 (60 FR 64413). The Department is now conducting this review in accordance with section 751 of the Tariff Act and 19 CFR 355.22. The Department sent out a questionnaire on March 4, 1995, and received a joint questionnaire response from the GOS, MARIS, and AMS, on April 25, 1996. Subsequently, the Department sent out a supplemental questionnaire on May 17, 1996 and received a joint supplemental questionnaire response on May 31, 1996.

**Scope of the Review**

Imports covered by this review are shipments of hermetic refrigeration compressors rated not over one-quarter horsepower from Singapore. This merchandise is currently classified under Harmonized Tariff Schedule (HTS) item number 8414.30.40. The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

The review period is April 1, 1994 through March 31, 1995, and includes 3 programs. The review covers one producer and one exporter of the subject merchandise, MARIS and AMS, respectively. These two companies, along with the GOS, are the signatories to the suspension agreement.

Under the terms of the suspension agreement, the GOS agrees to offset completely the amount of the net bounty or grant determined by the Department in this proceeding to exist with respect to the subject merchandise. The offset entails the collection by the GOS of an export charge applicable to the subject merchandise exported on or after the effective date of the agreement. See Certain Refrigeration Compressors from the Republic of Singapore: Suspension of Countervailing Duty Investigation, 48 FR 51167, 51170 (November 7, 1983).

**Analysis of Programs**

(1) The Economic Expansion Incentives Act—Part VI

The Production for Export Programme under Part VI of the Economic Expansion Incentives Act allows a 90-percent tax exemption on a company's export profit if the GOS designates a company as an export enterprise. In the investigation, the Department preliminarily found this program to be countervailable because "this tax exemption is provided only to certified export enterprises." See Preliminary Affirmative Countervailing Duty Determination: Certain Refrigeration Compressors from the Republic of Singapore, 48 FR 39109, 39110 (August 29, 1983). MARIS is designated as an export enterprise and used this tax exemption during the period of review. AMS was not designated an export enterprise under Part VI of the Economic Expansion Incentives Act for the period of review.

According to the Export Enterprise Certificate awarded to MARIS in a letter dated May 12, 1981, MARIS is to receive this benefit on the production of compressors, electrical parts and accessories for refrigerators, and plastic refrigerators. To calculate the benefit, we divided the tax savings claimed by MARIS under this program by the f.o.b. value of total exports of products receiving the benefit, for the period of review.

MARIS' response to the Department's countervailing duty questionnaire for this review indicated that MARIS deducted export charges levied pursuant to the suspension agreement in arriving at an adjusted profit figure, which was then used to calculate exempt export profit for the review period. In the 90-91 administrative review, the Department determined that the amount of the export charge deduction must be added "back to MARIS' export profit in calculating MARIS' tax savings in order to offset the deduction of the export charges in the review period." See Preliminary Results of Countervailing Duty Review: Certain Refrigeration Compressors from Singapore, 57 FR 31175 (July 14, 1992), affirmed in Final Results of Countervailing Duty Review: Certain Refrigeration Compressors from Singapore, 57 FR 31175 (July 14, 1992), affirmed in Final Results of Countervailing Duty Review: Certain Refrigeration Compressors from Singapore, 57 FR 46539 (October 9, 1992). Therefore, as the Department did in the 92-93 administrative review, in calculating the benefit from this program, we have added back this deduction. On this basis, we preliminarily determine the benefit from this program during the review period to be 1.23 percent of the f.o.b. value of the merchandise.

(2) Finance & Treasury Center (FTC)

The Finance & Treasury Center (FTC) program provides for the taxation at a concessional rate of ten percent on certain income earned by companies providing treasury, investment, or financial services in Singapore for their subsidiaries/affiliates outside Singapore. The FTC program under Section 43E of the Singapore Income Tax Act has been in effect since April 1, 1989 (since Singapore tax “year of assessment 1991”). According to the response, applications to the FTC program had been received and approved by March 31, 1995 for 14 companies, including AMS. Every company which has applied to the program has been accepted. MARIS did not participate in the program for the period of review.

The Department examined the program in the 92-93 review and found it to be de facto specific, and therefore countervailable. See Certain Refrigeration Compressors from the Republic of Singapore: Final Results of Countervailing Duty Administrative Review ("Final Results"), 61 FR 10315-8 (March 13, 1996)). The Department also stated in its preliminary results for the 92-93 review that, "(b)ecause it is probable that participation in the FTC program by MNCs in Singapore could change over time, in future reviews we may re-examine the circumstances which have led the Department to find the program de facto specific, should any new information about the program's specificity arise." (See Certain Refrigeration Compressors from the Republic of Singapore: Preliminary Results of Countervailing Duty Administrative Review ("Preliminary Results"), 59 FR 59749 (November 18, 1994)).

During the 92-93 review, the Department found that 10 enterprises, representing five industries, were participating in the program (See Preliminary Results at 59750 (November 18, 1994)). For this review, the number of firms/participating in the FTC program for this review has increased to 14, and the number of industries participating has increased to eight. In performing our analysis of this program, the Department found that the overall increase in the number of firms/participating in the FTC program was not negligible. Section 771 (SA)[(D)(iii)(I)] of the Tariff Act provides that, where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of four factors exist. The first factor is whether the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. Given the large number of multi-national companies operating in Singapore, the Department continues to find the FTC program de facto specific, and therefore countervailable, because only a small group of firms/enterprises representing...
only eight industries actually used the FTC program.

To calculate the benefit, we divided the tax savings attributable to the subject merchandise under this program by the value of all AMS product sales for the period of review. On this basis, we preliminarily determine the benefit from this program during the review period to be 0.01 percent of the f.o.b. value of the merchandise.

(3) Financing through the Monetary Authority of Singapore

Under the terms of the suspension agreement, MARIS and AMS agreed not to apply for or receive any financing provided by the rediscount facility of the Monetary Authority of Singapore for shipments of the subject merchandise to the United States. We determined during the review that neither MARIS nor AMS received any financing through the Monetary Authority of Singapore on the subject merchandise exported to the United States during the review period. Therefore, we preliminarily determine that both companies have complied with this clause of the agreement.

Preliminary Results of Review

The suspension agreement states that the GOS will offset completely with an export charge the net bounty or grant calculated by the Department. As a result of our review, we preliminarily determine that the signatories have complied with the terms of the suspension agreement, including the payment of the provisional export charges in effect for the period April 1, 1994 through March 31, 1995. We also preliminarily determine the net bounty or grant to be 1.24 percent of the f.o.b. value of the merchandise for the April 1, 1994 through March 31, 1995 review period.

Following the methodology outlined in section B.4 of the agreement, the Department preliminarily determines that, for the period April 1, 1994 through March 31, 1995, a negative adjustment may be made to the provisional export charge rate in effect. The adjustments will equal the difference between the provisional rate in effect during the review period and the rate determined in this review, plus interest. The provisional rate, established in the notice of the final results of the 90–91 administrative reviews of the suspension agreement (See Certain Refrigeration Compressors from the Republic of Singapore; Final Results of Countervailing Duty Administrative Review, 57 FR 46540 (October 9, 1992)) was 5.52 percent. The GOS may refund or credit, in accordance with section B.4.c of the agreement, the difference between that amount and 1.24 percent, plus interest, calculated in accordance with section 778(b) of the Tariff Act, within 30 days of notification by the Department. The Department will notify the GOS of these adjustments after publication of the final results of this review.

If the final results of this review remain the same as these preliminary results, the Department intends to notify the GOS that the provisional export charge rate on all exports to the United States with Outward Declarations filed on or after the date of publication of the final results of this administrative review shall be 1.24% percent of the f.o.b. value of the merchandise.

The agreement can remain in force only as long as shipments from the signatories account for at least 85 percent of imports of the subject refrigeration compressors into the United States. Our information indicates that the two signatory companies accounted for 100 percent of imports into the United States from Singapore of this merchandise during the review period.

Parties to the proceeding may request disclosure within 5 days of the date of publication of this notice. Any interested party may request a hearing within 10 days of publication. Case briefs and/or written comments from interested parties may be submitted no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be filed not later than 37 days after the date of publication of this notice. Any hearing, if requested, will be held 44 days after the date of publication, or the first workday thereafter. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any such written comments or at a hearing.

These requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This administrative review and this notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1677a(1)) and 19 CFR 353.22.

Dated: August 22, 1996.

Robert S. LaRussa,
Acting Assistant Secretary for Import Administration.

[FR Doc. 96–22177 Filed 8–28–96; 8:45 am]

BILLING CODE 3510–DS–P

National Oceanic and Atmospheric Administration

[LD. 081696A]

Small Takes of Marine Mammals Incidental to Specified Activities; McDonnell Douglas Aerospace Delta II Vehicles at Vandenberg Air Force Base, CA

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

ACTION: Notice of receipt of application and proposed authorization for a small take exemption; request for comments.

SUMMARY: NMFS has received a request from the U.S. Air Force for continuation of an authorization to take small numbers of harbor seals by harassment incidental to launches of McDonnell Douglas Aerospace (MDA) Delta II (Delta II) vehicles at Space Launch Complex 2W (SLC–2W), Vandenberg Air Force Base, CA (Vandenberg). Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to authorize the Air Force to incidentally take, by harassment, small numbers of harbor seals, California sea lions and northern elephant seals in the vicinity of Vandenberg for a period of 1 year.

DATES: Comments and information must be received no later than September 30, 1996.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. A copy of the application, a list of the references used in this document, and/or previous Federal Register notices on this activity may be obtained by writing to this address or by telephoning one of the contacts listed below.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead, Office of Protected Resources at 301–713–2055, or Irma Lagomarsino, Southwest Regional Office at 310–980–4016.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 et seq.) directs NMFS to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.
Permission may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth.

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which U.S. citizens can apply for an authorization to incidentally take small numbers of marine mammals by harassment for a period of up to 1 year. The MMPA defines “harassment” as: * **any act of pursuit, torment, or annoyance which (a) has the potential to injure a marine mammal or marine mammal stock in the wild; or (b) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.**

Subsection 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

**Summary of Request**

On July 17, 1996, NMFS received an application from the U.S. Air Force requesting continuation of an authorization for the harassment of small numbers of harbor seals and potentially for other pinniped species incidental to launches of Delta II vehicles at SLC-2W, Vandenberg. These launches would place Department of Defense, National Aeronautics and Space Administration (NASA), and commercial medium-weight payloads into polar or near-polar orbits. MDA/NASA intends to launch up to 10 Delta IIs during the period of this proposed 1-year authorization.

Because SLC-2W is located north of most other launch complexes at Vandenberg, and because there are oil production platforms located off the coastline to the south of SLC-2W, missions flown from SLC-2W cannot fly directly on their final southward course. The normal trajectory for a SLC-2W launch is 259.5° west for the first 90 seconds, then a 41-second dog-leg maneuver to bring the vehicle on its southward course of 196°. This trajectory takes the launch vehicle away from the coast and nearly 30 miles west of San Miguel Island (SMI), the westernmost Channel Island (Air Force, 1995b).  

**Description of Habitat and Marine Mammals Affected by Delta IIs**

The Southern California Bight (SCB), including the Channel Islands area, support a diverse assemblage of pinnipeds (seals and sea lions) and cetaceans (whales, dolphins, and porpoises). California sea lions (Zalophus californianus), northern elephant seals (Mirounga angustirostris), harbor seals (Phoca vitulina) and northern fur seals (Callorhinus ursinus) breed on the Islands, with the largest rookeries on SMI and San Nicolas Island.

A small breeding population of California sea lions occurs on Vandenberg and both sea lions and northern elephant seals are regular visitors to the shoreline near SLC-2W. A small population of harbor seals are normal residents of Purisima Point adjacent to SLC-2W and southern sea otters (Enhydra lutra) were censused there during the spring of 1995. Because it is the only species that hauls out along the Vandenberg coast, the only marine mammal anticipated to be incidentally harassed by Delta II launches is the harbor seal. A description of the SCB population of harbor seals and other pinniped species was provided on August 18, 1995, in conjunction with publication of the previous notice of application for this activity (60 FR 43120) and is therefore not repeated here. Only new information on harbor seals is provided below. Interested reviewers are encouraged to refer to the document cited above for the appropriate discussion. That document is also available from NMFS (see ADDRESSES).

Harbor seals are considered abundant throughout most of their range and have increased substantially in the last 20 years. Hanan and Beeson (1994) reported 21,462 seals counted on the mainland coast and islands of California during May and June, 1994. Using that count and Huber et al.'s (1993) correction factor (1.61 times the count) for animals not hauled out gives a best population estimate of 34,554 harbor seals in California (Barlow et al. 1995). Vandenberg supports a substantial population of harbor seals. A total of 19 distinct haulout sites are present on Vandenberg (between Point Sal and Jalama Beach), although not all sites are used regularly (Roest 1995). For most of the year, the average number of harbor seals on the Vandenberg coast is about 330 individuals. This number nearly doubles during the molting season (June) to roughly 610. The largest population occurs on South Vandenberg, although a smaller permanent population is present at two sites near Purisima Point on North Vandenberg. Based on aerial surveys completed between 1983 and 1993 in May or June by the California Department of Fish and Game, harbor seal populations on Vandenberg varied from a low of 139 in 1983 to a high of 864 in 1990 (Roest 1995). Some variability in numbers may be due to actual changes in population densities while others may be due to refinement in techniques for completing the aerial surveys. In general, it appears that the current population of harbor seals at all 19 haulout sites on Vandenberg peaks at roughly 600 to 800 seals (Air Force 1996).

Maximum numbers of harbor seals at Purisima Point in May/June average about 40 while the Spur Road site seems to have an average maximum of from 60 to 80 individuals. More than other sites, Spur Road appears to have peak numbers in the fall (Air Force 1996, Roest 1995). However, both sites are submerged at high tide, making them unavailable to harbor seals during those times.

**Potential Effects of Delta II Launches on Marine Mammals**

As a result of the noise associated with the launch itself, there is a potential to cause a startle response to those harbor seals and other pinnipeds that may haul out on the coastline of North Vandenberg, principally Purisima Point and Spur Road. Launch noise would be expected to occur over the coastal habitats in the vicinity of SLC-2W while low-level sonic booms could be heard over the water in the area west of the Channel Islands.

The effect on pinnipeds would be disturbance by sound, which is anticipated to result in a negligible short-term impact to the small number of harbor seals and other pinnipeds that may be hauled out along the coast near SLC-2W at the time of Delta II launches. NMFS is unaware of any evidence that any marine mammals, other than those onshore at the time of launch, would be subject to harassment by launch noises, although the potential does exist that marine mammal species may hear either the launch noise or the sonic boom. In addition, because of the mostly
horizontal propagation of launch noise, little noise is expected to penetrate the water interface.

At North Vandenberg, launch noises are expected to impact mostly harbor seals, as other pinnipeds (California sea lions and northern elephant seals) are known to haul out at these sites only infrequently and in smaller numbers. Based upon measurements made in 1995 (Aerospace Corporation 1996), the maximum overall sound pressure levels from launch noise associated with the Delta II under typical conditions is predicted to be about 115 dBA (129 dB unweighted)(re 20 Pa @ 1 m) at the nearest potential harbor seal haulout (3,000 ft (914.4 m) from launch site) and 110 dBA (125 dB) at Purisima Point (5,000 ft (1,524 m) from launch site) and last for approximately 1 minute.

Because of high-tide and pre-dawn conditions at the time of the two previous launches of Delta IIs at Vandenberg, few to no seals were expected onshore at these launch times. However, based upon monitoring 3 days prior to, and after, these launches, there appeared to be no differences in the number of harbor seals using these sites for hauling out before and after launchings of Delta IIs (Air Force 1996).

As a result of the launch of a Taurus rocket (slightly smaller in size to the Delta II) in March 1994 at SLC-2W, Stewart et al. (1994) observed that 20 of 23 harbor seals on Purisima Point fled into the water. The A-weighted sound exposure level at Purisima Point for that launch was 108.1 dBA (127.5 dB unweighted). Therefore, it can be predicted that most, if not all, pinnipeds onshore near SLC-2W will leave the shore as a result of launchings of Delta IIs. Harbor seals and other pinnipeds, hauled out at Point Arguello and Rocky Point (approximately 15 mi (24.1 km) south of SLC-2W), may alert to the launch noise but are not expected to flee to the water, because of the distance and the resultant attenuation of launch noise at that distance.

Launch noises are not expected to impact marine mammals offshore, although pinnipeds in the nearshore waters around SLC-2W may alert to the noise, and some may possibly submerge. In order to be detectable by a marine mammal, airborne noise needs to be greater than ambient within the same frequency as the animal’s hearing range. For harbor seals, recent research (Terhune 1988, Turnbull and Terhune 1989, Terhune 1991, Turnbull 1994) indicates that harbor seals have relatively poor hearing capacity in the frequencies of sound that dominate the noise produced by a rocket launch. At the lowest frequency measured (100 Hz), the threshold was between 65 dB and 75 dB. Terhune (1991) indicated that the critical ratio at the lowest frequency measured (250 Hz) was 24 dB. Thus, noise would need to be roughly 24 dB or more above background to be perceived by a harbor seal. With launch noises expected to quickly attenuate offshore, and with ambient noise level expected to range between 56 and 96 dBA (Air Force, 1995a), there is presently reasonable expectation that no marine mammals, other than pinnipeds onshore at the time of launch, would be subject to harassment by launch noises, although the potential does exist that other marine mammal species may hear the launch noise. However, simply hearing the noise does not mean that the animals have been harassed.

Northern Channel Islands

Sonic booms resulting from launches of the Delta II vary with the vehicle trajectory and the specific ground location. Sonic booms are not expected to intersect with the ocean surface until the vehicle changes its launch trajectory. This location will be well offshore. Depending upon the intensity and location of a sonic boom, pinnipeds on SMI could exhibit an alert response or stampede into the water. However, while it is highly probable that a sonic boom from the Delta II would occur over SMI, maximum overpressures of these sonic booms are estimated to be 1.0 lb/ft² (psf) over SMI (Air Force 1995c). A sonic boom with an overpressure of 1.0 psf or less is not considered significant (equivalent to hearing two hands clapped together at a distance of 1 ft). Also, the maximum overall sound pressure level is not expected to exceed 78 dBA (112 dBA) (Air Force 1995c). A sonic boom of this magnitude is unlikely to be distinguishable from background noises caused by wind and surf (Air Force 1995a). Monitoring of the effects of noise generated from Titan IV launches on SMI pinnipeds in 1991, Stewart et al. (1992) demonstrated that noise levels from a sonic boom of 133 dB (111.7 dBA) caused an alert response by small numbers of California sea lions, but no response from other pinniped species (including harbor seals). In 1993, an explosion of a Titan IV created a sonic boom-like pressure wave and caused approximately 45 percent of the California sea lion pups that were 23-400 days old, including 14,000-15,000 one-month old pups, to flee into the water (SMI during the launch) and 2 percent of the northern fur seals to enter the surf zone. Although approximately 15 percent of the sea lion pups were temporarily abandoned when their mothers fled into the surf, no injuries or mortalities were observed. Most animals were returning to shore within 2 hours of the disturbance (Stewart et al. 1993).

Since the noise level from Delta II launches is expected to be well below both these levels and the threshold criteria of 101 dBA identified by Stewart et al. (1993), no incidental harassment takings are anticipated to occur on the northern Channel Islands.

Cetaceans and pinnipeds in the water should also be unaffected by the sonic booms, although, depending upon location and ambient noise levels, some species may be able to hear the sonic boom. While the maximum magnitude of sonic booms from launches of the Delta II is unknown, because of its similarity in size and weight to the Lockheed launch vehicles (LLV) (see 60 FR 38308, July 26, 1995), the sonic boom signature from the largest of those vehicles (LLV—3—3.5 psf/125.6 dB), can be used to predict the impact by the Delta II. Pressure levels of this magnitude would be less than those measured for other launch vehicles, such as the Titan IV and the Space Shuttle, for which small take authorizations for harassment have been issued previously (see 56 FR 41628, August 22, 1991 and 51 FR 11737, April 7, 1986).

Although rough seas may provide some surfaces, at the proper angle, for sound to penetrate the water surface (Richardson et al. 1991, 1995), sound entering a water surface at an angle greater than 130° from the vertical has been shown to be largely deflected at the surface, with very little sound entering the water (Chappell 1980, Richardson et al. 1991). Chappell (1980) believes that a sonic boom would need to have a peak overpressure in the range of 138 to 169 dB to cause a temporary hearing threshold shift (TTS) in marine mammals, lasting at most a few minutes. Therefore, with only a remote likelihood that a marine mammal would be struck directly under the line of flight of the Delta II, and with the Delta II having overpressures below the threshold for potentially causing TTS in marine mammals, NMFS believes that sonic booms are not likely to result in the harassment of, or injury to, cetacean or pinniped populations in offshore waters of the SCB.

Mitigation

Unless constrained by other factors including, but not limited to, human safety, national security or launch
trajectories, efforts to ensure minimum negligible impacts of Delta II launches on harbor seals and other pinnipeds are proposed for inclusion in the Incidental Harassment Authorization. These proposals include:

1. A avoidance whenever possible of launches during the harbor seal pupping season of February through May; and
2. Preference for night launches during the period of the year when harbor seals are hauled out in any numbers along the coast of North Vandenberg.

Monitoring

NMFS proposes that the holder of the Incidental Harassment Authorization would monitor the impact of Delta II launches on the harbor seal haulouts in the vicinity of Spur Road and Purisima Point. The applicant proposes to conduct at least 3 sets of seal abundance and behavioral observations with the first no more than 7 days prior to the launch and the final set as soon as practicable after the launch. Video monitoring of daylight launches would also be required. A report on this monitoring program would be required to be submitted prior to next year's authorization request, unless the monitoring indicated that serious injuries or mortalities had occurred that might relate to the launching. In this case, the authorization would require immediate notification of this fact to the Southwest Regional Director, NMFS.

Conclusions

The short-term impact of the launching of Delta II rockets is expected to result at worst, in a temporary reduction in utilization of the haulout as seals or sea lions leave the beach for the safety of the water. Launchings are not expected to result in any reduction in the number of pinnipeds, and they are expected to continue to occupy the same area. In addition, there will be no impact on the habitat itself. Based upon studies conducted for previous space vehicle launches at Vandenberg, significant long-term impacts on pinnipeds at Vandenberg and the northern Channel Islands are unlikely.

Proposed Authorization

NMFS proposes to issue an incidental harassment authorization for 1 year for launches of the Delta II rocket at SLC-2W, provided the above-mentioned monitoring and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed launches of the Delta II at SLC-2W would result in the harassment taking of only small numbers of harbor seals and possibly other pinnipeds species, will have a negligible impact on pinniped stocks in the SCB and will not have an unmitigable adverse impact on the availability of these stocks for subsistence uses.

Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning this request (see ADDRESSES).

Dated: August 23, 1996.
Rennie S. Holt,
Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 96-22057 Filed 8-28-96; 8:45 am]
BILLING CODE 3510-22-F

[I.D. 082096E]

North Pacific Fishery Management Council; Committee Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory bodies will hold public meetings.

ADDRESSES: Sitka Centennial Building, 330 Harbor Drive, Sitka, AK 99835.

DATES: The meetings will be held during the week of September 16, 1996. See SUPPLEMENTARY INFORMATION for specific dates and times.

FOR FURTHER INFORMATION CONTACT: Council staff, Phone: 907-271-2809.

SUPPLEMENTARY INFORMATION: Committee meetings scheduled include the Ecosystems Committee and the Enforcement Committee. Other committee and workgroup meetings may be held on short notice during the week; notices will be posted at the meeting site. All meetings are open to the public with the exception of Council executive sessions to discuss personnel, international issues, and litigation. An executive session is tentatively scheduled for noon on September 19, 1996. The Advisory Panel (AP) and the Scientific and Statistical Committee (SSC) will begin on September 16, 1996, at 8:00 a.m. The SSC will conclude their meeting on September 18, 1996, and the AP will conclude their meeting by September 19, 1996. The Council will begin their meeting on September 18, 1996, at 8:00 a.m. and conclude on September 22, 1996. The Enforcement Committee and the Ecosystems Committee are both scheduled for 7:00 p.m. on September 18, 1996. The agenda for the meetings will include the following subjects:

1. Reports from the National Marine Fisheries Service and Alaska Department of Fish and Game on the current status of the fisheries off Alaska, reports on enforcement, the Bering Sea ecosystem, and the results from the socio-economic studies report on the sablefish and halibut individual fisheries quota program.
2. Report and recommendations from an industry committee on crab caps and closures in the Bering Sea/Aleutian Islands (BSAI) and final action on Tanner crab prohibited species caps (PSC).
3. Final action on measures to improve retention and utilization in the groundfish fisheries off Alaska.
4. Status report on modified pay-as-you-go observer program and initial review of a regulatory amendment to require additional observer coverage on shore plants and motherships during the pollock “A” season.
5. Under groundfish management, the following subjects will be discussed and appropriate action taken:
   b. Approve preliminary harvest and bycatch specifications for 1997 groundfish fisheries in the BSAI and GOA, including discard mortality rates for halibut and Vessel Incentive Program rate standards.
   c. Initial review of an amendment to remove dusky rockfish from the GOA pelagic shelf rockfish complex.
   d. Final action on revised directed fishing standards for turbot, Pacific cod and pollock in the arrowtooth fisheries and northern rockfish in the shortraker/rougheyre fisheries and proposed electronic reporting requirements.
   e. Initial review of amendments to ban night trawling for Pacific cod in the BSAI, to prohibit a directed fishery on forage fish, and to reduce percentage allowances for accounting for slime and ice on fish.
   f. Review of a proposed rule for seamount restrictions.
6. Under staff tasking the Council will review proposals received for amendments to the BSAI and GOA Groundfish Fishery Management Plans and for amendments to the Sablefish and Halibut IFQ Program and give direction to the staff for further analysis. The IFQ proposals will be forwarded to the Industry IFQ Implementation Team.
for review and comment prior to tasking staff with analyses.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Helen Allen, 907-271–2809, at least 5 working days prior to the meeting date.

Dated: August 21, 1996.

Richard H. Schaefer,
Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

SUMMARY: This notice requests public comment on new bidding options for the 1996 Washington State Salmon Vessel License Buy Out Program (LBOP) to be administered by the Washington Department of Fish and Wildlife (WDFW) through a cooperative agreement with NMFS. The objectives of the program are to provide financial assistance to commercial salmon fishermen adversely impacted by the salmon fishery disaster, and to aid the long-term viability of the fishery resource. This notice also responds to comments submitted on the notice of proposed 1996 LBOP, which was published in the Federal Register on April 23, 1996 (61 FR 17879). In that notice, NMFS announced certain administrative changes to the NEAP and requested comments on proposed NEAP revisions for the Habitat Restoration Program and the Data Collection Jobs Program, as well as the LBOP. On August 1, 1996, NMFS published a Federal Register notice (61 FR 40197) implementing the final program for the Habitat Restoration Jobs Program and Data Collection Jobs Program, and also announced that final decisions on the administration of the 1996 LBOP will be deferred until the public is provided with notice and an opportunity to comment on new bidding options developed as a result of comments received on the initial notice.

DATES: Written comments must be received on or before September 27, 1996.

ADDRESSES: Comments should be sent to Stephen P. Freese, Northwest Emergency Assistance Plan, Trade and Industry Services Division, Northwest Regional Office, National Marine Fisheries Service, BIN C15700, 7600 Sand Point Way NE, Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Stephen Freese, (206) 526-6113.

SUPPLEMENTARY INFORMATION: On August 2, 1995, the Secretary of Commerce (Secretary) declared that a fishery resource disaster continued in 1995 for the salmon fisheries of the Pacific States of California (north of San Francisco), Oregon, and Washington, excluding Puget Sound. Under the authority of the Interjurisdictional Fisheries Act (IFA) of 1986 (16 U.S.C. 4107(d)), as amended, an additional $12.7 million in Federal financial assistance was made available for affected salmon fishermen. In the April 23, 1996, Federal Register notice (61 FR 17879), NMFS announced its decision to continue the basic structure of the Habitat Restoration Jobs Program and the Data Collection Jobs Program, as first established on October 11, 1994 (59 FR 51419), with subsequent amendments published on January 31, 1995 (60 FR 3908), and June 22, 1995 (60 FR 32507). NMFS decided to modify certain limitations, terms, and conditions of the NEAP programs to enable more fishermen to benefit from the assistance available from the jobs programs and to further reduce fishing capacity under the LBOP. The public was asked in the notice to comment on these new terms, limitations, and conditions prior to final implementation.

With respect to the 1996 LBOP, four options were presented for public comment, as follows:

Option 1—Eligible fishermen submit new bids or maintain the bids that they submitted to the 1995 LBOP. Starting with the lowest offers, licenses are accepted and retired by WDFW until available funding is exhausted.

Option 2—Starting with the lowest unsuccessful 1995 LBOP offer, WDFW would purchase licenses until available funding is exhausted.

Option 3—Unsuccessful bidders in the 1995 LBOP are offered set fixed prices for each license: Salmon troll $38,000, and Salmon gill net $24,894, Salmon trawl $21,300, and delivery $8,394, Salmon gill net $38,000, and Salmon charter $21,300. Remaining funds would be applied to new applications starting with the lowest offer.

Option 4—Applicants submit bids and uninsured loss estimates. Starting with the lowest ratio of bid to uninsured loss, WDFW would purchase licenses until available funding is exhausted.

In response to the April 23, 1996, notice of proposed program, NMFS received 27 comment letters from 10 fishing associations, 14 fishermen, 1 tribe, and 2 government entities. Most of

Western Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Western Pacific Fishery Management Council will hold a meeting of its Bottomfish Task Force.

DATES: The meeting will be held on September 24, 1996, from 9:00 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at the Executive Center, 1088 Bishop St., Room 4003, Honolulu, HI; telephone: (808) 539–3000.

Council address: Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1405, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The task force will hold its third meeting to discuss and formulate limited entry alternatives for the Mau Zone bottomfish fishery in the Northwestern Hawaiian Islands and consider other business as required.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to meeting date.
these comments concerned the LBOP. The comments specifically relating to the NEAP Habitat Restoration Program and the Data Collection Jobs Program were considered and addressed in the Federal Register notice published on August 1, 1996. However, as a result of significant intervening factors between the time of publication and proposed implementation, NMFS and the State of Washington decided to defer the final decision on the 1996 LBOP. These intervening factors included consultations with Washington State officials, and comments on the initial notice indicating a lack of public consensus on any proposed bidding option. The Governor of Washington, citing this lack of consensus, also supported a delay of the program for consideration of new options. These new bidding options were developed in response to these intervening factors and are presented in this notice for public comment before a final decision is made. The comments and NMFS response to the initial notice (61 FR 17879) are presented below for purposes of addressing issues that were raised by commenters concerning the 1995 program and maintaining participation by the public in the development of the new options.

Comments and Responses

Because many comments referred to the 1995 LBOP, it is helpful to know the outcome of this program. Under the 1995 LBOP, 459 of the 1378 possible licenses were submitted and 296 licenses were ultimately purchased. The maximum amount paid for a gill net license under this program was $38,000; for a troll license, $24,984; and for a charterboat license, $21,300. The average compensation for the 83 gill net licenses purchased was $21,998; for the 190 troll licenses purchased, $9,136; and for the 23 charterboat licenses purchased, $13,896. There are potentially 163 repeat participants and 919 new participants for the 1996 LBOP.

Comment 1: Several commenters wanted to give preference to fishermen who participated in the 1995 LBOP, because the commenters felt that these unsuccessful bidders took the first risk and demonstrated the sincerest intentions of giving up their licenses. The commenters also felt that fishermen who chose not to participate in the 1995 LBOP clearly understood that they would have no chance to receive any benefit from the program. Therefore, the commenters argued that these nonparticipants would be no worse off under Option 2. In contrast, other members of the public commented that preference should not be given to unsuccessful bidders in the 1995 program because NMFS and WDFW never conditioned participation in any subsequent buy out program on participation in the initial program, and such an exclusion would unduly penalize a license holder who did not, for whatever reason, submit an offer under the 1995 program.

Response 1: Participation in the 1995 LBOP was voluntary and participating fishermen were given an opportunity to withdraw their offers and retain their licenses. Therefore, participation in the 1995 LBOP does not necessarily reflect "risk" or any greater "sincerity" to give up a license, particularly as many fishermen offered their licenses at the maximum price possible. NMFS agrees that neither the 1995 LBOP notice nor any other document ever stated that persons who did not participate in the 1995 LBOP would be excluded from future programs.

Comment 2: Many commenters addressed how the different bidding options would affect fishermen who suffered various levels of uninsured loss. Some stated that Option 1 favored those with low uninsured losses, while others believed that Option 4 favored the highly productive fishing operations that have the largest uninsured losses. Finally, compared with the other options, some said that Option 2 tended to give preference to those fishermen who had neither low nor high uninsured losses.

Response 2: The purpose of these options was not to target any specific sector of the industry, but to present methods by which the agency and WDFW proposed to achieve the NEAP objectives of providing financial assistance to commercial fishermen adversely impacted by the salmon fishery disaster, and to aid the long-term viability of the fishery resource. NMFS and the State of Washington, after review of the comments, will choose the option that most effectively achieves the NEAP objectives.

Comment 3: Several commenters stated that the 1995 LBOP forced fishermen to accept a fraction of their uninsured loss.

Response 3: NMFS stresses again that the LBOP is a voluntary program, not an entitlement program. Fishermen are asked to put a monetary value on their own licenses. Fishermen who do not feel the program provides enough compensation are not compelled to participate.

Comment 4: Several commenters commented that Option 2 was the most cost-effective option.

Response 4: Of the options presented, Option 2 does appear to have the least administrative costs, since it relies on existing bids. However, the administrative costs associated with the new options, in relation to the benefits, do not differ significantly. While NMFS and the State of Washington must obviously consider the impact of administrative costs on the program, NMFS will choose the option that best meets the program's objectives.

Comment 5: Several commenters said that the proposed program was not like the NMFS Fishing Capacity Reduction Demonstration Program for Northeast groundfish vessels (FCRDP), while another commenter complained that the procedure proposed in Option 4 negates the competitive process and unnecessarily complicates the program.

Response 5: The reference in the proposed program notice to the FCRDP was to suggest that Option 4 adjusts bids via a vessel performance procedure in a way that is similar to the FCRDP bidding process. NMFS does not believe that the procedure complicates the program, because it releases the same information that would have to be submitted for other options. Furthermore, NMFS received no negative comments from the FCRDP participants that indicated any miscomprehension of the bidding system.

Comment 6: Several fishermen commented that the new bidders would have an advantage because information has been published on the 1995 individual bids and associated losses. NMFS stresses again that the LBOP is a voluntary program, not an entitlement program. But to present methods by which the agency and WDFW proposed to achieve the NEAP objectives of providing financial assistance to commercial fishermen adversely impacted by the salmon fishery disaster, and to aid the long-term viability of the fishery resource. NMFS and the State of Washington, after review of the comments, will choose the option that most effectively achieves the NEAP objectives.

Comment 7: One fisherman argued that Option 2 should be adopted, because the additional funds were meant to continue the same programs, which should, in effect, "pick up where they left off." Another commented that the notice of proposed program referred to a continued disaster. Therefore, they argued, it would be prejudicial to former, unsuccessful applicants to deny them the opportunity to "continue" to accept or reject their original bids. On the other hand, another fisherman commented that the WDFW and NOAA documents show that the 1996 LBOP is
a separate and distinct program from the 1995 LBOP.

Response 7: The Secretary established the NEAP as an overarching financial assistance plan to assist the Pacific Northwest in coping with the fisheries disasters that occurred before and up until 1995. Under the plan, NMFS created the individual NEAP grant programs, such as the Habitat Restoration Jobs Program, the Data Collection Jobs Program, and the LBOP. These programs each have unique award terms, limitations, and conditions. The new funding provided for the programs described in the proposed notice does not obligate NMFS to continue the programs with the same program parameters; NMFS has the discretion to create new programs with the same or different terms, limitations, and conditions. Based on the comments and consultations with State of Washington officials, NMFS has determined that a new LBOP with new parameters should be considered.

Comment 8: Several commenters stated that fishermen should be allowed to sell more than one license.

Response 8: The initial proposed options and the options being proposed below do not restrict the number of licenses that may be sold by one applicant. However, NMFS is specifically requesting comment on this issue as part of the new options presented below in this notice.

Comment 9: One respondent requested that fleet reduction targets be determined and that reentry into the fishery be delayed until each fleet meets its reduction target.

Response 9: Funds were allocated between the industry sectors (see Response 15) consistent with recommendations from the NMFS Proposed Recovery Plan for Snake River Salmon, which calls for reduction of the Oregon and Washington troll fleet by 50 percent and elimination of all gill net fishing on the mainstem of the Columbia River. In addition, the new Option 2 proposed below includes restrictions on reentry into the fleet.

Comment 10: One commenter stated that a fisherman who sells a permit under the 1996 LBOP should be ineligible to purchase another permit.

Response 10: The new Option 2, which is described below, addresses this comment by prohibiting a person who sells a license in the 1996 program from purchasing a commercial license for 10 years, beginning January 1, 1997.

Comment 11: Many commenters voiced concerns about timing and communication with the industry. Some thought additional meetings between Federal and State officials and the industry would be useful, while others supported a delay in the program to aid communication with the industry and to improve the design of the program.

Response 11: NMFS and the State of Washington are postponing final decisions on the 1996 LBOP in order to receive comments on the new options presented below. This delay should provide a greater opportunity for public participation through the established Federal and Washington State public comment processes.

Comment 12: Several commenters complained that not all affected parties had an equal opportunity to meet with State and Federal officials.

Response 12: The Administrative Procedure Act does not prohibit contact with the public during the informal rulemaking process as long as the content of the meetings, and any supplementary information provided at the meetings, are made part of the public record. NMFS recognizes the benefit of public participation in the decision making process, and therefore, representatives of NOAA, NMFS, and the Governor of Washington met with various sectors of the affected public during the option development stage and comment period. NMFS is willing to meet with anyone who is interested in discussing the program, time and resources permitting.

Comment 13: One commenter alleged that WDFW officials provided misinformation about the limits to bidders, causing some to "sell out" at too low a price and others not to bid. The commenter also suggested that the application pool should explicitly the importance of choosing a bid amount since high bids may make the application less competitive.

Response 13: NMFS has forward these comments to WDFW.

Comment 14: Some commenters opposed any potential application to the 1996 LBOP of the $25,000/$50,000 maximum income limitation used in the Habitat Restoration Jobs Program and Data Collection Jobs Program.

Response 14: The $25,000/$50,000 maximum income limitation was not proposed and is not being considered for this program.

Comment 15: One commenter suggested that because gill net vessels have fewer options compared to most troll and charter vessels, compensation for gill net licenses should be treated differently than for other commercial permits.

Response 15: The 1996 LBOP allocates $2.3 million for the purchase of salmon troll and delivery licenses, $2.3 million for the purchase of Columbia River gill net licenses, and $0.4 million for salmon charter licenses. These allocations reflect an appreciation for the different circumstances facing the major industry sectors. However, further specialization of the program to accommodate each industry sector would be too administratively burdensome and would undermine the goal of equitable and efficient distribution of the disaster funds.

Comment 16: One fisherman who moved his operation to Alaska because of the Boldt Decision requested that the income from Alaska be used to determine uninsured loss. He further requested inclusion of income from years before 1988.

Response 16: The Secretary's disaster declaration limits assistance to the salmon fisheries of California, Oregon, and Washington, excluding Puget Sound, and NMFS has defined the disaster period as extending only to the years 1991 through 1995.

Comment 17: One tribal organization made three related comments. First, buy out programs for non-tribal fishermen should be continued. Second, each tribe should receive its own allocation of NEAP funds. Third, NEAP should include programs that help tribes develop new non-salmon fisheries.

Response 17: As currently structured, the proposed 1996 LBOP allows participation by both tribal and non-tribal fishermen. Available funding is insufficient to provide individual allocations and programs for each particular user group.

Proposed Revisions to the 1996 LBOP

Based on above comments and discussions with Washington State officials concerning the four initial options proposed, NMFS and the State of Washington agreed to work together in developing new options. These options share similar characteristics with Options 1 and 4 presented in the proposed notice of April 23, 1996, but with certain important differences. One difference is that the calculation of uninsured loss is no longer necessary under the amended IFA. However, NMFS will retain the concept and require fishermen to calculate their "salmon disaster impact" (SDI), which is a value analogous to the calculation of uninsured loss under the initial buy out program. A fisherman's SDI is equal to 2.5 times the difference between the highest gross salmon fishery income derived from fishing during any calendar year 1986 through 1991 (base year), less the sum of the least amount of salmon fishery income derived from commercial salmon fishing during any calendar year from 1991 through 1995 (comparison year). Fishermen can use
the same information they supplied to the 1995 LBOP to determine their SDI. The use of SDI in place of an uninsured loss determination puts similar restrictions on new participants as were placed on the original participants. Therefore, no large penalty or reward accures to those who participated in the initial program.

The options in this notice also differ from those published on April 23, 1996, in that bids would also be constrained by an absolute maximum offer limit. Under Option 1, fishermen may offer their licenses for any amount up to $40,000 or their SDI, whichever is less. Similarly, under Option 2, fishermen may offer their licenses for any amount up to $50,000 or their SDI, whichever is less. The higher maximum offer limit under Option 2 ($50,000) reflects the additional requirement that successful participants cannot purchase or operate another commercial salmon license for 10 years beginning January 1, 1997, unless the license was owned or operated by that person in 1995. If the individual owned a license in 1995, this is indicative of the fact that the person owned multiple licenses and did not purchase a new license in 1996 in order to speculate on any future government buy out program. Therefore, any license owned in 1995 and retained after participation in the 1996 LBOP is excluded from the ten-year prohibition.

These maximum offer limits are designed to increase the number of potential successful bidders and ensure awards consistent with amounts paid under the initial program. These limits are reasonable given the limited funds available, the amounts paid for licenses under the initial program, and the number of fishermen affected by the disaster and still eligible for the program. Comments are specifically requested on these maximum offer amounts.

Eligibility Criteria

To be eligible under either option, the person making the offer must fulfill the following requirements:

1. The person making the offer must have possessed or was eligible to possess one of the following Washington State salmon fishery licenses in 1994 and possessed the same license in 1995:
   a. Salmon troll license;
   b. Salmon delivery license;
   c. Salmon gill net—Grays Harbor-Columbia River;
   d. Salmon gill net—Willapa Bay-Columbia River; or
   e. Salmon charter.
2. A participant must demonstrate an SDI greater than $0.
3. Applicants must not have earned more than $2,000,000 in net revenues annually from commercial fishing for the period between 1991 and 1994.

Options

Option 1—License holders may offer their licenses for any amount up to $40,000 or their SDI, whichever is less. Licenses will be purchased starting with the lowest bid. In the event of a tie, preference will be given to the fisherman with the highest SDI.

Option 2—License holders may offer their licenses for any amount up to $50,000 or their SDI, whichever is less. Bids will be ranked according to the offer ratio. The offer ratio is the division of the offer amount by the SDI. Licenses will be ranked and purchased starting with those bids that have the lowest offer ratios. In the event of a tie, where offer ratios are identical, the lowest offer will be given preference. Successful participants cannot purchase or operate another commercial salmon license for 10 years beginning January 1, 1997, unless the license was owned or operated by that person in 1995.

Option 1 Example

Step 1: Determine SDI

Step 1A: Base Year Selection:

Select the highest year of gross income during the base period 1986 through 1991. For Fisherman A, this is $38,000. For Fisherman B, this is $8,000.

Step 1B: Comparison Year Selection:

Select the lowest year of gross income during the comparison year of 1991 through 1995. For Fisherman A, this is $3,000. For Fisherman B, this is $0.

Step 1C: Subtraction

Subtract the selected comparison year gross income from the selected base year income. For Fisherman A, this is $38,000 minus $3,000, or $35,000. For Fisherman B, this is $8,000 minus $0, or $8,000.

Step 1D: Multiplication

Multiply the difference between the comparison year and base year gross income by 2.5. For Fisherman A, this is $35,000 multiplied by 2.5, or $87,500. For Fisherman B, this is $8,000 multiplied by 2.5, or $20,000.

Step 1E: SDI Determination

SDI is the result of steps 1A through 1D. Fisherman A’s SDI is $87,500 (($38,000 - $3,000) X 2.5 = $87,500). Fisherman B’s SDI is $20,000 (($8,000 - $0) X 2.5 = $20,000).

Step 2: Determine Maximum Offer Amount

The maximum offer amount under Option 1 is $40,000 or the fisherman’s SDI, whichever is less. Fisherman A’s SDI is $87,500, which is greater than $40,000. Therefore, Fisherman A’s maximum bid is $40,000 because $40,000 is the maximum any fisherman can receive under this option.

Fisherman B’s maximum bid is $20,000 because his SDI is less than $40,000.

Step 3: Determine Bid

Fishermen can choose to submit an offer that ranges from $1 to their maximum offer limit. Fisherman A’s range is from $1 to $40,000. Fisherman B’s range is from $1 to $20,000.

Ranking of Bids under Option 1

If both Fisherman A and Fisherman B submit their respective maximum offers, Fisherman B’s offer would be accepted first because it is less than Fisherman A’s offer. If Fisherman A elected to submit an offer of $19,000 and Fisherman B elected to submit a maximum offer of $20,000, then Fisherman A’s offer would be accepted first because it is less than Fisherman B’s offer. In the event of a tie between fishermen, preference will be given to the fisherman with the highest SDI. Therefore, if both Fisherman A and Fisherman B submit offers of $19,000, then Fisherman A would be given preference because Fisherman A’s SDI is higher than Fisherman B’s.

Option 2 Example

Step 1: Determine SDI (Same as Steps 1 through 1E in Option 1 Example)

Step 2: Determine Maximum Offer Amount

The maximum offer amount under this option is $50,000 or the fisherman’s SDI, whichever is less. Fisherman A’s SDI is $87,500, which is greater than $50,000. Therefore, Fisherman A’s maximum bid is $50,000 because $50,000 is the maximum any fisherman can receive under this option.

Fisherman B’s maximum bid is $20,000 because his SDI is less than $50,000.

Step 3: Determine Offer

Fishermen can choose to submit an offer that ranges from $1 up to their maximum offer limit. Fisherman A’s range is from $1 to $50,000. Fisherman B’s range is from $1 to $20,000.

Step 4: Determine Offer Ratio

Divide the amount offered by the fisherman’s SDI. If Fisherman A chose to offer the maximum of $50,000, then Fisherman A’s ratio would be $50,000/
divided by $87,500, which is equal to 0.57. If Fisherman B chose to offer his SDI ($20,000), then Fisherman B’s offer ratio would be $20,000/20,000 = 1.0.

Ranking of Bids under Option 2

If both Fisherman A and Fisherman B elected to submit their respective maximum offers, Fisherman A’s offer would be the first accepted because the 0.57 offer ratio is less than 1.0. If Fisherman B elected to submit an offer of $11,000, then Fisherman B’s offer ratio would be 0.55 ($11,000/$20,000). Because Fisherman B’s offer ratio is lower than Fisherman A’s offer ratio, Fisherman B’s offer would be accepted first. In the event of a tie with identical offer ratios, preference will be given to the fishermen with the lowest offer amount.

Additional Terms, Limitations, and Conditions

A license holder may offer more than one license, but income used in the calculation of an offer that is accepted may not be used in the calculation of any other offer. Licenses will be purchased in order of ranking until funds are exhausted. The State of Washington, in consultation with NMFS, will reserve the right to reject any and all offers if it is determined by NMFS that such action is in the best interests of the program or if revisions to the program are warranted in the future.

Proprietary information submitted by applicants will only be disclosed to State and Federal officials who are responsible for the License Buy Out Program, or otherwise when required by court order or other applicable law. This information is subject to the Freedom of Information Act.

Catalogue of Federal Domestic Assistance

The Program is listed in the “Catalogue of Federal Domestic Assistance” under No. 11.452, Unallied Industry Projects.

Classification

This action has been determined to be not significant for purposes of E.O. 12866. The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this notice would not have a significant economic impact on a substantial number of small entities because only a small portion of West Coast salmon fishermen will be directly affected. NMFS estimates that only approximately 3.6 percent of the industry will receive financial assistance through the LBOP. Therefore, the impacts of the notice are not significant within the meaning of the Regulatory Flexibility Act. They are not likely to lead to a reduction in the annual gross revenues by more than 5 percent or an increase in total costs of production by more than 5 percent, nor would this action result in any greater compliance costs.

This program involves a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). The collection of this information has been approved by the Office of Management and Budget (OMB), under OMB control number 0648-0288. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.


Dated: August 22, 1996.

C. Karnella,
Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 96-21997 Filed 8-28-96; 8:45 am]
BILLING CODE 3510-22-F

DEPARTMENT OF DEFENSE

Office of the Secretary

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: CHAMPUS Claim Form—Patient’s Request for Medical Payment; DD Form 2642, OMB Number 0720-0006.

Type of Request: Reinstatement, with change.

Number of Respondents: 1,500,000.

Responses Per Respondent: 1.

Annual Responses: 1,500,000.

Average Burden Per Response: 15 minutes.

Annual Burden Hours: 375,000 hours.

Needs and Uses: Respondents to this information collection are beneficiaries claiming reimbursement for medical expenses under the Civilian Health and Medical Program for the Uniformed Services (TRICARE/CHAMPUS). DD Form 2642, CHAMPUS Claim—Patient’s Request for Medical Payment, is used by TRICARE/CHAMPUS beneficiaries to file for reimbursement of costs paid to providers and suppliers for authorized health care services or supplies. The information collected will be used to determine beneficiary eligibility, other health insurance liability, and certification that the beneficiary received the care.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent’s Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Allison Eydt.

Written comments and recommendations on the proposed information collection should be sent to Ms. Eydt 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 request 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 August 23, 1996.

Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 96-21997 Filed 8-28-96; 8:45 am]
BILLING CODE 5000-04-M

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Service (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that Walter Reed Army Medical Center (WRAMC), and National Naval Medical Center (NNMC), have been designated as the components of a Multi-Regional Specialized Treatment Services (STS) Facility for Cardiac Surgery for TRICARE Regions 1 and 2. This designation covers the following Diagnosis Related Groups: 104—Cardiac valve procedure with cardiac cath 105—Cardiac valve procedure without cardiac cath 106—Coronary bypass with cardiac cath 107—Coronary bypass without cardiac cath 108—Other cardiothoracic procedures.
110—Major cardiovascular procedures with cardiac cath
111—Major cardiovascular procedures without cardiac cath

Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one nonmedical attendant, will be reimbursed by WRAMC or NNMC in accordance with the provisions of the Joint Federal Travel Regulation. All DoD beneficiaries who reside in the Multi-Regional STS Catchment Area for TRICARE Region 1 which includes participation by TRICARE Region 2 must be evaluated by WRAMC or NNMC before receiving CHAMPUS cost sharing for procedures that fall under the above Diagnosis Related Groups. Evaluation in person is preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It is possible to conduct the evaluation telephonically if the patient is unable to travel to WRAMC or NNMC. If the procedure cannot be performed at WRAMC or NNMC, the facility will provide a medical necessity review in order to support issuance of a Nonavailability Statement.

The Region 1 Multi-Regional STS Catchment Area covering TRICARE Regions 1 and 2 is defined by zip code in the Defense Medical Information System STS Facilities Catchment Area Directory, dated December 1, 1995. The Catchment Area includes zip codes within TRICARE Regions 1 and 2 in the District of Columbia and the states of Delaware, Maryland, New Jersey, New York, North Carolina, Pennsylvania and Virginia that fall within a 200 mile radius of the midpoint of a line between WRAMC and NNMC.

EFFECTIVE DATE: October 1, 1996.

FOR FURTHER INFORMATION CONTACT: Colonel Dennis Moritz, WRAMC, at (202) 762-6433, Captain Edward Zech, NNMC, at (301) 295-2552, or Colonel Michael Dunn, OSD (Health Affairs), at (703) 695-6800.

SUPPLEMENTARY INFORMATION: In FR Doc. 96-21998 Filed 8-28-96; 8:45 am

U.S. Court of Appeals for the Armed Forces Code Committee Meeting

ACTION: Notice of public meeting.

SUMMARY: This notice announces the forthcoming public meeting of the Code Committee established by Article 146(a), Uniform Code of Military Justice, 10 U.S.C. 946(a), to be held at 10:00 a.m. on September 30, 1996 in the Court Conference Room, United States Court of Appeals for the Armed Forces, 450 E Street, Northwest, Washington, DC 20442-0001. The agenda for this meeting will include consideration of proposed changes to the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1984, as well as other matters relating to the operation of the Uniform Code of Military Justice throughout the Armed Forces.

DATE: September 30, 1996.

FOR FURTHER INFORMATION CONTACT: Thomas F. Granahan, Clerk of Court, United States Court of Appeals for the Armed Forces, 450 E Street, Northwest, Washington, DC 20442-0001, telephone (202) 761-1448.

Dated: August 26, 1996.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

FOR FURTHER INFORMATION CONTACT:

Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for Long-Term Dredged Material Management at St. Joseph Harbor, MI

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent to prepare a Draft Environmental Impact Statement (DEIS).

SUMMARY: The U.S. Army Corps of Engineers, Detroit District, is evaluating the environmental impacts of long-term dredged material management alternatives for St. Joseph Harbor, Michigan. The Federal navigation project includes 7,700 feet of channel with authorized depths from 18 to 21 feet. Sandy material dredged from the outer harbor is used for beach nourishment—a beneficial use that restores eroding beaches in the harbor vicinity. Beach nourishment continues to be an effective, beneficial long-term dredged material management tool for the outer harbor. The inner harbor dredged material, which is silty, traditionally has been placed at various upland sites; however, these sites are either full or no longer available. Thus, a 20-year long-term dredged material management plan is being developed for the inner harbor. Alternatives under consideration include open-water placement, new upland placement sites, and beneficial use. The no Federal action alternative will also be considered.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and DEIS can be directed to Mr. Lee E. Weigum, Chief, Environmental Analysis Branch; Engineering & Planning Division; U.S. Army Engineer District, Detroit; P.O. Box 1027; Detroit, Michigan 48231–1027. Telephone 313-226-6752.

SUPPLEMENTARY INFORMATION: St. Joseph Harbor lies along the southeast shore of Lake Michigan, about 60 miles east-northeast from Chicago, Illinois. The harbor is formed by the lower reaches of the St. Joseph River, which flows between the cities of St. Joseph, Michigan, on the south, and Benton Harbor, Michigan, on the north. The cities of St. Joseph and Benton Harbor have several deep-draft facilities at the harbor. The harbor has several commercial wharves handling coal, building materials, petroleum products, and miscellaneous commodities. St. Joseph Harbor is also used by a variety of recreational craft, including several charter fishing boats.

The Federal navigation project at St. Joseph, including operation and maintenance activities, is authorized by the River and Harbor Act of March 3, 1875, and subsequent acts. The project includes a channel, with an authorized depth of 21 feet, extending 6,900 feet up the St. Joseph River from Lake Michigan to the mouth of the Paw Paw River, and varying in width from 265 feet at the channel entrance to 110 feet at the Paw Paw River. The channel extends an additional 800 feet up the Benton Harbor Canal to Riverview Drive, with an authorized depth of 18 feet and a width of 80 feet. Two 18-foot deep turning basins lie on either side of the channel near the mouth of the Paw Paw River.

Dredged material management for St. Joseph Harbor historically has consisted of two strategies: The outer harbor material, which is primarily sand, is used to nourish adjacent eroding beaches; whereas the inner harbor material, which contains silt, has been placed at various upland sites for final storage or beneficial use. Maintenance dredging of the outer harbor, which includes the entrance canal from Lake Michigan through the breakwaters and...
revetments to approximately the Coast Guard station (about 2,800 feet), is required to project management of 350,000 cubic yards of dredged material over the next 20 years. This material would continue to be beneficially used for nourishment of eroding beaches in the harbor vicinity.

The inner harbor material, which is silty, is dewatered at an interim site (Whirlpool site) and later trucked to various upland sites for final storage or beneficial use. Previously used upland sites are either full or no longer available. Maintenance dredging of the inner harbor is projected to require management of 300,000 cubic yards of dredged material over the next 20 years. Therefore, the U.S. Army Corps of Engineers, Detroit District, is evaluating the environmental impacts of new long-term dredged material management alternatives for dredged material from the inner harbor. The environmental evaluation will be coordinated with the development of a 20-year Dredged Material Management Plan for the harbor.

Two specific dredged material management alternatives have been identified: Placement at an upland site at the Southwest Michigan Regional Airport in Benton Harbor, Michigan, and placement at a previously used (1970s and early 1980s) open-water site. Beneficial use applications will also be explored. The no Federal action alternative will be considered and will serve as a baseline from which to measure the impacts of the action alternatives. The 20-year management plan may consist of a combination of alternatives and beneficial use applications.

The upland site lies between the airport and the Paw Paw River, extending about 3,000 feet along an embankment at the western runway end. The site extends from the top of the bank, about 550 feet toward the river, with a change in elevation of over 30 feet. The site includes trees, shrubs, and open grassy areas. Below the site is a marshy area that borders the Paw Paw River. Dredged material placement would avoid the marsh areas, if possible. Dredged material placement at the airport site may include beneficial use by providing fill to build-up the area beyond the end of the runway, which would accommodate the development of a runway safety area.

The open-water site is an area, approximately ½-mile by ½-mile, located on the bottom of Lake Michigan, about 1½ miles due west from the northern pier head. The site has sufficient water depth (approximately 50 feet) to prevent significant disturbance of the dredged material by wind and storm induced wave action in the lake. Dredged material would be transported directly from the dredging operation to the open water site by floating plant (such as a barge or a bottom dumping dredge), hydraulic pipeline, or other similar methods. The suitability of the dredged material for open-water placement will be determined in accordance with the Great Lakes Dredged Material Testing and Evaluation Manual (U.S. Environmental Protection Agency and U.S. Army Corps of Engineers 1994), which presents testing and evaluation guidance for proposed discharges of dredged material into the waters of the United States within the Great Lakes Basin.

Significant issues to be analyzed include potential impacts on wetlands, water quality, fish and wildlife habitat, and cultural resources. Social impacts, including impacts upon recreation, aesthetics, and the local economy, will also be considered. The proposed dredged material management plan alternatives will be reviewed for compliance with the Fish and Wildlife Act of 1956; the Fish and Wildlife Coordination Act of 1958; the National Historic Preservation Act of 1966; the National Environmental Policy Act (NEPA) of 1969; the Clean Air Act of 1970; the Coastal Zone Management Act of 1972; the Endangered Species Act of 1973; the Water Resources Development Act of 1976; the Clean Water Act of 1977; Executive Order 11993, Protection and Enhancement of the Cultural Environment, May 1971; Executive Order 11998, Flood Plain Management, May 1977; Executive Order 11990, Wetland Protection, May 1977; and Corps of Engineers, Dept. of the Army, 33 CFR Part 230, Environmental Quality: Policy and Procedure for Implementing NEPA.

The proposed dredged material management plan will be coordinated with the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the Michigan Department of Environmental Quality, the Michigan Department of Natural Resources, Michigan State Historic Preservation Office, and local and regional Indian tribes. All Federal, State, and local agencies, Indian tribes, and other private organizations and parties are invited to participate in the proposed project review. Questions, concerns, and comments may be directed to the address given above. It is anticipated that the Draft Environmental Impact Statement would be made available in February 1998 for a 45-day public review period. During the public review period, the Corps of Engineers and the local project sponsor would hold a public meeting in the St. Joseph Harbor vicinity.

Dated: August 16, 1996.

Thomas C. Haid,
Lieutenant Colonel, U.S. Army, District Engineer.

[FR Doc. 96–22079 Filed 8–28–96; 8:45 am]

BILLING CODE 3710–GA–M

DEPARTMENT OF EDUCATION

Advisory Council on Education Statistics; Partially Closed Meeting

AGENCY: Advisory Council on Education Statistics, ED.

ACTION: Notice of Partially Closed Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Education Statistics (ACES). 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 the open portions of the meeting.

DATES: September 11–13, 1996.

TIMES: September 11—Full Council, 1:00 p.m.–5:30 p.m. (open); September 12—Management Committee, 8:30 a.m.–5:00 p.m. (closed from 1:00 p.m.–5:00 p.m.); Statistics Committee, 8:30 a.m.–5:00 p.m., (open); Strategy/Policy Committee, 8:30 a.m.–5:00 p.m., (open); September 13—Full Council, 8:30 a.m.–9:30 a.m. (closed) and 9:30 a.m.–1:00 p.m. (open).

LOCATION: 80 F Street, NW., Room 100, Washington, DC 20208–7575. The Committee meetings will take place in the following locations: Management-Room 326a; Strategy/Policy-Room 326b; Statistics-Room 322.


SUPPLEMENTARY INFORMATION: The Advisory Council on Education Statistics (ACES) is established under Section 406(c)(1) of the Education Amendments of 1974, Pub. L. 93–380. The Council is established to review general policies for the operation of the National Center for Education Statistics (NCES) in the Office of Educational Research and Improvement and is responsible for advising on standards to ensure that statistics and analyses disseminated by NCES are of high
quality and are not subject to political influence. In addition, ACES is required to advise the Commissioner of NCES and the National Assessment Governing Board on technical and statistical matters related to the National Assessment of Education Progress (NAEP).

The proposed agenda includes the following:
- Discussion of NCES’s next steps in implementing the redesign of the National Assessment of Education Progress (NAEP).
- An update and discussion on the Third International Mathematics and Science Study (TIMSS).
- Individual meetings of the three ACES committees which will focus on specific topics. The agenda for the Management Committee includes a report on the preliminary findings from NCES’s customer survey and related customer service activities. In addition, there will be discussions of a design feasibility grant competition to solicit ideas on a redesigned NAEP. If these portions of the meeting were held in open session, the possible disclosure of the Department’s position might affect decisions by third parties outside the Government. These discussions would be likely to significantly frustrate implementation of a proposed agency action if conducted in open session. These portions of the meeting will be closed under the authority of Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. Appendix 2) and under exemption (9)(B) of Section 522b(c) of Title 5 U.S.C.

The agenda for the Statistics Committee includes issues surrounding background variables in NAEP, and the potential for linking data from the TIMSS and NAEP. The agenda for the Strategy/Policy Committee includes review of a draft strategic plan for NAEP and the use of criteria for decisionmaking on the NCES budget. A summary of the activities of the closed sessions and related matters which are informative to the public consistent with the policy of Title 5 U.S.C. 551b(c) will be available within 14 days of the meeting. Records are kept of all Council proceedings and are available for public inspection at the Office of the Executive Director, Advisory Council on Education Statistics, 555 New Jersey Avenue, NW., Room 400, Washington, DC 20208–7575.

Sharon P. Robinson,
Assistant Secretary for Educational Research and Improvement.

DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

[Docket No. TM96–14–23–001]

Eastern Shore Natural Gas Company; Notice of Proposed Changes In FERC Gas Tariff
August 23, 1996.

Take notice that Eastern Shore Natural Gas Company (ESNG) tendered for filing on August 20, 1996 certain revised tariff sheets in the above captioned docket as part of its FERC Gas Tariff, First Revised Volume No. 1, with proposed effective dates of April 1, 1996 and August 1, 1996, respectively. ESNG states the purpose of the instant filing is to supplement ESNG’s August 5, 1996 storage tracker filing in Docket No. TM96–14–23–000 (August 5, 1996 filing) in order to reflect demand and capacity rates charged by Transcontinental Gas Pipe Line Corporation (Transco) under its LSS Rate Schedule, the costs of which are included in ESNG’s Rate Schedule LSS. More specifically, its filing (a) makes a correction on 2nd Sub 1st Rev Sub 78th Rev Sheet No. 6 due to a typing error under its CFSS Rate Schedule Demand Charge, and (b) tracks changes from Transco in its supplemental filing in its Docket No. TM96–15–29–000, et. al. dated August 8, 1996. ESNG further states its tracking filing is being filed pursuant to Section 24 of the General Terms and Conditions of ESNG’s FERC Gas Tariff to reflect changes in ESNG’s jurisdictional rates.

ESNG states that copies of the filing have been served upon its jurisdictional customers and interested State Commissions.

Eastern Shore states that copies of the filing have been served upon its jurisdictional customers and interested State Commissions. Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with 18 CFR 385.211 of the Commission’s Rules and Regulations. All such protests should be filed on or before August 27, 1996. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 96–22018 Filed 8–28–96; 8:45 am]
BILLING CODE 6717–01–M

[Project No. 2375; Project No. 8277 Maine]

International Paper Company; Otis Hydroelectric Company; Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places
August 23, 1996

Rule 2010 of the Federal Energy Regulatory Commission’s (Commission) Rules of Practice and Procedure provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding. The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect to the phase or issue in the proceeding for which the list is established.

The Commission is consulting with the Maine State Historic Preservation Officer (hereinafter, SHPO) and the Advisory Council on Historic Preservation (hereinafter, Council) pursuant to the Council’s regulations, 36 CFR Part 800, Implementing Section 106 of the National Historic Preservation Act, as amended, (16 U.S.C. Section 470l), to prepare a programmatic agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places at Project No. 2375 and Project No. 8277.

The programmatic agreement, when executed by the Commission, the SHPO, and the Council, would satisfy the Commission’s Section 106 responsibilities for all individual undertakings carried out in accordance with the licenses until the licenses expire or are terminated (36 CFR 800.13(e)). The Commission’s responsibilities pursuant to Section 106 for the above projects would be fulfilled through one programmatic agreement which the Commission proposes to draft in consultation with certain parties listed below. The executive programmatic agreement would be incorporated into any orders issuing licenses.

1 18 CFR Section 385.2010.
International Paper Company and Otis Hydroelectric Company, as prospective licensees for Project No. 2375 and Project No. 8277, respectively, are invited to participate in consultations to develop the programmatic agreement and to sign as concurring parties to the programmatic agreement.

For purposes of commenting on the programmatic agreement, we propose to restrict the service list for Project No. 2375 and Project No. 8277 as follows:

Mr. Dave Beaudoin, International Paper, Riley Road, Jay, ME 04239
Mr. R. Alec Giffen, Land & Water Associates, 9 Union Street, Hallowell, ME 04347
Mr. Steve Groves, International Paper, Riley Road, Jay, ME 04239
Mr. Bob Hunziker, International Paper, Two Manhattanville Road, Purchase, NY 10577
Mr. Gary Liimatainen, Kleinschmidt Associates, 75 Main Street, Pittsfield, ME 04967
Mr. Earle G. Shettleworth, State Historic Preservation Officer, Maine Historic Preservation Commission, 55 Capitol Street, State House Station 65, Augusta, ME 04333
Dr. Art Spiess, Archaeologist, Maine Historic Preservation Commission, 55 Capitol Street, State House Station 65, Augusta, ME 04333

Any person on the official service list for the above-captioned proceedings may request inclusion on the restricted service list, or may request that a restricted service list not be established, by filing a motion to that effect within 15 days of this notice date.

An original and 8 copies of any such motion must be filed with the Secretary of Commission (888 First Street, N.W., Washington, D.C. 20426) and must be served on each person whose name appears on the official service list. If no such motions are filed, the restricted service list will be effective at the end of the 15 day period. Otherwise, a further notice will be issued ruling on the motion.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 96–22016 Filed 8–28–96; 8:45 am]
BILLING CODE 6717–01–M

OkTex Pipeline Company; Notice of Proposed Changes In FERC Gas Tariff
August 23, 1996.

Take notice that on August 19, 1996, OkTex Pipeline Company ("OkTex") tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, an original and five copies of the following tariff sheets:

- Eighth Revised Sheet No. 5
- Revised Sheet No. 5

OkTex states that the Eighth Revised Sheet No. 5 reduces the OkTex Annual Charge Adjustment Clause ("ACA") from $0.0023 to $0.0020 per MMBtu. OkTex requests that the above-referenced tariff sheets become effective on October 1, 1996. Copies of the filing were served upon the Company's jurisdictional customers and upon interested state commissions.

Any person desiring to be heard or to protect said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestant 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 available for public inspection.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 96–22017 Filed 8–28–96; 8:45 am]
BILLING CODE 6717–01–M

Transcontinental Gas Pipe Line Corporation; Notice of Informal Settlement Conference
August 23, 1996.

Take notice that an informal settlement conference will be convened in this proceeding on August 29, 1996. The conference will begin at 10:00 a.m. at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in a conference room to be designated. The purpose of the conference is to explore the possibility of settlement of the above-referenced docket. Any party, as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b) is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission’s regulations (18 CFR 385.214).

For additional information, contact Russell Mamone at (202) 208–0744 or Donald Heydt at (202) 208–0740.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 96–22018 Filed 8–28–96; 8:45 am]
BILLING CODE 6717–01–M
Wisconsin Public Service Corporation, et al.; Electric Rate and Corporate Regulation Filings

August 22, 1996.

Take notice that the following filings have been made with the Commission:

1. Wisconsin Public Service Corporation

[Docket No. ER96-2684-000]

Take notice that on August 12, 1996, Wisconsin Public Service Corporation, tendered for filing a non-firm point-to-point transmission service agreement with MidAmerican Energy Co. and TransCanada Power Corp. under its CS-1 Coordination Sales Tariff.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

2. Louisville Gas and Electric Company

[Docket No. ER96-2685-000]


Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

3. Louisville Gas and Electric Company

[Docket No. ER96-2686-000]

Take notice that on August 12, 1996, Louisville Gas and Electric Company (LG&E), tendered for filing a Non-Firm Transmission Agreement between Louisville Gas and Electric Company and Duke/Louis Dreyfus L.L.C. under Rate TS.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

4. Illinois Power Company

[Docket No. ER96-2687-000]

Take notice that on August 13, 1996, Illinois Power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing firm transmission agreements under which Wagner Castings Company will take transmission service pursuant to its open access transmission tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

 Illinois Power has requested an effective date of August 1, 1996.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

5. Duke Power Company

[Docket No. ER96-2688-000]

Take notice that on August 9, 1996, Duke Power Company (Duke), tendered for filing a Transmission Service Agreement under which Duke will provide transmission service to Enron Power Marketing, Inc. as agreed to by the parties under the rates, terms and conditions of the Open Access Transmission Tariff.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

6. Duke Power Company

[Docket No. ER96-2689-000]


Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

7. Virginia Electric and Power Company

[Docket No. ER96-2690-000]

Take notice that on August 12, 1996, Virginia Electric and Power Company (Virginia Power), tendered for filing an unexecuted Service Agreement for Non-Firm Point-to-Point Transmission Service between Enron Power Marketing, Inc. and Virginia Power under the Open Access Transmission Tariff to Eligible Purchasers dated July 9, 1996. Under the tendered Service Agreement Virginia Power will provide non-firm point-to-point service to Enron Power Marketing, Inc. as agreed to by the parties under the rates, terms and conditions of the Open Access Transmission Tariff.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

8. Idaho Power Company

[Docket No. ER96-2691-000]


Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

9. Illinois Power Company

[Docket No. ER96-2692-000]

Take notice that on August 13, 1996, Illinois Power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing firm transmission agreements under which Wagner Castings Company will take transmission service pursuant to its open access transmission tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

10. Duke Power Company

[Docket No. ER96-2693-000]

Take notice that on August 12, 1996, Duke Power Company (Duke), tendered for filing a Transmission Service Agreement (TSA) between Duke, on its own behalf and acting as agent for its wholly-owned subsidiary, Nantahala Power and Light Company, and Heartland Energy Services, Inc. (Heartland). Duke states that the TSA sets out the transmission arrangements under which Duke will provide Heartland non-firm point-to-point transmission service under its Pro Forma Open Access Transmission Tariff.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

11. Central Power and Light Company; West Texas Utilities Company

[Docket No. ER96-2694-000]

Take notice that on August 13, 1996, Central Power and Light Company and West Texas Utilities Company, (jointly the Companies), tendered for filing a service agreement under which they will provide transmission service to DuPont Power Marketing Inc. (DuPont) and Brazos Power Marketing Cooperative, Inc. (Brazos) under their point-to-point transmission service tariff.

The Companies state that copies of the filing have been served on DuPont and Brazos.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.
12. Public Service Company of Colorado

[Docket No. ER96–2695–000]

Take notice that on August 13, 1996, Public Service Company of Colorado (Public Service), tendered for filing an Amendment to the Interconnection and Transmission Service Contract between Public Service and Western Power Administration (Western). Specifically Public Service is filing Revision 11 to Exhibit D of this Contract designated as Public Service Rate Schedule FERC No. 47. This revision removes Holy Cross Electric Association as a Delivery Point from Exhibit D. Public Service requests that this filing be made effective as of June 1, 1996.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

13. Madison Gas and Electric Company

[Docket No. ER96–2696–000]

Take notice that on August 13, 1996, Madison Gas and Electric Company (MGE), tendered for filing a service agreement with Morgan Stanley Capital Group, Inc., under MGE’s Power Sales Tariff. MGE requests an effective date 60 days from the filing date.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

14. Public Service Company of Oklahoma, Southwestern Electric Power Company

[Docket No. ER96–2697–000]

Take notice that on August 13, 1996, Public Service Company of Oklahoma and Southwestern Electric Power Company (collectively, the Companies), tendered for filing a service agreement under which they will provide transmission service to DuPont Power Marketing, Inc. (DuPont) under their point-to-point transmission service tariff.

The Companies state that a copy of the filing has been served on DuPont.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.


[Docket No. ER96–2698–000]

Take notice that on August 9, 1996, Allegheny Power Service Corporation on behalf of Monongahela Power Company, the Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Supplement No. 2 to add Enron Power Marketing, Inc. as a non-firm point-to-point customer under the Allegheny Power Open Access Transmission Service Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96–18–000. The proposed effective date under the Service Agreement is July 10, 1996. Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

16. TransAlta Enterprises Corporation

[Docket No. ER96–2699–000]

Take notice that on August 13, 1996, TransAlta Enterprises Corporation, tendered for filing a letter from the Executive Committee of the Western Systems Power Pool (WSPP) indicating that TransAlta Enterprises Corporation had completed all the steps for pool membership. TransAlta Enterprises Corporation requests that the Commission amend the WSPP Agreement to include it as a member.

TransAlta Enterprises Corporation requests an effective date of August 12, 1996 for the proposed amendment. Accordingly, TransAlta Enterprises Corporation requests waiver of the Commission’s notice requirements for good cause shown.

Copies of the filing were served upon the WSPP Executive Committee.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

17. Entergy Services, Inc.

[Docket No. ER96–2700–000]


Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

18. Citizens Utilities Company

[Docket No. ER96–2703–000]

Take notice that on August 13, 1996, Citizens Utilities Company (Citizens), tendered for filing revised rates under its open access transmission tariff for its Vermont Electric Division—FERC Tariff Nos. 2 and 3.

Citizens states that a copy of its filing was served on the parties in Docket No. ER95–1586–000/EL96–17–000.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

19. Entergy Services, Inc.

[Docket No. ER96–2704–000]


Entergy Services requests an effective date of August 13, 1996.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

20. Entergy Services, Inc.

[Docket No. ER96–2705–000]


Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

21. Entergy Services, Inc.

[Docket No. ER96–2706–000]

Take notice that on August 13, 1996, Entergy Services, Inc. (Entergy Services), tendered for filing Service Schedule TE which provides for Term Energy Exchange between Tennessee Valley Authority (TVA) and Entergy Services, as agent for Entergy Mississippi, Inc., Entergy Arkansas, Inc., Entergy New Orleans, Inc. Entergy Services requests an effective date of August 13, 1996.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

22. Citizens Utilities Company

[Docket No. ER96–2707–000]

Take notice that on August 13, 1996, Citizens Utilities Company (Citizens), tendered for filing proposed revisions to its transmission tariff for its Vermont Electric Division under its Block Loading Facilities Transmission Agreement (BLFTA)—FERC No. 28. These revisions would modify the definitions of CC and PL in the rate formula and would increase the incremental loss provision in the tariff.
Citizens states that a copy of its filing was served on the parties in Docket Nos. ER95–1586–000/EL96–17–000, which include each of the BLFTA participants and the Vermont Public Service Board.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

23. Wisconsin Public Service Corporation

[Docket No. ER96–2708–000]

Take notice that on August 13, 1996, Wisconsin Public Service Corporation (WPSC), tendered for filing executed Transmission Service Agreements between WPSC and TransCanada Power Corp.; and WPS Energy Services. The Agreements provide for transmission service under the Open Access Transmission Service Tariff, FERC Original Volume No. 11.

WPSC asks that the agreements become effective on the date of execution by WPSC.

Comment date: September 5, 1996, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First 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.

Linwood A. Watson, Jr.,
Acting Secretary.
[FR Doc. 96–22014 Filed 8–28–96; 8:45 am]
BILLING CODE 6717–01–P

[Docket No. CP96–715–000, et al.]

1. East Tennessee Natural Gas Company

[Docket No. CP96–715–000]

Take notice that on August 14, 1996, East Tennessee Natural Gas Company (East Tennessee), 1010 Milam Street, Houston, Texas 77002, filed in Docket No. CP96–715–000, a request pursuant to Section 157.205 and 157.212 of the Commission’s Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to install a delivery point in Putnam County, Tennessee to provide firm transportation service to the City of Cookeville, under East Tennessee’s blanket certificate issued in Docket No. CP82–412–000, pursuant to Section 7(c) of the Natural Gas Act, as all more fully set forth in the request which is on file with the Commission and open to public inspection.

East Tennessee indicates that it will install a tie-in assembly, approximately thirty feet of 4-inch interconnecting pipe and dual 4-inch orifice meter tubes. East Tennessee also says that it will tie in to the existing communications and electronic gas measurement (EGM) available at the adjacent Livingston Meter Station which is owned and operated by East Tennessee.

East Tennessee relates that the total cost of the new facilities is estimated to be approximately $117,514. East Tennessee states that it will own, operate and maintain the measurement facilities; will continue to own and operate the tie-in assembly and interconnecting pipe, and will maintain the communications and EGM.

East Tennessee reports that the total quantities to be delivered to Cookeville will not exceed the total quantities authorized. East Tennessee asserts that the installation of the proposed delivery point is not prohibited by East Tennessee’s tariff and that it has sufficient capacity to accomplish the proposed new delivery point without detriment or disadvantage to East Tennessee’s other customers.

Comment date: October 7, 1996, in accordance with Standard Paragraph G at the end of this notice.

2. Florida Gas Transmission Company

[Docket No. CP96–722–000]

Take notice that on August 16, 1996, Florida Gas Transmission Company (FGT), 1400 Smith Street, Houston, Texas 77002, filed a request with the Commission in Docket No. CP96–722–000, pursuant to Sections 157.205, and 157.212 of the Commission’s Regulations under the Natural Gas Act (NGA) for authorization to construct, operate and own a new delivery point authorized in blanket certificate issued in Docket No. CP82–553–000, all as more fully set forth in the request on file with the Commission and open to public inspection.

FGT proposes to construct, operate and own a new delivery point on its existing 4-inch Tampa East Lateral in Hillsborough County, Florida to be delivered by FGT to Gulf Coast Metals Co., Inc. (Gulf Coast). FGT reports that Gulf Coast has agreed to reimburse FGT for the costs and expenses incurred by FGT relating to the proposed construction in lieu of customer ownership. The estimated total cost of the proposed construction is $114,500 which includes federal income tax gross-up.

FGT states that the proposed delivery point would include a 2-inch tap connecting pipe, electronic flow measurement equipment, a meter and regulator station, and any other related appurtenant facilities necessary for FGT to deliver gas up to a maximum of 300 MMBtu per day at 60 psig. FGT further states that it would construct, own and operate approximately 900 feet of 2-inch, starting at the proposed tap and ending at the inlet side of the proposed meter and regulator station.

Comment date: October 7, 1996, in accordance with Standard Paragraph G at the end of this notice.

3. National Fuel Gas Supply Corporation

[Docket No. CP96–729–000]

Take notice that on August 19, 1996, National Fuel Gas Supply Corporation (National), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP96–729–000 a request pursuant to Sections 157.205 and 157.214 of the Commission’s Regulations under the Natural Gas Act (18 CFR 157.205 and 157.214) for authorization to increase the storage capacity at the Keeler Storage Field, located in McKean County, Pennsylvania, under the blanket certificate issued in Docket No. CP83–4–000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

National requests authorization to increase the maximum storage pressure of the Keeler storage from 500 psig to 625 psig, and to increase the storage capacity from 2.8 Bcf (with 1.3 Bcf working gas) to 3.3 Bcf (with 1.8 Bcf of working gas). National proposes to operate the storage pipelines connecting the Keeler Storage Field at 800 psig. National states the average depth of the storage formation is 1815 feet. National asserts that the new capacity resulting
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 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 filing 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 is 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 the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr., Acting Secretary.

[FR Doc. 96–22015 Filed 8–28–96; 8:45 am]

ENVIRONMENTAL PROTECTION AGENCY

STATEMENT OF THE CASE

ACTION:

State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Oklahoma

AGENCY: Environmental Protection Agency (EPA).

SUMMARY: The State of Oklahoma has submitted a request for approval of the Oklahoma Pollutant Discharge Elimination System (OPDES) Program pursuant to Section 402 of the Clean Water Act. If EPA approves the OPDES program, the Oklahoma Department of Environmental Quality (ODEQ) will administer that program in lieu of the National Pollutant Discharge Elimination System (NPDES) program now administered by EPA in Oklahoma.

DATES: EPA Region 6 will hold a public hearing on September 30, 1996 beginning at 7:00 p.m. for submission of verbal or written comments on EPA's program approval proposal. A public discussion for questions and answers will be held prior to the hearing from 3:00 p.m. until 5:00 p.m. To ensure issues brought up during the meeting from 3:00 to 5:00 are considered in EPA's decision, they should be made in writing to EPA, or on record during the public hearing later that evening. EPA Region 6 will continue to accept written comments through October 21, 1996 at its office in Dallas, Texas. Copies of such written comments should also be provided to ODEQ.

ADDRESSES: The September 30, 1996, public hearing will be held at the Tom Sneed Career Development Center Auditorium, Rose State College, I–40 and Hudiburg Drive at Exit 156B, Midwest City, Oklahoma. Specific directions will be posted at the ODEQ headquarters building located at 1000 N.E. 10th, Oklahoma City, Oklahoma.

Written comments must be submitted to: Ms. Ellen Caldwell (6WO–O), Water Quality Protection Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

A copy of each comment should be submitted to: Norma Aldridge, Department of Environmental Quality,
Water Quality Division, 1000 N.E. 10th Street, Oklahoma City, Oklahoma 73117-1212.

Copies of documents Oklahoma has submitted in support of its program approval request may be reviewed during normal business hours, Monday through Friday, excluding holidays, at: EPA Region 6, 12th Floor Library, 1446 Ross Avenue, Dallas, Texas 75202, (214) 665-7513

ODEQ Headquarters, Department of Environmental Quality, Water Quality Division, 1000 N.E. 10th Street, Oklahoma City, Oklahoma 73117-1212.

The documents are also available to the public at the following libraries:

1. Tulsa City/County Library, 400 Civic Center, Tulsa, Oklahoma 74103
2. Woodward Public Library, 1500 N. Main, Woodward, Oklahoma 73801
3. McAlester Public Library, 401 N. 2nd Street, McAlester, Oklahoma 74501
4. Lawton Public Library, 110 S.W. 4th Street, Lawton, Oklahoma 73501

FOR FURTHER INFORMATION CONTACT: Ms. Ellen Caldwell at the EPA address listed above or by calling (214) 665-7513 or Norma Aldridge at the ODEQ address listed above or by calling (405) 271-5205 ext 134.

Part or all of the State's submission (which comprises approximately 2391 pages) may be copied at the ODEQ office in Oklahoma City, or EPA office in Dallas, at a minimal cost per page. A paper copy of the entire submission may be obtained from the ODEQ office in Oklahoma City for a $358.65 fee (The cost of the principal documents, i.e., the Attorney General's Statement, Memorandum of Agreement, Program Description, and the Enforcement Management System all without their associated appendices is $163.35). An electronic copy of the documents stored on computer disk will be provided at no cost to interested parties which supply a disk to ODEQ for that purpose. The disk must be a new, 3.5" high density/double sided microdisk. The documents will be copied to the disk in WordPerfect 6.0.

SUPPLEMENTARY INFORMATION: Section 402 of the Clean Water Act (Act) created the NPDES program under which EPA may issue permits for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402 also provides that EPA may authorize a State to administer an equivalent state program upon a showing the State has authority and a program sufficient to meet the Act's requirements.

The basic requirements for state program approval are listed in 40 CFR Part 123. EPA Region 6 considers the documents submitted by the State of Oklahoma complete at the time of this notice and believes they comply with the regulations found at 40 CFR 123. It thus proposes to approve the OPDES program as described by the Oklahoma Department of Environmental Quality. EPA will consider final approval after all public comments have been considered.

On June 10, 1996, the Governor of Oklahoma requested NPDES partial program approval and submitted a program description (including funding, personnel requirements and organization, and enforcement procedures), an Attorney General's statement, copies of applicable State statutes and regulations, and a Memorandum of Agreement (MOA) to be executed by the Regional Administrator of EPA Region 6 and the Executive Director of ODEQ. As a result of discussions between EPA and ODEQ staff, changes and additions have been made to some of those documents to include regulatory and statutory corrections in the program. The additional information was received by EPA on August 14, 1996, and a letter of completeness was sent to the Executive Director of ODEQ on August 22, 1996.

EPA's Regional Administrator is required to approve the submitted program within 90 days of submission of the complete information unless it does not meet the requirements of section 402(b) of the Act and EPA regulations. To obtain such approval, the State must show, among other things, that it has authority to issue permits which comply with the Act, authority to impose civil and criminal penalties for permit violations, and authority to ensure that the public is given notice and opportunity for a hearing on each proposed permit. After close of the comment period, EPA's Regional Administrator will decide to approve or disapprove the OPDES program for implementation in lieu of the federal NPDES program.

EPA's final decision to approve or disapprove the OPDES program will be based on the requirements of section 402(b) of the Act and EPA regulations. EPA Region 6 considers the program as described by the Oklahoma Pollution Discharge Elimination System (OPDES) Permitting Program below. The State's OPDES program will implement federal law and operate in lieu of the EPA-administered NPDES program for those discharges for which the State has authority. EPA will, however, retain the right to object to OPDES permits proposed by ODEQ, and if the objections are not resolved, issue the permit itself. If EPA's Regional Administrator disapproves the OPDES program, she will notify ODEQ of the reasons for disapproval and of any revisions or modifications to the program which are necessary to obtain approval.

PUBLIC HEARING PROCEDURES: The following procedures will be used at the September 30, 1996 public hearing:

1. The Presiding Officer shall conduct the hearing in a manner which will allow all interested persons wishing to make oral statements an opportunity to do so; however, the Presiding Officer may inform attendees of any time limits during the opening statement of the hearings.

2. Any person may submit written statements or documents for the record.

3. The Presiding Officer may, in his discretion, exclude oral testimony if such testimony is overly repetitious of previous testimony or is not relevant to the decision to approve or require revision of the submitted State program.

4. The transcript taken at the hearing, together with copies of all submitted statements and documents, shall become a part of the record submitted to the Regional Administrator.

5. The hearing record shall be left open until the deadline for receipt of comments specified at the beginning of this Notice to allow any person time to submit additional written statement or to present views or evidence tending to rebut testimony presented at the public hearing.

Hearing statements may be oral or written. Written copies of oral statements are urged for accuracy of the record and for use of the Hearing Panel and other interested persons. Statements should summarize any extensive written materials. All comments received by EPA Region 6 by the deadline for receipt of comments, or presented at the public hearing, will be considered by EPA before taking final action on the Oklahoma request for NPDES program approval.

Scope and Summary of the Oklahoma Pollution Discharge Elimination System (OPDES) Permitting Program

A. Scope

1. Partial Program: Oklahoma's OPDES program is a partial program which conforms to the requirements of section 402(b) of the Clean Water Act. The program application submitted by ODEQ applies to all discharges covered...
by the authority of that agency. This includes most discharges of pollutants subject to the federal NPDES program (e.g., municipal wastewater discharges, pretreatment, and most industrial point source discharges, and point source discharges from federal facilities), including the disposal of sewage sludge (in accordance with Section 405 of the Act and 40 C.F.R. Part 503). ODEQ does not have regulatory authority over the following classes of facilities or discharges in the State of Oklahoma:

(a) Agricultural industries including concentrated animal feeding operations and silviculture. The Oklahoma Department of Agriculture is the state authority for point and nonpoint source discharges associated with agricultural production, services, silviculture, feed yards, livestock markets and animal wastes. The Department of Agriculture has not yet applied to EPA for authorization of their program, therefore, EPA will retain NPDES authority over these facilities and their discharges.

(b) Oil and Gas exploration and production related industries and pipeline operations outside the boundaries of facilities regulated by ODEQ. The Oklahoma Corporation Commission is the state authority regulating the oil and gas exploration and production related industries and their associated discharges. The Corporation Commission has not yet applied to EPA for authorization of their state program, therefore, EPA will retain NPDES authority over these industries and the discharges to surface waters of the state.

(c) Discharges in Indian Country. The State of Oklahoma does not seek jurisdiction over Indian Country. EPA will retain NPDES authority to regulate discharges in Indian Country (as defined in 18 W.S.C. 1151). Although State regulation 252:605–1–3(c) seems to assert that the OPDES program has the authority to regulate discharges on “Indian Lands,” it is contrary to the intent of the State as described in the EPA/ODEQ MOA and the Oklahoma Attorney General’s Statement. The State of Oklahoma has undertaken steps to revise the regulation clarifying ODEQ does not seek to issue authorized OPDES permits to discharges in Indian Country. EPA and ODEQ will work together with tribal authorities to resolve questions of permitting authority for individual discharges. Although EPA would be the issuing authority for permits in Indian Country, it is likely that Region 6 would work with ODEQ and appropriate tribes in the development of these permits to insure that both tribal and state waters are protected in a way consistent with the requirements of the CWA.

(d) Discharges of radioactive materials regulated by the federal government (i.e., those radioactive materials covered by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)). The State’s definition of “pollutant” does not exclude by reference radioactive materials regulated by other federal authorities. EPA does not have the authority to authorize the OPDES program to regulate radioactive wastes governed by the Atomic Energy Act. The regulatory authority for radioactive materials will remain under the jurisdiction of the U.S. Department of Energy and the Nuclear Regulatory Commission. Some industrial discharges which contain very low level radioactive wastes (e.g., manufacturers of watches may discharge trace amounts of radium, and hospital wastes sometimes contain iodine isotopes) which are not included in the Atomic Energy Act and are thus regulated by EPA; upon authorization of the OPDES program, the authority to regulate those discharges will become the responsibility of ODEQ.

(e) Oklahoma Ordinance Works Authority (OOWA). EPA will retain enforcement authority for OOWA (NPDES permit No. OK00034568), located in Pryor, Oklahoma, and all industries served by this facility. ODEQ is legally responsible for implementing the pretreatment program at OOWA.

2. Phased Program Authority: The State of Oklahoma, to ensure that the Oklahoma general permitting program is consistent with the requirements of 40 CFR 123.25(c), is revising its statutes and regulations to provide the Executive Director of the Oklahoma Department of Environmental Quality with the full authority to issue general permits under the OPDES system. Until the state completes this transfer of authority, EPA will retain full permitting and enforcement authority for those discharges which are covered, or proposed to be covered by EPA issued general permits. This will prevent the state from becoming overloaded with the permitting of these facilities via individual permits. Once the state has completed its regulatory and statutory changes to ensure their general permitting authority complies with 40 CFR 123.25(c), EPA will turn over all authority for these discharges to ODEQ. EPA will also transfer its general permits to ODEQ for administration. This phased authority will be transferred to the state no later than three years after authorization of the program.

a. EPA will be temporarily retaining NPDES authority for:

i. All existing discharges of storm water associated with industrial or construction activity (40 CFR 122.26(b)(14)), including allowable non-storm water, authorized to discharge under an NPDES storm water general permit as of the date of program assumption. The storm water general permits affected are: Baseline construction storm water general permit (57 FR 41209), NPDES permit numbers OKR10###; Baseline non-construction storm water general permit (57 FR 41297), NPDES permit numbers OKR00###; and Multi-sector storm water general permit (60 FR 51108), NPDES permit numbers OKR05###. (For an individual facility’s permit number, the * is a letter and the #’s are numbers—e.g. OKR002999).

ii. New discharges of storm water associated with industrial or construction activity, including allowable non-storm water, eligible for coverage under one of the NPDES storm water general permits listed above, excluding new discharges subject to a new source performance standard. ODEQ will have authority for new discharges subject to a new source performance standard and these discharges will require an OPDES permit. Since the excluded facilities will be applying for a State-issued permit, the new source review requirements of the National Environmental Policy Act (NEPA) will not apply. [NOTE: Phased authority does not apply to discharges from municipal separate storm sewers systems (MSSs, e.g., Oklahoma City and Tulsa); individual storm water permits or outfalls in waste water permits; and storm water discharges designated by the State in accordance with 40 CFR 123.26(g)(1)(I). The state will have authority over these discharges immediately upon authorization.]

iii. All existing and new discharges resulting from implementing corrective action plans, as required by 40 CFR 280, for cleanup of groundwater contaminated by releases from Petroleum Underground Storage Tank Systems (UST). A Petroleum UST System is defined in 40 CFR 280 as an underground storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

iv. Discharges from Petroleum Bulk Storage Tanks (PST). To EPA’s and ODEQ’s knowledge, all discharges...
authorized by EPA’s PST general permit are regulated by the Oklahoma Corporation Commission. Neither EPA nor ODEQ are aware of any discharge points covered under EPA’s PST general permit which are also located at facilities regulated by ODEQ. However, if it is determined that a permittee regulated by ODEQ has coverage under this EPA general permit, those discharges would be issued individual permits by ODEQ when the facility permit was modified, issued or reissued. So as not to leave the discharges from the PST without NPDES authorization, EPA and ODEQ would transfer authority over these discharges in the manner described in A. 2. b. (below) at the time ODEQ public noticed the permitting action.

A list of existing permittees under the general permits and thus remaining under EPA permitting authority is included as part of the public record and available for review. Facilities eligible for but not currently covered by one of these general permits may continue to be EPA for coverage. [Note: Oklahoma will continue to provide state-only permits for those dischargers which are to be phased over to ODEQ, and which need state authorization to discharge.]

b. Case-by-case transfers of NPDES authority for individual storm water, UST, and certain PST dischargers. From time to time, it may be desirable from an environmental or administrative standpoint to transfer authority, for an individual facility with EPA NPDES general permit coverage, prior to the time the State has received authority to issue general permits. Case-by-case transfers of NPDES authority for individual storm water, UST, and certain PST dischargers will be made using the following procedures:

1. ODEQ may request early transfer of NPDES authority over an individual facility or a class of storm water dischargers at any time. All requests will be in writing and will include a brief rationale.

2. For those categories of industrial waste water and storm water which EPA has retained temporary authority, and may not be eligible for coverage under an EPA general permit, the permittee may petition ODEQ to request early transfer of NPDES authority so the facility discharges may be covered by an individual OPDES permit. The applicant must send a written request for transfer of authority to ODEQ. If the applicant’s request is approved, ODEQ will request transfer of authority as specified in item i.

3. If ODEQ and EPA agree to early transfer of NPDES authority for a facility, the State will include outfalls for the affected discharges in a draft OPDES permit and the public notice of the draft permit will concurrently notice the transfer of authority for the facility’s discharges to ODEQ.

4. Final transfer of complete authority over EPA general permits. Ultimately, transfer of complete NPDES authority for storm water, UST, and certain PST discharges will be made using the following procedures:

i. Within three years from the date of program assumption, the State will make the necessary changes to State statutes in order to qualify for general permitting authority.

ii. Within 90 days of the effective date of the new statutes, the State will submit a supplemental Attorney General’s statement, along with a copy of the relevant statutes, certifying that the Executive Director has the authority to issue general permits.

iii. If EPA concurs with the Attorney General’s statement, the Agency will publish notice of the transfer of authority for all remaining storm water, UST, and specific PST discharges to ODEQ and send a copy to the appropriate mailing list.

iv. Once the Executive Director of ODEQ assumes authority in accordance with a promulgated final rule to issue general permits, the State will become the permitting authority (subject to EPA oversight) for all discharges of storm water associated with industrial and construction activity, UST remediation discharges, and PST discharges which fall under ODEQ’s authority. The EPA storm water general permits and any effective general permits for UST remediation discharges will then be transferred to ODEQ for administration. Within 30 days of the transfer of authority, EPA will provide ODEQ with a list of all facilities authorized to discharge under these general permits.

v. Transfer of NPDES Authority and Pending Actions: Upon approval of the Oklahoma program, authority for all NPDES Permit and Enforcement activities (within the scope of ODEQ’s authority) will be transferred to the State with the following exceptions: a) Permits for facilities whose permits are proposed but not final. The permit authority will be transferred to the state as the permits are finalized. b) Permits for which there is an unresolved evidentiary hearing request. Once a hearing has been denied or is held and the issue resolved, the permit will be transferred to the state. c) Enforcement authority for those facilities which have any outstanding compliance issues. EPA will retain jurisdiction of these facilities until resolution of these issues is accomplished in cooperation with the State. Files retained by EPA for the reasons given above will be transferred to the state as the actions are finalized. Facilities will be notified of this retained jurisdiction and again when the file is transferred to the State.

B. Summary of the Application Documents

The OPDES program is fully described in documents the State has submitted in accordance with 40 CFR 123.21, i.e., a Memorandum of Agreement (MOA) for execution by ODEQ and EPA; a Program Description, including an Enforcement Management System, outlining the procedures, personnel and protocols that will be relied on to run the state’s permitting and enforcement programs; a Statement signed by the Attorney General that describes the legal authority which the state has adopted to administer a program equivalent to the federal NPDES program; and several agreements under which ODEQ will coordinate with the State Historic Preservation Office and the U.S. Fish and Wildlife Service for the protection of antiquities and endangered species. The content of those documents is summarized below.

1. The EPA/ODEQ MOA: The requirements for MOAs are found in 40 CFR 123.24. A Memorandum of Agreement is a document signed by each agency, committing them to specific responsibilities relevant to the administration and enforcement of the state’s regulatory program. A MOA specifies these responsibilities and provides structure for the State’s program management and EPA’s program oversight.

The MOA submitted by the State of Oklahoma has been signed by Mark Coleman, Executive Director of the Department of Environmental Quality. The Regional Administrator of U.S. EPA Region 6 will sign the document after the program has been determined approvable and all comments received during the comment period (including comments received at the public hearing) have been considered. The MOA submitted by ODEQ includes the following items:

Section I—Introduction: This section contains the statement of scope of the NPDES program (pretreatment, storm water, sewage sludge disposal programs) and contains general statements describing the purpose of the MOA.

Section II—General Responsibilities: Describes, in general terms, the relative responsibilities regarding administration of the State program and EPA regarding oversight of the State program.
Section III—Program Responsibilities: Lists the responsibilities of ODEQ and EPA in maintaining an effective program. Also outlines the procedures for phased authority over general permit discharges, and gives timing for the transition.

Section IV—Permit Review and Issuance: Describes all agreements on the review and issuance of OPDES permits. It covers ODEQ's responsibilities to issue permits, the transfer of EPA files to the State, and the State's application review and permit development process. Included are such things as procedures for permit modification or reissuance, and EPA's review of OPDES drafted individual and general permits. This section includes the State's commitment for responding to public concerns and providing public participation in connection with public hearings, evidentiary hearings, and administrative and judicial enforcement actions.

Section V—Enforcement: Describes summary agreements between EPA and ODEQ that provide EPA with oversight of the OPDES enforcement program. These include those commitments on ODEQ's compliance monitoring, reviews, pretreatment audits, and inspections. ODEQ agrees to take penalty actions in accordance with the spirit of the EPA Penalty Policy.

Section VI—Reporting and Transmittal of Information: This section describes how reports and requests for information will be handled; and how information is transferred between the two agencies.

Section VII—Program Review: Explains how EPA must review the OPDES program.

Section VIII—Computation of Time: This section explains how time is computed with relation to the effective date of the MOA and non-business days.

Section IX—Modification to this MOA: Describes how the MOA can be modified by EPA and ODEQ.

Section X—Public Access to Information: Provides that all information (except that which is legally determined to be confidential) must be available to the public by both ODEQ and EPA.

Section XI—Independent EPA Powers: Explains that the MOA does not limit EPA's authority to take action under the Clean Water Act.

Section XII—Incorporation By Reference: Allows DEQ to adopt federal standards by reference.

Section XIII—MOA Effective: The MOA becomes effective when the EPA Regional Administrator signs the document.

2. Program Description: A program description submitted by a state seeking program approval must meet the minimum requirements of 40 CFR 123.22. It must provide a narrative description of the scope, structure, coverage and processes of the state program; a description of the organization, staffing and position descriptions for the lead state agency; and itemized costs and funding sources for the program. It must describe all applicable state procedures (including administrative procedures for the issuance of permits and administrative or judicial procedures for their review) and include copies of forms used in the program. It must further contain a complete description of the State's compliance and enforcement tracking program. The program description submitted by ODEQ includes the following items:

Chapter 1—Scope and Authority of the DEQ Program: This chapter describes the authority (statutes and rules) for the state program and the scope. In particular, it provides a description of the authority over sewage sludge, pretreatment and storm water programs.

Chapter 2—Organization, Structure and Responsibilities: This chapter gives an overview of the Water Quality Division, other Divisions within DEQ; and OPDES staff job descriptions.

Chapter 3—Cost Estimates and Funding of the Oklahoma Delegations Program: This chapter gives a budget summary on programs's projected finances and funding sources for the program.

Chapter 4—Permitting Procedures: Describes how ODEQ staff will develop effluent limitations, the permitting process, and the process for determining Total Maximum Daily Load of a surface water.

Chapter 5—Public Participation: This chapter describes the procedures governing public involvement in ODEQ decision making. This includes rulemaking, public forums and meetings, the permitting process, development and updating the Continuing Planning Process, and other public participation opportunities.

Chapter 6—Source Inventory: Describes the source inventory for sludge, unpermitted discharges, general permits and pretreatment programs that will be entered into the Permits Compliance System (PCS—the computer tracking system for NPDES permits).

Chapter 7—Compliance Monitoring: Gives a brief overview of compliance review activities for inspections, Discharge Monitoring Reports and other required reports to be submitted by the permittee.

Chapter 8—PCS and Program Reporting: Describes the Permits Compliance System and the types of data tracked by it. This chapter also describes how this data is updated.

Chapter 9—Flow of Information and Records: Details the documents to be processed, the timelines for these processes, types of information received by ODEQ, permit file contents, and describes how information is disseminated.

Chapter 10—Enforcement and Compliance: This chapter gives the legal authority for ODEQ enforcement actions, outlines ODEQ policies related to compliance and enforcement and provides a description of state enforcement actions.

Chapter 11—Pretreatment: This chapter gives the authority for ODEQ pretreatment program; and the components of the program such as, the establishment of limits for indirect users, fundamentally different factors, categorical determination requests, reporting requirements, inspections and enforcement.

Chapter 12—Storm Water: describes the storm water program, its implementation in Oklahoma, and the general permits which regulate many of the storm water dischargers. The authority to regulate dischargers covered by general permits will be phased over to the state within three years.

Chapter 13—Sewage Sludge: Gives a brief description of sewage sludge program, its history, and statutory framework. It describes sludge permits and reports required.

Chapter 14—Toxics Control: Describes the permit conditions relating to the control of toxicity. This includes biomonitoring requirements and numerical limits for toxics in permits.

Chapter 15—Program Description: EPA Oversight: Explains the mechanism EPA will use to oversee the OPDES program and the authority for EPA oversight.

3. Enforcement Management System (EMS): States seeking authorization of their permitting and enforcement program under NPDES have the option of adopting EPA's enforcement policies, procedures, and guidance; or provide in their program package a complete description of their enforcement authority and compliance evaluation program (40 CFR 123.26 and 123.27). Oklahoma developed its own enforcement management system. An EMS outlines the ways the State systematically and efficiently identifies instances of noncompliance and
provides timely and appropriate enforcement actions to achieve the final objective of full compliance by the permittee with the Clean Water Act. An EPA memo dated October 2, 1989, titled “Final Version of the Revised Enforcement Management System,” describes seven basic principles that are common to an effective EMS:

- Maintain a source inventory that is complete and accurate;
- Handle and assess the flow of information available in a systematic and timely basis;
- Accomplish a pre-enforcement screening by reviewing the flow of information as soon as possible after it is received;
- Perform a more formal enforcement evaluation where appropriate, using systematic evaluation screening criteria;
- Institute a formal enforcement action and follow-up whenever necessary;
- Initiate field investigations based on a systematic plan; and,
- Use internal management controls to provide adequate enforcement information to all levels of organization.

The ODEQ’s Enforcement Management System (EMS) is a written outline or guide which discusses the procedures that will be followed to ensure that both federal and state regulatory requirements and goals are accomplished in a timely and appropriate manner.

The inspection and enforcement functions of the Oklahoma Department of Environmental Quality (ODEQ) reside in the Water Quality Division’s Field Inspection and Compliance Section and the Water Quality Program Management Section headquartered in Oklahoma City. The Field Inspection and Compliance Section is responsible for inspecting all permitted and unpermitted facilities which have or are believed to have a surface water discharge and is primarily responsible for the investigation and resolution of all citizen complaints involving waters of the State. The State Environmental Laboratory and the local ODEQ representatives from the Environmental Complaints and Local Services Division (located within the counties of Oklahoma) assist in preliminary inspection and investigation of complaints.

Penalties. The ODEQ has adopted EPA’s civil penalty policy to ensure the consistent assessment and collection of administrative penalties in their state. The amount of penalty sought by ODEQ for permit or CWA violations will be consistent with Clean Water Act Penalty Policy.

Enforcement. In contrast to the compliance orders EPA issues under CWA § 309(a)(3), ODEQ’s Compliance Orders (COs) are subject to appeal. Staffing, ODEQ has committed to establish full program staffing by FY 99. This will require the state to hire additional personnel over a 3 year period; 10 the 1st year, 8 the 2nd year and 2 the 3rd year.

4. Attorney General’s Statement: An Attorney General’s Statement is required and described in regulations found at 40 CFR 123.23. The State Attorney General must certify that the State has lawfully adopted statutes and regulations which provide the State agency with the legal authority to administer a permitting program in compliance with 40 CFR Part 123. The Attorney General’s Statement from Oklahoma describes and cites state legal authority which provide adequate legal authority to administer the program; and certifies that the State does indeed have the legal authority to administer the OPDES program in accordance with the regulations in 40 CFR 123.

Comments on the Described Program

The program submitted by the State of Oklahoma has been determined by EPA to be complete in accordance with the regulations found at 40 CFR 123. EPA and ODEQ want to encourage public participation in this authorization process so that the citizens of Oklahoma will understand the program in their state. Therefore, EPA requests that the public review the program that ODEQ has submitted and provide any comments they feel are appropriate. EPA and the State want the public to be able to effectively coordinate with ODEQ on OPDES permitting and enforcement actions. EPA will consider all comments on the OPDES program and/or its authorization in its decision.

Other Federal Statutes

A. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires that all federal agencies consult on federal actions which may affect federally listed species to insure they are unlikely to jeopardize the continued existence of those species or adversely modify their critical habitat. Regulations controlling consultation under ESA Section 7 are codified at 50 CFR Part 402. The approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement, but the State’s subsequent OPDES permit actions are not. EPA has completed informal consultation with the U.S. Fish and Wildlife Service (FWS or the Service). In the course of consultation, EPA, the Service, and ODEQ have outlined procedures by which ODEQ and FWS, will confer on permits which are likely to affect federally listed species. These processes are reflected in a Memorandum of Understanding between the State and FWS. In addition, a consultation agreement has been reached between EPA and FWS on EPA’s oversight role and objection procedures on permits when the two state agencies can not agree on the protection of historic properties. The EPA/ODEQ MOA includes conditions for EPA and ODEQ to follow to ensure that the requirements of the consultation with the SHPO are met. These consultation documents are available with the program package for public review and comment.

B. Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires that all federal agencies consult on federal actions which may affect federally threatened or endangered species or sites listed or eligible for listing in the National Register of Historic Places. Regulations controlling consultation under ESA Section 7 are codified at 50 CFR Part 402. The approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement, but the State’s subsequent OPDES permit actions are not. EPA has completed informal consultation with the U.S. Fish and Wildlife Service (FWS or the Service). In the course of consultation, EPA, the Service, and ODEQ have outlined procedures by which ODEQ and FWS, will confer on permits which are likely to affect federally listed species. These processes are reflected in a Memorandum of Understanding between the State and FWS. In addition, a consultation agreement has been reached between EPA and FWS on EPA’s oversight role and objection procedures on permits when ODEQ and FWS cannot agree on the protection of species in an individual State permit action. These conditions are reflected in the EPA/ODEQ MOA. These documents are available with the program package for public review and comment.

C. Small Business Regulatory Enforcement Fairness Act

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as
amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today’s Federal Register. This rule is not a “major rule” as defined by section 804(2) of the APA as amended.

D. Regulatory Flexibility Act

After review of the facts presented in this document, I hereby certify, pursuant to the provisions of 5 U.S.C. 605(b), that this proposal will not have a significant impact on a substantial number of small entities. The approval of the Oklahoma NPDES permit program would merely transfer responsibilities for administration of the NPDES permit program from Federal to State government.

I hereby propose to authorize the OPDES program in accordance with 40 CFR part 123.

Dated: August 22, 1996.

Jane N. Saginaw,
Regional Administrator.

[FR Doc. 96–21944 Filed 8–28–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information
Collections Being Reviewed by FCC for Extension Under Delegated Authority 5 CFR 1320 Authority, Comments Requested

August 23, 1996.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commissions burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

The FCC is reviewing the following information collection requirements for possible 3-year extension under delegated authority 5 CFR 1320, authority delegated to the Commission by the Office of Management and Budget (OMB).

DATES: Written comments should be submitted on or before October 28, 1996. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Dorothy Conway at 202–418–0217 or via internet to dconway@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0219.
Title: Section 90.49(b) Communications standby facilities “Special eligibility showing”.

Type of Review: Extension of existing collection.

Respondents: Business or other for-profit.

Number of Respondents: 200.
Estimated Time Per Response: .75 hours.
Total Annual Burden: 150 hours.
Total Annual Cost: 0.

Needs and Uses: The reporting requirement contained in Section 90.49(b) is necessary to ensure that a communications common carrier requesting private radio service frequencies to be used as a standby facility for carrying safety-related communications when normal common carrier circuits are inoperative due to circumstances beyond the control of the carrier are necessary for the protection of life and property. This information is collected only once, upon initial application for a license.

Federal Communications Commission William F. Caton, Acting Secretary.

[FR Doc. 96–22046 Filed 8–28–96; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 1996–17]

Filing Dates for the Missouri Special Election

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: Missouri has scheduled a special general election on November 5, 1996, in the Eighth Congressional District to fill the U.S. House seat vacated by the late Congressman Bill Emerson.

Committees required to file reports in connection with the Special General Election on November 5 should file a 12-day Pre-General Election Report on October 24, 1996; a 30-day Post-General Election Report on December 5, 1996; and a Year-end Report on January 31, 1997.

FOR FURTHER INFORMATION CONTACT: Ms. Bobby Werfel, Information Division, 999 E Street, N.W., Washington, DC 20463; Telephone: (202) 219–3420; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION: All principal campaign committees of candidates in the Special General Election and all other political committees which support candidates in this election shall file a 12-day Pre-General Report on October 21, with coverage dates from the close of the last report filed, or the day of the committee’s first activity, whichever is later, through October 16; and a Post-General Report on December 5, with coverage dates from October 17 through November 25, 1996.
Dated: August 23, 1996.

Lee Ann Elliott,
Chairman, Federal Election Commission.

[FR Doc. 96-22005 Filed 8-28-96; 8:45 am]
BILLING CODE 6715-01-M

GENERAL SERVICES ADMINISTRATION

Federal Telecommunications Standards

AGENCY: Office of Policy, Planning and Evaluation, GSA.

ACTION: Notice of adoption of Federal standard.

SUMMARY: The purpose of this notice is to announce the adoption of Federal Telecommunications Standards (FED-STD). FED-STD 1037C Telecommunications: Glossary of Telecommunications Terms is approved and will be published.

FOR FURTHER INFORMATION CONTACT: Shirley Radack, telephone (301) 975-2833, National Institute of Standards and Technology, Building 225, Room A-126, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION:

1. The General Services Administration (GSA) is responsible under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, for the Federal Standardization Program.

2. On November 16, 1994, a notice was published in the Federal Register (59 FR 59255) that a proposed FED-STD 1037B entitled Telecommunications: Glossary of Telecommunications Terms was being proposed for Federal use and that comments were requested.

3. GSA and the Department of Commerce (DOC) reviewed the written comments submitted by interested parties and other material available relevant to this standard. GSA and DOC also reviewed the justification package as approved by the Federal Telecommunications Standards Committee (FTSC) and the National Communications System (NCS). On the basis of this review, GSA determined to adopt the proposed standards as Federal Telecommunications Standards (FED-STD) 1037C, Telecommunications: Glossary of Telecommunications Terms.

4. This Federal Telecommunications Standard is mandatory.

5. Requests for copies of the Federal Telecommunications Standard 1037C, Telecommunications: Glossary of Telecommunications Terms should be directed to the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (703) 487-4650.

Dated: August 7, 1996.

G. Martin Wagner,
Associate Administrator, Office of Policy, Planning and Evaluation.

Federal Standard 1037C

Telecommunications: Glossary of Telecommunication Terms

1. Scope: a. This glossary provides standard definitions for the fields subsumed by the umbrella discipline of telecommunications. Fields defined herein include: antenna types and measurements, codes/coding schemes, computer and data communications (computer graphics vocabulary, file transfer techniques, hardware, software), fiber optics communication, facsimile types and techniques, frequency topics (frequency modulation, interference, spectrum sharing), Internet, ISDN, LANs (MANs, WANS), modems, modulation schemes, multiplexing techniques, networking (network management, architecture/topology), NII, NS/EP, power issues, PCS/UPT/cellular mobile, radio communications, routing schemes, satellite communications, security issues, switching techniques, synchronization/timing techniques, telegraphy, telephony, TV (UHF, VHF, cable TV, HDTV), traffic issues, transmission/propagation concerns (signal loss/attenuation, transmission lines), video technology, and wave propagation/measurement terminology.

b. The terms and accompanying definitions contained in this standard are drawn from authoritative non-Government sources such as the International Telecommunication Union, the International Organization for Standardization, the Telecommunications Industry Association, and the American National Standards Institute, as well as from numerous authoritative U.S. Government publications, the FTSC Subcommittee to Revise FED-STD 1037B has rewritten many definitions as deemed necessary either to reflect technology advances or to make those definitions that were phrased in specialized terminology more understandable to a broader audience.

1.1 Applicability: This standard incorporates and supersedes FED-STD-1037B, June 1991. Accordingly, all Federal departments and agencies shall use it as the authoritative source of definitions for terms used in the preparation of all telecommunications documentation. The use of this standard by all Federal departments and agencies is mandatory.

1.2 Purpose: The purpose of this standard is to improve the Federal acquisition process by providing Federal departments and agencies a comprehensive, authoritative source of definitions of terms used in telecommunications and directly related disciplines by national, international, and U.S. Government telecommunications specialists.

2. Requirements and Applicable Documents: a. The terms and definitions that constitute this standard, and that are to be applied to the uses cited in paragraph 3 below, are contained on page A-1 through Z-1 of this document. There are no other documents applicable to implementation of this standard. A list of acronyms and abbreviations is presented as Appendix A. The list of abbreviations and acronyms uses bold font to identify those term names that are defined in this glossary. An abbreviated index of
selected principal families of related term names is presented in Appendix B. b. Within this document, symbols for units of measurement (and the font type for these symbols) are in accord with ANSI/IEEE Std. 260.1-1993, American National Standard Letter Symbols for Units of Measurement (SI Units, Customary Inch-Pound Units, and Certain Other Units).

3. Use: a. All Federal departments and agencies shall use the terms and definitions contained herein. Only after determining that a term or definition is not included in this document may other sources be used.
b. Nearly all terms are listed alphabetically: a few exceptions to this rule include (1) the family of network topologies, which are grouped under the definition of "network topology," and (2) the family of dispersion terms, which are grouped under the definition of "dispersion." In all cases, ample cross references guide the reader to the location of the definition. Term names containing numerals are alphabetized as though the numbers were spelled out; thus, "144-line weighting" will appear in the "O" portion of the alphabet between the terms "on-board communication station" and "one-way communication," since it is pronounced as if it were spelled "one-forty-four line. . ." For user convenience, exceptions to the rule are taken for entries comprising numerically consecutive terms, e.g., "digital signal 0," . . . "digital signal 4," which are grouped numerically following the "digital signal" entry.

c. An abbreviation for the term name often appears in parentheses following the term name. When both the abbreviation and the spelled-out version of a term name are commonly used to name an entity defined in this glossary, the definition resides with the more commonly used version of the term name. If the more commonly used designation is the fully spelled-out term name, then the definition resides under that name. If, however, the more common term name is the abbreviation, then the definition rests with the abbreviated spelling of that term name. For example, the definition of "decibel" resides under "dB."
d. When more than one definition is supplied for a given term name, the definitions are numbered, and the general definition is given first. Succeeding definitions are often specific to a specialized discipline, and are usually so identified.
e. Note: Definitions are not a mandatory part of this document; these notes are expository or tutorial in nature. When a note follows a source citation (such as "[JP1]"), that note is not part of the source document cited. Notes and cross references apply only to the immediately preceding definition, unless stated otherwise.
f. Three types of cross references are used: "Contrast with," "Synonym" and "See".
(1) "Contrast with" is used for terms that are nearly antonyms, or when understanding one concept is aided by examining the definition of its counterpart.
(2) When term names are synonymous, the definition is placed under only one of the term names, i.e., the preferred term name, which is generally the most common name. Synonyms are listed for cross-reference purposes only. The other term name entries contain only a "Synonym" listing; i.e., the definition for synonymous term names is not repeated. Terms labeled "Colloquial synonym" are in occasional informal use, but not semantically inexact or may border on slang.
(3) "See" is used where an undefined term name is entered as a cross reference only to direct the reader to a related term name (or term names) that is (are) defined in the glossary.
g. Term names that are semantically incorrect, that have been replaced by recent advances in technology, or that have definitions that are no longer applicable, are designated as "deprecated." In such case the reader is referred to current term names, where applicable.
h. The telecommunication terms included in this glossary either are not sufficiently defined in a standard desk dictionary or are restated for clarity and convenience. Likewise, combinations of such words are included in this glossary only where the usual desk-dictionary definitions, when used in combination, are either insufficient or vague.
i. Definitions that carry the source citation "[47CFR]" (which refers to Title 47 U.S. Code of Federal Regulations), or "[NTIA]" (which refers to the NTIA Manual), or the source citation "[RR]" (which refers to the ITU Radio Regulations) may have a format or syntax that differs from the definitions in the remainder of FED-STD 1037C because the FTSC Subcommittee to Revise FED-STD 1037B was not authorized to make any changes whatever to the definitions in these three documents. One minor formatting change was made to definitions from NSTISSI No. 4009, National Information Systems Security (INFOSEC) Glossary, cited [NIS]; Often the introductory; indefinite article or definite article was added at the beginning of the cited definition, and that article was added in square brackets "[ ]" to indicate that its addition was the only change made in the quoted definition.
j. Figures have been added to many definitions throughout the glossary to illustrate complex concepts or systems that are defined herein. With the exception of the figure called "electromagnetic spectrum," these figures are not a mandatory part of this document.
k. This standard contains two appendixes, neither of which is mandatory.

Appendix A consists of a list of abbreviations used in this glossary. In that list, the bold font graces the term names that are defined in this glossary. Appendix B consists of an abbreviated index of families of defined terms whose technologies are related. This index is provided as a tool to identify all related terms within a specific discipline so that the reader's understanding of a definition may be amplified by reading related definitions within a specific discipline. The index also provides the reader with information on the breadth and scope of disciplines addressed in the glossary.

4. Effective Date: The use of this approved standard by U.S. Government departments and agencies is mandatory, effective 180 days following the date of this standard.

5. Changes: When a Federal department or agency considers that this standard does not provide for its essential needs, a request for exception should be submitted to the National Institute of Standards and Technology (NIST) in accordance with Federal Information Processing Standards Procedures.

Federal departments and agencies are encouraged to submit updates to this standard; those updates will be considered for the next revision of this standard. Submit suggested changes to the National Communications System, whose address is given below. Office of the Manager, National Communications System, Office of Technology and Standards, 701 South Court House Road, Arlington, VA 22204-2198.

Federal Telecommunications Standards

AGENCY: Office of Policy, Planning and Evaluation, GSA.

ACTION: Notice of adoption of Federal standard.

SUMMARY: The purpose of this notice is to announce the adoption of Federal Telecommunications Standards (FED-STD). FED-
STD 1052 Telecommunications: High Frequency Radio Modems is approved and will be published.

FOR FURTHER INFORMATION CONTACT: Shirley Radack, telephone (301) 975-2833, National Institute of Standards and Technology, Building 225, Room A-126, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION:
1. The General Services Administration (GSA) is responsible under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, for the Federal Standardization Program.
2. On November 28, 1994, a notice was published in the Federal Register (59 FR 60849) that a proposed FED-STD 1052 entitled Telecommunications: High Frequency Radio Modems was being proposed for Federal use and that comments were requested.
3. GSA and the Department of Commerce (DOC) reviewed the written comments submitted by interested parties and other material available relevant to this standard. GSA and DOC also reviewed the justification package as approved by the Federal Telecommunications Standards Committee (FTSC) and the National Communications System (NCS). On the basis of this review, GSA determined to adopt the proposed standards as Federal Telecommunications Standards (FED-STD) 1052, Telecommunications: High Frequency Radio Modems.

The justification package from FTSC and NCS, and GSA’s analysis of comments received in response to the notice, are a part of the public record and available for inspection.
4. A copy of the standard is provided as an attachment to this notice. Requests for copies of Federal Telecommunications Standards 1052 should be directed to the Federal Telecommunications Standards Committee, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, telephone (202) 755-0325.

Dated: August 7, 1996.
G. Martin Wagner,
Associate Administrator, Office of Policy, Planning, and Evaluation.

Federal Standard 1052
Telecommunications: HF Radio Modems

1. Scope: The terms and accompanying definitions contained in this standard are drawn from authoritative non-Government sources such as the International Telecommunication Union, the International Organization for Standardization, the Telecommunications Industry Association, and the American National Standards Institute, as well as from numerous authoritative U.S. Government publications. The Federal Telecommunications Standards Committee (FTSC) HF Radio Standards Development Working Group (SDWG) developed a family of High Frequency Radio specifications that defines necessary technical parameters for HF radio connections. Federal Standard 1052 is one of the family of standards to be used in conjunction with the interoperability criteria for HF radio automatic operation.

1.1. Applicability: All Federal departments and agencies shall use Federal Standard 1052 as the authoritative source of definitions for terms used in this revision of all telecommunications documentation. The use of this standard by all Federal departments and agencies is mandatory.

1.2. Purpose: The purpose of this standard is to improve the Federal Acquisition process by providing Federal departments and agencies with a comprehensive, authoritative source for details of basic automatic networking operations in HF radio.

2. Requirements and Applicable Documents: The HF radio terms and definitions constitute this standard, and are to be applied to the design and procurement of HF radio equipment requiring operations in stressed environments. There are a family of Federal Telecommunications Standards that may be applicable to implementation of this standard and these are listed in the standard.

3. Use: All Federal departments and agencies shall use this standard in the design and procurement of HF radio modem equipment. Only after determining that a requirement is not included in this document may other sources be used.

4. Effective Date: The use of this approved standard by U.S. Government departments and agencies is mandatory, effective 180 days following the publication date of this standard.

5. Changes: Federal departments and agencies are encouraged to submit updates and corrections to this standard, which will be considered for the next revision of this standard. Suggested changes should be sent to: National Communications System, Office of Technology and Standards, 701 South Court House Road, Arlington, VA 22204-2198.

SUMMARY: The purpose of this notice is to announce a clarification in the Federal Telecommunications Standards (FED-STD); FED-STD 1045A Telecommunications: High Frequency Radio Automatic Link Establishment.

FOR FURTHER INFORMATION CONTACT: Shirley Radack, telephone (301) 975-2833, National Institute of Standards and Technology, Building 225, Room A-126, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION:
1. The General Services Administration (GSA) is responsible under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, for the Federal Standardization Program.
2. The National Communications System requested a clarification sentence be added to paragraph 5.3.4 of the FED-STD 1045A. GSA reviewed and approved the incorporation of the following clarification:

“ALE stations shall employ the individual calling protocol (using a three-way handshake), specific between stations after a link has been established”.

All existing copies of the standard should be amended with this clarification sentence.
3. Requests for copies of Federal Telecommunications Standard 1045A should be directed to the GSA Federal Supply Bureau (FSSB), Specifications Section, Suite 8100, 490 East L’Enfant Plaza, SW., Washington, DC 20407; telephone (202) 755-0325.

Dated: August 7, 1996.
G. Martin Wagner,
Associate Administrator, Office of Policy, Planning, and Evaluation.

Federal Telecommunications Standards

AGENCY: Office of Policy, Planning, and Evaluation, GSA.

ACTION: Notice of correction of Federal standard.

BILLING CODE 6820-25-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[INFO-96-24]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the
Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639-7090.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques for other forms of information technology. Send comments to Wilma Johnson, CDC Reports Clearance Officer, 1600 Clifton Road, MS-D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

**Proposed Projects**

1. **Biomechanical Stress Control in Drywall Installation—New-Drywall installers represented approximately 1.42% of the construction workforce in 1992. Based on analysis of the Supplementary Data System (BLS) of 21 states, the compensable injury/Incidence rate (27.5 cases per 100 workers for this group was nearly three times the injury rate of 9.5 for all other construction occupations combined, in 1987. Data from the 1992 and 1993 Annual Survey of Occupational Injuries and Illnesses (BLS) indicated that there were an estimated 4,680 traumatic injuries among drywall installers involving days away from work in the construction industry in 1992, and 4,122 in 1993. In 1993, bodily reaction and exertion (31.8%), falls (28.6%), and contact with objects (24.6%) were the leading events of injury and illness involving days away from work. As a result, sprains and strains (40.6%) constituted the most frequent nature of injuries and illnesses category in 1994. To gain an understanding of these injuries, NIOSH has initiated this project to examine different approaches in both field and laboratory settings to identify and control the high-risk activities associated with the traumatic injuries and overexertion hazards of drywall installation work. One of the field study components for this project is to identify high-risk tasks and activities for drywall installers, using a drywall installation survey which was developed at NIOSH. The findings of this survey will provide further understanding and focus laboratory research efforts on the most hazardous tasks/activities of drywall installation work. Study populations will include drywall installers or construction workers with drywall installation experience. Each questionnaire will take approximately 20 minutes to complete. The total cost to respondents is estimated at $500.

<table>
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<th>Respondents</th>
<th>No. of Respondents</th>
<th>No. of Responses/Response</th>
<th>Avg. Burden/Response (in hrs.)</th>
<th>Total Burden (in hrs.)</th>
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</tr>
<tr>
<td>Total</td>
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</tbody>
</table>

Dated: August 28, 1996.

**Wilma G. Johnson,** Acting Associate Director for Policy Planning And Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 96–22036 Filed 8–28–96; 8:45 am] BILLS CODE 4163–18–P

**Workers' Family Protection Task Force: Meeting**

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), announces the following committee meeting.

Name: Workers' Family Protection Task Force.

Times and Dates: 9 a.m.–4 p.m., September 18, 1996. 9 a.m.–4 p.m., September 19, 1996.

Place: Department of Labor Building, 200 Constitution Avenue, NW., Room C–5521, Seminar Room 4, Washington, DC 20210.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people.

Purpose: The purpose of the meeting is to discuss the draft working report of the Workers' Family Protection Task Force (WFPTF). The Task Force is comprised of representatives from industry, labor, government, and academia. The draft working report identifies research needs based on review of the "Report to Congress on Workers' Home Contamination Study Conducted Under the Workers' Family Protection Act (29 U.S.C. 671a)." The Task Force is required to determine if additional data is needed; determine the feasibility of developing additional data; and develop an investigative strategy to obtain the data.

Matters To Be Discussed: Agenda items will include a review of the WFPTF charter; an overview and discussion of each section of the draft report; a description of the Work Groups; and plans for development and distribution of the final report.

Agenda items are subject to change as priorities dictate.

Contact Persons for Additional Information: Technical information may be obtained from Elizabeth Whelan, Ph.D., Executive Secretary, NIOSH, CDC, 4676 Columbia Parkway, M/S R15, Cincinnati, Ohio 45226; telephone 513/841–4437. Copies of the "Report to Congress on Workers' Home Contamination Study Conducted Under the Workers' Family Protection Act (29 U.S.C. 671a)" and the draft working report can be obtained from Pam Graydon, Administrative Assistant, NIOSH, CDC, 4676 Columbia Parkway, M/S PO3/C30, Cincinnati, Ohio 45226; telephone 513/533–8312. Copies of the draft working report will also be available at the meeting.

Dated: August 22, 1996.

**Carolyn J. Russell,** Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 96–22039 Filed 8–28–96; 8:45 am] BILLS CODE 4163–19–M

**Administration for Children and Families**

**Submission for OMB Review; Comment Request**

Title: Adoption and Foster Care Analysis and Reporting System (AFCARIS), title IV–B and title IV–E. OMB No.: 0980–0267.

Description: Section 479 of title IV±E of the Social Security Act directs States to establish and implement an adoption and foster care reporting system. The purpose of the data collected is to inform State/federal policy decisions, program management, respond to Congressional and Department inquiries. Specifically, the data is used
to short/long-term budget projections, trend analysis, and target areas for improved technical assistance. The data will provide information about foster care placements, adoptive parents, length of time in care, delays in termination of parental rights and placements for adoption.

Respondents: State governments.

<table>
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<tr>
<th>Instrument</th>
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<th>Number of responses per respondent</th>
<th>Average burden hours per response</th>
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<td>3,251</td>
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</table>

Estimated Total Annual Burden Hours: 331,602

Additional Information: Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, Division of Information Resource Management Services, 370 L’Enfant Promenade, S.W., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer. OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: Ms. Wendy Taylor. Dated: August 26, 1996.

Bob Sargis,
Acting Reports Clearance Officer, Office of Information Management Services.

[FR Doc. 96–22050 Filed 8–28–96; 8:45 am] BILLING CODE 4184–01–M

Food and Drug Administration
[Docket No. 96N–0165]

Agency Information Collection Activities: Proposed Collection; Comment Request; Reinstatement

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995, Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Cosmetic Product Voluntary Reporting Program.

DATES: Submit written comments on the collection of information by October 28, 1996.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets at the heading of this document.

FOR FURTHER INFORMATION CONTACT: Charity B. Smith, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, rm. 16B–19, Rockville, MD 20857, 301–827–1686.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c). To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Cosmetic Product Voluntary Reporting Program (21 CFR 720.4, 720.6, 720.8(b)) (OMB Control Number 0910–0030—Reinstatement)

Under the Federal Food, Drug, and Cosmetic Act (the act) cosmetic products that are adulterated under section 601 of the act (21 U.S.C. 361) or misbranded under section 602 of the act (21 U.S.C. 362) cannot legally be distributed in interstate commerce. To assist FDA in carrying out its responsibility to regulate cosmetics FDA requests, under part 720 (21 CFR part 720), but does not require, that firms that manufacture, pack, or distribute cosmetics file an ingredient statement for each of their products with the agency (§ 720.4). Ingredient statements for new submissions (§ 720.1) are reported on Form FDA 2512, “Cosmetic Product Ingredient Statement” and Form FDA 2512a, a continuation form. Changes in product formulation (§ 720.6) are also reported on Forms FDA 2512 and FDA 2512a. When a firm discontinues the commercial distribution of a cosmetic, FDA requests that the firm file Form FDA 2514, “Discontinuance of Commercial Distribution of Cosmetic Product Formulation” (§ 720.6). If any of the information submitted on or with these forms is confidential, the firm may submit a request for confidentiality under § 720.8.

FDA uses the information received on these forms as input for a computer-based information storage and retrieval system. These voluntary formula filings provide FDA with the best information available about cosmetic product formulations, ingredients and their frequency of use, businesses engaged in the manufacture and distribution of cosmetics, and approximate rates of product discontinuance and formula modifications. FDA’s database also lists cosmetic products containing ingredients suspected to be carcinogenic or otherwise deleterious to humans and the public health generally. The information provided under the Cosmetic Product Voluntary Reporting Program assists FDA’s scientists in evaluating reports of alleged injuries and adverse reactions to the use of cosmetics. The information also is
utilized in defining and planning analytical and toxicological studies pertaining to cosmetics. FDA shares nonconfidential information from its files on cosmetics with consumers, medical professionals, and industry. For example, by submitting a Freedom of Information Act request, consumers can obtain information about which products do or do not contain a specified ingredient and about the levels at which certain ingredients are typically used. Dermatologists use FDA files to cross-reference allergens found in patch test kits with cosmetic ingredients. The Cosmetic, Toiletry, and Fragrance Association, which is conducting a review of ingredients used in cosmetics, has relied on data provided by FDA in selecting ingredients to be reviewed based on frequency of use.

FDA estimates the burden of the Cosmetic Product Voluntary Reporting Program as follows:

### ESTIMATED ANNUAL REPORTING BURDEN

<table>
<thead>
<tr>
<th>21 CFR Section</th>
<th>Form No.</th>
<th>No. of Respondents</th>
<th>Annual Frequency per Response</th>
<th>Total Annual Responses</th>
<th>Hours per Response</th>
<th>Burden Hours</th>
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</thead>
<tbody>
<tr>
<td>720.1 &amp; 720.4 (new submissions)</td>
<td>FDA 2512/2512a</td>
<td>550</td>
<td>4.2</td>
<td>2,310</td>
<td>0.50</td>
<td>1,155</td>
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<td>720.4 &amp; 720.6 (amendments)</td>
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<td>770</td>
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<td>254</td>
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<td>720.6 (notice of discontinuance)</td>
<td>FDA 2514</td>
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<td>720.8 (request for confidentiality)</td>
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<td></td>
<td>1,662</td>
</tr>
</tbody>
</table>

There are no capital costs or operating and maintenance costs associated with this collection.

This estimate is based on the number and frequency of submissions received in the past and on discussions between FDA staff and respondents during routine communications. The actual time required for each submission will vary in relation to the size of the company and the breadth of its marketing activities.

Dated: August 21, 1996.

William K. Hubbard,
Associate Commissioner for Policy Coordination.

[FR Doc. 96–22121 Filed 8–28–96; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96N–0261]

Agency Information Collection Activities: Proposed Collection; Comment Request; Reinstatement

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995, Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements relating to the submission of reclassification petitions for medical devices.

DATES: Submit written comments on the collection of information by October 28, 1996.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–250), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Charity B. Smith, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, rm. 168–19, Rockville, MD 20857, 301–827–1686.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3520, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Recategorization Petitions for Medical Devices—21 CFR Part 860 (OMB Control Number 0910–0138)

Type of OMB Approval Requested: Reinstatement Without Change of a Previously Approved Collection for Which Approval has Expired

FDA has the responsibility under sections 513(e), 513(f), 514(b), 515(b), and 520(l) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(e) and (f), 360d(b), 360e(b), and 360(l)) and 21 CFR part 860, subpart C, to collect data and information contained in reclassification petitions. The reclassification provisions of the act allow any person to petition for reclassification of a medical device from...
any one of three classes (I, II, III) to another class. The reclassification procedures regulation (§ 860.123) requires the submission of sufficient, valid scientific evidence demonstrating that the proposed classification will provide a reasonable assurance of safety and effectiveness of the device for its intended use. The reclassification provisions of the act serve primarily as a vehicle for manufacturers to seek reclassification from a higher to a lower class, thereby reducing the regulatory requirements applicable to a particular device. The reclassification petitions requesting downclassification from class III to class II or class I, if approved, provide an alternative route to the market in lieu of premarket approval for class III devices.

FDAs estimates the burden of this collection of information as follows:

<table>
<thead>
<tr>
<th>CFR Section</th>
<th>No. of Respondents</th>
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There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on current trends, FDA anticipates that 11 petitions will be submitted each year. The time required to prepare and submit a reclassification petition, including the time needed to assemble supporting data, averages 500 hours per petition. This average is based upon estimates by FDA administrative and technical staff who are familiar with the requirements for submission of a reclassification petition, have consulted and advised manufacturers on these requirements, and have reviewed the documentation submitted.

Dated: August 21, 1996.
William K. Hubbard,
Associate Commissioner for Policy Coordination.

[Docket No. 96E–0113]

Determination of Regulatory Review Period for Purposes of Patent Extension; VEXOL™

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for VEXOL™ and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product. FDA recently approved for marketing (HY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Patent and Drug Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product’s regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA’s determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product VEXOL™ (rimexolone). VEXOL™ is indicated for the treatment of postoperative inflammation following ocular surgery and in the treatment of anterior uveitis. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for VEXOL™ (U.S. Patent No. 4,686,214) from Alcon Laboratories, Inc., and the Patent and Trademark Office requested FDA’s assistance in determining this patent’s eligibility for patent term restoration. In a letter dated May 13, 1996, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of VEXOL™ represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product’s regulatory review period.

FDA has determined that the applicable regulatory review period for VEXOL™ is 1,779 days. Of this time, 1,566 days occurred during the testing phase of the regulatory review period, while 213 days occurred during the approval phase. These periods of time were derived from the following dates:

1. The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective: February 17, 1990. FDA has verified the applicant’s claim that the date that the investigation new drug application (IND) became effective was on February 17, 1990.

2. The date the application was initially submitted with respect to the human drug product under section 505(b) of the Federal Food, Drug, and Cosmetic Act: June 1, 1994. The applicant claims May 31, 1994, as the date the new drug application (NDA) for VEXOL™ (NDA 20–474) was initially submitted. However, FDA records indicate that NDA 20–474 was submitted on June 1, 1994.

3. The date the application was approved: December 30, 1994. FDA has verified the applicant’s claim that NDA 20–474 was approved on December 30, 1994.

[FR Doc. 96–22122 Filed 8–28–96; 8:45 am] BILLING CODE 4160–01–F
This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 995 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before October 28, 1996, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before February 24, 1996, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 16, 1996.

Stuart L. Nightingale,
Associate Commissioner for Health Affairs.

[FR Doc. 96–22123 Filed 8–28–96; 8:45 am]
BILLING CODE 4160–15–P

Health Resources and Services Administration

Project Grants for Renovation or Construction of Non-Acute Health Care Facilities

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of single source awards.

SUMMARY: The Health Resources and Services Administration (HRSA) announces the award of two grants under the program authority of Section 1610(b) of the Public Health Service Act. Awards in the amount of $3,929,600 each were issued to the School of Dental Medicine at the University of Pennsylvania to link basic research in oral health care with clinical care for infectious diseases, especially for those patients with HIV, and to the Allegheny University of the Health Sciences for leadership training and diversity, with a particular focus upon women’s health issues.

FOR FURTHER INFORMATION CONTACT: Additional information may be obtained from Mrs. Charlotte G. Pascoe, Director, Division of Facilities Compliance and Recovery, Bureau of Health Resources Development, Health Resources and Services Administration, 5600 Fishers Lane, Room 7–47, Rockville, MD 20857. The telephone number is (301) 443–4303 and the FAX number is (301) 443–0619.

Other Grant Information

Certification Regarding Environmental Tobacco Smoke

The Public Health Service strongly encourages all grant and contract recipients to provide a smoke-free workplace and to promote the non-use of all tobacco products. In addition, Public Law 303–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of a facility) in which regular or routine education, library, day care, health care or early childhood development services are provided to children.

OMB Catalog of Federal Domestic Assistance

The number for the Project Grants for Renovation or Construction of Non-Acute Health Care Facilities is 93.887.

Dated: August 26, 1996.

Ciro V. Sumaya,
Administrator.

[FR Doc. 96–22120 Filed 8–28–96; 8:45 am]
BILLING CODE 4160–15–P

National Institutes of Health

National Institute on Drug Abuse; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the National Advisory Council on Drug Abuse, National Institute on Drug Abuse (NIDA) on September 17–18, 1996, at the Parklawn Building, Conference Rooms G, H, and I, 5600 Fishers Lane, Rockville, MD 20857.

On September 17, from 9 a.m. to 4 p.m., in accordance with provisions set forth in sections 552(b)(4) and 552(b)(6), Title 5, U.S.C. and section 10(d) of Public Law 92–463, this portion of the meeting will be closed to the public for the review, discussion, and evaluation of grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

On September 18, from 9 a.m. to 5 p.m., this portion of the meeting will be open to the public for announcements and reports of administrative, legislative, and program developments in the drug abuse field. Attendance by the public will be limited to space available.

A summary of the meeting and a roster of committee members may be obtained from Ms. Camilla L. Holland, NIDA Committee Management Officer, National Institutes of Health, Parklawn Building, Room 10–42, 5600 Fishers Lane, Rockville, Maryland 20857 (301/443–2755).

Substantive program information may be obtained from Ms. Eleanor C. Friedenberg, Room 10–42, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301/443–2755).

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Eleanor C. Friedenberg in advance of the meeting.


Dated: August 23, 1996.

Susan K. Feldman,
Committee Management Officer, NIH.

[FR Doc. 96–22112 Filed 8–28–96; 8:45 am]
BILLING CODE 4140–01–M

National Institute of Dental Research; Notice of a Meeting of the National Advisory Dental Research Council

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the National Advisory Dental Research Council, National Institute of Dental Research, on September 16–17, 1996. The meeting of the full Council will be open to the public on September 16 from 2:00 p.m. to recess, Conference Room 10, Sixth Floor, Building 31, National Institutes of Health, Bethesda, Maryland, for general discussion and program presentations. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552(b)(4) and 552(b)(6), Title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting of the Council will be closed to the
public on September 17, 8:30 a.m. to adjournment, for the review, discussion and evaluation of individual grant applications. These applications and information concerning individuals associated with the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal applications and reports, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Dr. Dushanka V. Kleinman, Executive Secretary, National Advisory Dental Research Council, and Deputy Director, National Institute of Dental Research, National Institutes of Health, Building 31, Room 2C39, Bethesda, Maryland 20892, (telephone (301) 496–9469) will furnish a roster of committee members, a summary of the meeting, and other information pertaining to the meeting. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Executive Secretary listed above in advance of the meeting.

(Catalog of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research)

Dated: August 26, 1996.

Susan K. Feldman,
Committee Management Officer, NIH.

[FR Doc. 96–22113 Filed 8–28–96; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4086–N–36]

Government National Mortgage Association; Notice of Proposed Information Collection for Public Comments

AGENCY: Government National Mortgage Association ("Ginnie Mae"), Department of Housing and Urban Development ("HUD").

ACTION: Notice.

SUMMARY: In compliance with the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), Ginnie Mae is providing notice in the Federal Register of proposed Information collections in order to solicit public comment. These proposed Information collections include customer satisfaction surveys and focus groups and are intended to evaluate existing Ginnie Mae services and programs.

DATES: Comments due: October 28, 1996.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Sonya K. Suarez, Government National Mortgage Association, Office of Policy, Program, and Risk Management, Department of Housing and Urban Development, 451–7th Street, SW, Room 6222, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Sonya K. Suarez, on (202) 708–2772 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Customer Satisfaction Surveys and Focus Groups.
OMB Control Number: New instrument, not applicable.

Description of the need for the information and proposed use: Ginnie Mae intends to seek clearance for an undefined number of focus groups and customer satisfaction surveys to be conducted over the next three years. These proposed collections are designed to obtain customer feedback on existing Ginnie Mae services and programs as required by Executive Order 12862, Setting Customer Service Standards.

This Executive Order mandates that federal agencies like HUD be customer-driven in order to meet the principles of the National Performance Review. Ginnie Mae, as a government-owned corporation within HUD, must comply with the terms and spirit of the Executive Order. Ginnie Mae uses the full faith and credit of the United States to guaranty the timely payment of principal and interest on publicly sold mortgage pass-through certificates ("mortgage-backed securities" or "MBS"). The Ginnie Mae MBS are backed by a pool of individual mortgage created by mortgage lenders.

There are several Ginnie Mae MBS programs and new programs in process of development. Examples of programs include the Ginnie Mae I single family, Ginnie Mae II, Ginnie Mae REMIC and Ginnie Mae Platinum programs. The kind and quality of MBS programs and services are expected to vary significantly by program type, lender orientation, market conditions and investors preferences. Ginnie Mae's diverse private sector customer base in the mortgage and capital markets gives rise to a need for a comprehensive customer satisfaction data collection approach. To this end, Ginnie Mae proposes to establish a mechanism through which it will be able to explore issues of mutual concern (e.g., kind and quality of desired services) with its major outside participants and beneficiaries.

Ginnie Mae is seeking the flexibility to devise surveys and focus groups by mortgage servicer type e.g., single-family, multifamily, manufactured homes, home improvement loans or hospital/nursing homes. Ginnie Mae may also need to develop different data collection schemes for lenders as compared to investors (i.e., Wall Street dealers or securities holders). Ginnie Mae expects to conduct between 4–7 surveys annually (all programs combined). It is expected that Ginnie Mae may conduct as many as 4–8 focus groups with lenders and/or investors.

The areas of concern to Ginnie Mae and its participants and beneficiaries are expected to change over time. It is important, therefore, that Ginnie Mae have the ability to evaluate customer concerns quickly. Accordingly, Ginnie Mae plans to request that OMB grant an approval for a three-year period of focus groups and surveys. Participation in the focus groups and surveys will be voluntary. Ginnie Mae will consult with OMB regarding each specific information collection during the approval period.

Agency form numbers: Not applicable.

Members of affected public: Business or other for-profit and the Federal Government.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:
Respondents (Ginnie Mae mortgage backed securities issuers or investors) | Est. number of respondents | Est. time of per response | Est. total time of response
--- | --- | --- | ---
Single Family MBS Issuers | 520 | 15 minutes | 7800 minutes/130 hours.
Multifamily MBS Issuers | 125 | 15 minutes | 1875 minutes/31.25 hours.
Manufactured Housing MBS Issuers | 25 | 15 minutes | 375 minutes/6.25 hours.
Multiclass (REMICS) Sponsors | 25 | 15 minutes | 375 minutes/6.25 hours.
MBS Investors | 1000 | 10 minutes | 10000 minutes/166.67 hours.
Total | 1695 | | 20425 minutes/340.42 hours.

Status: New collection of information.


Dated: August 21, 1996.

George S. Anderson,
Executive Vice President, Government National Mortgage Association.

[FR Doc. 96–22025 Filed 8–28–96; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. FR–4086–N–38]

Office of the Assistant Secretary for Public and Indian Housing; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTIONS: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: October 28, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, S.W., Room 4238, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–0846, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of proposal: Insurance Information.

OMB control number: 2577–0045.

Description of the need for the information and proposed use: The Annual Contributions Contract between HUD and a Public Housing Agency (PHA) or Indian Housing Authority (IHA) requires the PHA or IHA to insure their property for an amount sufficient to protect against financial loss. Completion of HUD–5460 is needed only when a new project is constructed. It is used to establish an insurable value at the time the project is built. The amount of insurance can then be increased each year as inflation and increased costs of construction create an upward trend on insurable values.

Agency form number, if applicable: HUD–5460.

Members of affected public: PHA/IHAs. Based upon historical information, it is estimated that approximately 60 new projects will be constructed each year. Public burden for collection of the information necessary to complete HUD–5460 is estimated to average one hour per response, including time for reviewing instructions, searching existing data sources, gathering data needed, and reviewing the collection of information. Annual burden hours per PHA/IHA should not exceed one hour, and total hours for all combined would be approximately sixty. Status of the proposed information collection: Reinstatement.


Dated: August 20, 1996.

Michael B. Janis,
General Deputy, Assistant Secretary for Public and Indian Housing.

BILLING CODE 4210–33–M
Insurance Information

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0045 (exp. 1/31/95)

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1. Fire and Extended Coverage

A. Describe items listed below by thickness & material used in construction.

1. Exterior Walls: ____________________________ Thickness: ____________________________ Material: ____________________________
   - Load bearing
   - Non-bearing

2. Interior Partitions: Thickness: ____________________________ Material: ____________________________

3. Walls Between Units: Thickness: ____________________________ Material: ____________________________
   - Are firewalls built from the ground? [ ] Yes [ ] No
   - Are they built to the underside of roof sheathing? [ ] Yes [ ] No
   - Number of inches above the roof: ____________________________

   - Describe openings, if any:

4. Top Ceiling: Thickness: ____________________________ Material: ____________________________

5. Flooring System:
   a. First Floor: Thickness: ____________________________ Material: ____________________________
   b. Second Floor: Thickness: ____________________________ Material: ____________________________
   c. Third Floor: Thickness: ____________________________ Material: ____________________________
   d. Fourth Floor: Thickness: ____________________________ Material: ____________________________

6. Roof: [ ] Pitched [ ] Flat
   a. Framing: Thickness: ____________________________ Material: ____________________________
   b. Sheathing: Thickness: ____________________________ Material: ____________________________
   c. Covering: Thickness: ____________________________ Material: ____________________________

B. Information for Rating Purposes
   1. Give greatest distance of any project building from a fire hydrant:
   2. Describe city fire department
      [ ] Volunteer [ ] Part paid & part volunteer [ ] Full Time

2. Boiler Insurance

A. Type of Heating (check * one)
   [ ] Central Heating [ ] Group Heating Plant [ ] Space Heaters
   [ ] Hot Water [ ] Steam

B. Type of Boiler (check * one)
   [ ] Coal [ ] Gas [ ] Oil [ ] LPG

C. No. of Boilers

D. Pressure

E. Sq. Ft. of heating Surface per Boiler

F. Type of Fuel (check * one)

G. Approximate value of heating plant (building and equipment). If system is composed of group heating plants, give approximate value of largest plant. If plant is located in basement of building, include value of dwelling area above plant which would be subject to damage by an explosion:

The Insurable Value for the first term can be accurately computed upon completion of a project. For subsequent renewals the Field Office will provide assistance in determining the current insurable value. Instructions for computation of Insurable Value are on the back of this form.

Previous editions are obsolete

form HUD-5460 (08/15/96) ref. Handbook 7401.5
Public reporting burden for this collection of information is estimated to average 1 hour 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 Reports Management Officer, Paperwork Reduction Project (2577-0045), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. This agency may not conduct or sponsor, and a person is not required to respond to, a collection information unless that collection displays a valid OMB control number. Do not send this form to the above address.

The Annual Contributions Contract (ACC) between HUD and a Public Housing Agency (PHA) or Indian Housing Authority (IHA) requires the PHA or IHA to insure their property for an amount sufficient to protect against financial loss. PHAs/IHAs complete the Form HUD-5460 only when a new project is constructed. It is used to establish an insurable value at the time the project is built. The amount of insurance can then be increased each year as inflation and increased costs of construction create an upward trend on insurable values. Responses to the collection of information are voluntary. The information requested does not lend itself to confidentiality.

Instructions for Computation of Insurable Value (Block 1-D)

1. Architect’s Fee (include 30% of fees). From latest Contract Award Budget, form HUD-52484, Account Classification 1430.1, column (f).

2. Structures and Equipment. Total the following items:
   (a) From form HUD-52396, (attached to Contract Award Budget):
       Dwelling Structures, Account 1460;
       Dwelling Equipment, Account 1465;
       Nondwelling Structures, Account 1470;
       Nondwelling Equipment, Account 1475.
   (b) From Contract Award Budget, Column 5:
       Dwelling Equipment - Non-expendable, Account 1465.1;
       Nondwelling Equipment, Accounts 1475.1, 1475.2 and 1475.3.
   (c) From Change Order Record Card:
       Changes charged to Dwelling and Nondwelling Units.

3. Total of 1 and 2

Deductions

4. From form HUD-51000, Schedule of Amounts for Contract Payments:
   Add applicable items of footings and foundations.

5. a. 25% of plumbing rough-in only. Do not include any cost of fixtures, etc.
   b. 10% of cost of electrical rough-in. Do not include any cost of fixtures, etc.
   10% of cost of heating if central plant is provided.

Previous editions are obsolete

form HUD-5460 (08/15/96)
ref. Handbook 7401.5

[FR Doc. 96-22026 Filed 8-28-96; 8:45 am]
BILLING CODE 4210-33-C
National Affordable Housing Act) was signed into law on November 28, 1990 (Pub. L. 101–625) and created the HOME Program to expand the supply of affordable housing. Interim regulations were first published for the program on December 16, 1991 and subsequent interim rules have been published and codified at 24 CFR part 92. On July 12, 1995, the Department invited wide ranging comments on the interim rule in order to prepare a final rule for the program. This paper work submission will support the changes to be made in the final rule and reflects the increased flexibility that participating jurisdictions may elect to exercise within the statutory framework of the program.

HOME funds may be used to develop or assist modest housing occupied by low-income families. Eligible applicants are States, units of general local government or consortia which are eligible to receive HOME allocations by formula. The additional information collection is essential if the Department is to determine the eligibility of the activity and the property to be assisted in keeping with the statutory requirements of the Act.

This Notice also lists the following information:

Title of Proposal: HOME Investment Partnerships Program
OMB Control Number, if applicable: N/A

Description of the need for the information and proposed use:
Documentation would be required by HUD under § 92.206 Eligible project costs if a participating jurisdiction elects to refinance existing debt in connection with the rehabilitation of a multifamily project. A participating jurisdiction must establish refinancing guidelines and include them in its consolidated plan as described in 24 CFR part 91.

Public comment suggested that HUD provide the option of refinancing multifamily projects but develop requirements which assure that this option is used in a fiscally responsible manner. While the Department declined to set limitations on the amount of subsidy used for refinancing or the nature or ownership of the projects, the final rule requires that participating jurisdictions develop and make public the guidelines under which they would permit multifamily property refinancing.

Documentation would be required by HUD under § 92.254 Qualification as affordable housing: homeownership if a participating jurisdiction elects to determine 95 percent of the median area purchase price for single family housing in the jurisdiction instead of using the single family mortgage limits under Section 203(b). The Department has adopted the Section 203(b) limits as a surrogate for the 95 percent statutory limitation.

A few participating jurisdictions, which are part of larger metropolitan areas, expressed concern that the Section 203(b) limits were not reflective of 95 percent of the median area purchase price for their communities. These communities generally had expensive housing markets. The final rule would permit any participating jurisdictions with these concerns to determine 95 percent of median area purchase price based on recent sales in their locality and provide that information to the Department for review.

Under the same section, documentation will be required by HUD if a participating jurisdiction elects to do a market analysis for a neighborhood in which it wishes to demonstrate a presumption of affordability in lieu of imposing an enforcement mechanism on new homebuyer units.

In public comment, several participating jurisdictions indicated the negative effect of imposing resale restrictions on units in which HOME funds are used solely as construction financing. One jurisdiction claimed that the inner city neighborhoods in which they worked provided modest housing which could be affordable to eligible applicants through conventional financing after rehabilitation occurs. HOME funds are used to spur private investment by financing the rehabilitation which could be done quickly and efficiently.

Based on market data prepared by the participating jurisdiction, a presumption of affordability could be supported. In this way, participating jurisdictions could eliminate imposition of resale requirements, making the units a more attractive sales option for prospective eligible homeowners. A participating jurisdiction could elect this procedure at its discretion in lieu of imposing and monitoring long-term lien provisions, requiring the sale of the unit to another low-income family.

Agency form numbers, if applicable: N/A

Members of affected public: States, units of general local government.

Estimation of the total annual number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:
Total annual estimated burden hours for those optional requirements are 2,275.

Status of the proposed information collection: Public comment requested by HUD.

Contact person and telephone number (this is not a toll-free number) for copies of the proposed forms and other available documents: Mary Kolesar, Director, Program Policy Division, Office of Affordable Housing Programs, Room 7162, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone number (202) 708-2470. (This is not a toll-free number.) A telecommunications device for hearing- and speech-impaired persons (TTY) is available at 1-800-877-8339 (Federal Information Relay Service).


Dated: July 25, 1996.

Andrew Cuomo,
Assistant Secretary for Community Planning and Development.

[FR Doc. 96-22028 Filed 8-28-96; 8:45 am]
BILLING CODE 4210-29-M

[Docket No. FR–4086–N–33]

Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: October 28, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Josie D. Harrison, Reports Liaison Officer, Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Steven Tursky, (202) 708–2288 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. This Notice also lists the following information:

Title of Proposal: Affirmative Fair Housing Marketing Plan.

OMB Control Number: 2529–0013. Description of the need for the information and proposed use: HUD uses this information to assess the adequacy of the applicant’s proposed actions to carry out the Affirmative Fair Housing Marketing requirements of 24 CFR 200.600 and review compliance with these requirements under 24 CFR Part 108, the AFFH Compliance Regulations.

Agency form numbers, if applicable: HUD 935-2.

Members of affected public: Applicants for mortgage insurance under the Department’s insured single family and multifamily programs. Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: On an annual basis, 2,500 respondents, 1 response per respondent, 2,500 total responses, 1,875 total burden hours.

Status of the proposed information collection: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.


Dated: August 19, 1996.

Laurence D. Pearl,
Acting Deputy Assistant Secretary for Policies and Initiatives.

[FR Doc. 96–22028 Filed 8–28–96; 8:45 am]
BILLING CODE 4210–29–M

[Docket No. FR–4086–N–34]

Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: October 28, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Josie D. Harrison, Reports Liaison Officer, Fair Housing and Equal Opportunity, Department of Housing & Urban Development, 451—7th Street, SW, Room 5124, Washington, DC 20410–5000.

Section affected | Number of respondents | Frequency of response | Hours of response | Annual total |
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FOR FURTHER INFORMATION CONTACT: Nathaniel K. Smith, (202) 708-2740 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Civil Rights Tenant Characteristics/Occupancy Report, Insured Unsubsidized Housing Programs.

OMB Control Number: 2529-0007.

Description of the need for the information and proposed use: Management Agents of HUD insured unsubsidized housing programs furnish resident information concerning race/ethnicity and gender of tenant household heads; to assist the Department in carrying out its responsibility for assuring that Federal statutes that prohibit discrimination and provide for fair housing are met.

Agency form numbers, if applicable: HUD 949.

Members of affected public: Owners or management agents of HUD insured unsubsidized housing programs.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: On an annual basis, 4,000 respondents, 2.3 responses per respondent, 9,200 total responses, 4,938 total burden hours.

Status of the proposed information collection: Revision of a currently approved collection, with minor changes.


Dated: August 19, 1996.

Laurence D. Pearl, Acting Deputy Assistant Secretary for Policies and Initiatives.

[FR Doc. 96-22029 Filed 8-28-96; 8:45 am]
BILLING CODE 4210-28-M

[Docket No. FR-4086-N-35]
Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: October 28, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Josie D. Harrison, Reports Liaison Officer, Fair Housing and Equal Opportunity, Department of Housing & Urban Development, 451-7th Street, SW., Room 5124, Washington, DC 20410-5000.

FOR FURTHER INFORMATION CONTACT: Sherry Fobear, (202) 708-2215, x303, (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Fair Housing Initiatives Programs Application Kit and Reporting Requirements.

OMB Control Number: 2529-0033.

Description of the need for the information and proposed use: The Fair Housing Initiatives Program will provide funds to public and private agencies involved in carrying out programs that prevent or eliminate discriminatory housing practices prohibited by the Fair Housing Act—Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601–19. The funded organizations will develop, implement, and carry out programs designed to enhance compliance with the Fair Housing Act and substantially equivalent State and local fair housing laws.

Agency form numbers, if applicable: NA.

Members of affected public: State and local governments or their agencies, public and private non-profit organizations, or other public and private entities.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 400 respondents, one response annually per respondent applying for funding, 53 average hours per response, 21,200 burden hours; 70 out of 400 respondents selected for funding, 4 responses annually per respondent for reporting program and financial status, 8 average hours per response, 2,240 burden hours; and 70 respondents, one response annually for monitoring compliance with agency requirements, 8 average hours per response, 560 burden hours, 24,000 total burden hours.

Status of the proposed information collection: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.


Dated: August 14, 1996.

Susan M. Forward, Deputy Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 96-22030 Filed 8-28-96; 8:45 am]
Office of the Assistant Secretary for Public and Indian Housing; Notice of Proposed Information Collection for Public Comments

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: October 28, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, S.W., Room 4238, Washington, D.C. 20410-5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708-0846, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: HUD-assisted Indian Housing Development Cost Budget and Project Characteristics.

OMB Control Number: 2577-0130.

Description of the need for the information and proposed use: HUD needs financial and project characteristics information for HUD-assisted development as required by the Final Rule, Part 950, Indian Housing Programs, which was published April 10, 1995. HUD has created a new form to ease the reporting burden for those Indian Housing Authorities (IHAs) who are processing development under the "Standard Method". IHAs will submit only a minimum amount of financial information using this form. Section 950.260(a) of the Final Rule requires IHAs to submit project characteristics information. HUD uses this information to monitor each of the stages of the development process: planning, construction start, and date of full availability to identify significant changes in the characteristics of the project.


Members of affected public: State, Local or Tribal Government.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: For the three forms, on a once per project basis, 219 respondents, one response per project, 219 total responses, 11 hours, 1,023 total burden hours.

Status of the proposed information collection: Revision.


Dated: August 21, 1996.

Kevin Emanuel Marchman,
Acting Assistant Secretary for Public and Indian Housing

BILLING CODE 4210–33–M
**Development Project Characteristics**

Native American Low-Income Housing Program

| U.S. Department of Housing and Urban Development |
| Office of Public and Indian Housing |

OMB Approval No. 2577-0130 (exp. 7/31/99)

**Public reporting burden for this collection of information is estimated to average 1 hour 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 Reports Management Officer, Paperwork Reduction Project (2577-0130), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. This agency may not conduct or sponsor, and a person is not required to respond to, a collection information unless that collection displays a valid OMB control number.**

**Do not send this form to the above address.**

1. Legal Name of Housing Authority
2. Project Number

3. **Stage**
   - Planning
   - Construction Start
   - DOFA/Other (specify)

4. **Development Method**
   - Conventional
   - Acquisition
   - Turnkey
   - Modified Turnkey
   - Force Account
   - Other (specify)

5. **Layout**
   - Scattered
   - Clustered

6. Reformatted
   - Yes
   - No

7. **Total Net sq. ft. (project)**
8. **Average Room Size**

9. **Construction Type**
   - Masonry
   - Mixed Masonry
   - Frame (modular)
   - Mixed (specify)

10. **Construction Method**
    - Stick
    - Manufactured/Modular
    - Acquired
    - Panelized

11. **Program Type**
    - Mutual Help
    - Rental

12. **Foundation Type**
    - Slab On Grade
    - Full Basement
    - Partial Basement
    - Crawl Space
    - Post and Pad

    - Concrete Masonry
    - Poured Concrete
    - Driven / Bored Piling

13. **Structure Type**
    - Single Family Detached
    - Row or Townhouse Style
    - Semi-Detached
    - Zero Lot Line (duplex)

    - Elevator Structure
    - Mixed Type (acquired [ncl])

14. **Construction Contract Amount**
15. **Native American Contractor**
16. **Minority Contractor**

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<thead>
<tr>
<th>$</th>
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<tr>
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17. **Schedule of Buildings and Units**

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<th>Non-Elderly</th>
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</tbody>
</table>

**Totals**

18. **Number of Non-Dwelling Buildings**

**Comments**

---

Submitted by

Date

**DRAFT**

Paul D. Silverman

Page 1 of 2

form HUD-53046 (07/17/96)
ref. Indian Housing Development Guidebook
Instructions for Preparing Development Project Characteristics, form HUD-53046.

A. General. Submit this form to the Area or Division Office of Native American Programs (ONAP) at each of the following stages of the development process:
   Planning
   Construction Start
   Date of Full Availability (DOFA)
   The form may also be submitted anytime during the development process to notify ONAP of significant changes in the characteristics of the project.

1. Enter full legal name of the Housing Authority.
2. Enter the complete project number. Example: AZ99B001099
3. Identify at which stage this form is being submitted.
4. Identify the development method used for this project.
5. Identify the site layout for this project.
6. Indicate whether this project was created through reformulation.
7. Enter the total net square footage of the project dwellings.

8. Enter the average number of rooms for all units in the project.
9. Identify the construction type used for this project.
10. Identify the construction method used for this project.
11. Identify the program type for this project.
12. Identify the foundation type used for this project.
13. Identify the structure type used for this project.
14. Identify the original contract amount for the project.
15. Specify whether the general contractor is an Indian-owned business.
16. Specify whether the general contractor is a minority business enterprise.
17. Indicate the number of buildings and units (by bedrooms) for non-elderly occupancy and the number designed for elderly occupancy for this project.
18. Indicate the number of non-dwelling units for this project. Describe in the Comments section the usage of any non-dwelling units.

Add any comments necessary.
**Development Cost Budget - Assisted Method**

**Native American Low-Income Housing Program**

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**Housing Authority Costs:**

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<td>1410.3 Work - MH Contribution</td>
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<td>1410.4 Legal Expenses</td>
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<td>1410.9 Employee Benefit Contribution</td>
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<td>1410.11 Audit</td>
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<tr>
<td>22</td>
<td>1425 Initial Operating Deficit</td>
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**Planning:**

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<th>Actual Development Cost Incurred to ( / )</th>
<th>Actual/Estimated Additional to Complete (8)</th>
<th>Total Development Cost Per Unit</th>
<th>Amount Sum of (10)</th>
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<tr>
<td>23</td>
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<td>1430.2 Consultant Fees</td>
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<td>1430.6 Permit Fees</td>
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<td>1430.7 Inspection Costs</td>
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<td>27</td>
<td>1430.9 Housing Surveys</td>
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<td>28</td>
<td>1430.19 Sundry Planning Costs</td>
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<td>Total Planning (sum of lines 23 - 28)</td>
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**Site Acquisition:**

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<th>Actual/Estimated Additional to Complete (8)</th>
<th>Total Development Cost Per Unit</th>
<th>Amount Sum of (10)</th>
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<tr>
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<td>1440.1 Property Purchases (or Leases)</td>
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<td>31</td>
<td>1440.4 Surveys and Maps</td>
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<td>32</td>
<td>1440.5 Appraisals</td>
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<td>1440.6 Title Information</td>
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<td>1440.7 Site - MH Contribution</td>
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<td>1440.8 Legal Costs - Site</td>
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<td>1440.10 Option Negotiations</td>
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<td>1440.12 Current Tax Settlement</td>
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<td>1440.19 Sundry Site Costs</td>
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<td>Total Site Acquisition (sum of lines 30 - 38)</td>
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## Subpart I. Budget (cont.)

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<th>Actual Development Cost Incurred to (Per Unit)</th>
<th>Actual Estimated Additional to Complete (Amount)</th>
<th>Total Development Cost (Sum of (6) and (7))</th>
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<td>Work-MH Contribution</td>
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<tr>
<td>42</td>
<td>Materials and Equipment - MH Contribution</td>
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<td>43</td>
<td>Other MH Contributions</td>
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<tr>
<td>44</td>
<td>IHS Off-site Water and Sewer</td>
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<td>Total Site Improvement</td>
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<td>Dwelling Structures</td>
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<td>Materials and Equipment - MH Contribution</td>
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<td>Office Furniture and Equipment</td>
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<td>Maintenance Equipment</td>
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<td>Computer Equipment</td>
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<td>Nondwelling Equipment-MH Contribution</td>
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<td>Total Nondwelling Equipment</td>
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<td>Contract Work in Progress</td>
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<td>Demolition Costs</td>
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<td>72</td>
<td>Subtotal (sum of lines 6, 18, 22, 26, 29, 33, 35, 39, 45, 50, 54, 56 - 72)</td>
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<td>73</td>
<td>Management Cost Allocation</td>
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<td>MOD Costs Funded by Development</td>
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<tr>
<td>75</td>
<td>Contingency (1% or 5% or less of line 73)</td>
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<td>Total Development Cost (sum of lines 73 - 76)</td>
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<td>77</td>
<td>Donations</td>
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<tr>
<td>78</td>
<td>Development Cost Including Donations (lines 77 + 78)</td>
<td></td>
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</tbody>
</table>

The HA approving official hereby certifies and ensures that it will comply with the regulations and requirements with respect to the acceptance and use of Federal funds for this Federally-assisted program.

Signature of HA Approving Official

Signature of HUD Reviewing Official

Previous editions are obsolete

Page 2 of 6

Indian Housing Development Guidebook

form HUD-53045-A (07/17/96)
<table>
<thead>
<tr>
<th>Subpart II. TDC Cap Calculation</th>
<th>Subpart III. Mutual Help Contribution Calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Line 79 Development Cost</td>
<td>1. Cash</td>
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<tr>
<td>2. Minus: Line 74 1450 MHC Subaccount (Line 11)</td>
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<tr>
<td>3. Line 44 1450.9 IHS Off-site Water and Sewer</td>
<td>2. 1410 MHC Subaccount (Line 34)</td>
</tr>
<tr>
<td>4. Line 75 1499 MOD Costs Funded by Development</td>
<td>3. 1440 MHC Subaccount (Line 34)</td>
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<tr>
<td>5. Line 78 Donations</td>
<td>4. 1450 MHC Subaccounts (sum of lines 41 - 43)</td>
</tr>
<tr>
<td>6. Plus: Form HUD-52825 or HUD-52837</td>
<td>5. 1460 MHC Subaccounts (sum of lines 47 - 49)</td>
</tr>
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<td>7. Total Development Cost Cap</td>
<td>6. 1465 MHC Subaccount (Line 53)</td>
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<td></td>
<td>7. 1470 MHC Subaccounts (sum of lines 56 - 58)</td>
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<td>8. 1475 MHC Subaccount (line 66)</td>
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<td>9. Total Mutual Help Contribution</td>
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<td></td>
<td>(sum of all lines should equal $1,500 times the number of units)</td>
</tr>
</tbody>
</table>

Remarks:
Instructions for Preparing Development Cost Budgets

A. General.

1. Form HUD-53045-A must be used by HA's who are receiving HUD assistance in the development process, either voluntarily or as the result of a corrective action order. HA's who are processing development under the "Standard" or "Non-Assisted" method may instead submit form HUD-53045-B.

   a. For the first budget (Planning Budget), complete only columns 5, 6, and 7 of Subpart I. Complete all applicable lines of Subparts II and III.

   b. Round off all amounts to the nearest dollar.

   c. Where descriptions or supplementary data are required, use the Remarks section or an attached sheet, identifying the applicable item.

2. Prepare an original and two copies for all Development Cost Budgets and submit to the appropriate Area or Division ONAP.

3. Budgets should cover all of the housing to be built under a single project number, whether on one or several sites.

4. For descriptions of the cost accounts to be used, see the Public and Indian Housing Low-Rent Technical Accounting Guide, 7510.1. The Area or Division ONAPs will assist HAs upon request in the distribution of costs to individual accounts.

B. Heading

1. Legal Name of Housing Authority: Enter the full legal name of the Housing Authority.

2. Project Location: Identify the location of the project.

   Example: Window Rock, AZ

3. Budget Sequence Number:

   a. If submitting a budget, identify the budget sequence number. If it is the first budget for that project enter number 1. The next budget submission for that project should be identified as budget sequence number 2 and so forth.

   b. If submitting a cost statement, leave blank.

4. Project Number: Enter the complete project number.

   Example: AZ99B001099

5. Development Method: Identify the predominant development method used: Conventional, Turnkey, Modified Turnkey, Acquisition, Force Account, or Self Help

6. Program Type: Identify the program type: LR - Low Rent, NMH - New Mutual Help

7. Number of Units: Specify the number of units which are being developed as Elderly units and the number being developed as Nonelderly. The sum of the two numbers should equal the total number of units being constructed for that project.

8. Purpose: Place an X next to the description which most closely matches the purpose of the submission.

C. Subpart I. Budget

1. Column Entries.

   a. Last Budget: Enter the amounts from the most recent HUD reviewed budget. This column should only be left blank if the Housing Authority is submitting the project's first budget (Budget Sequence Number 1).

   b. Actual Development Cost Incurred to:

      1) If submitting an Actual Development Cost Statement or a budget, identify the date through which the actual development costs have been incurred.

      2) If submitting semi-annual cost statements, enter the date on which the reporting period ended (i.e., 6/30/96 or 12/31/96).

   c. Actual/Estimated Additional to Complete: Use this column to reflect the additional estimated or actual costs for completing the development work.

   d. Total Development Cost/Per Unit: Complete column 7 first then calculate the per unit cost by dividing the amount in column 7 by the total number of units identified in the heading.

   e. Total Development Cost/Amount: This column is the sum of columns 4 and 5.

2. Line Entries

   a. Turnkey and Conventional Projects.

      1) Turnkey. The account classifications for Developer's Price, lines 1 through 8, are to be completed only for projects being developed under the Turnkey method. Where the developer is not providing the site, no entry will be made in line 1, Account 1440; instead, just as for conventional projects, lines 10 through 39 will be completed. For a developer-provided site, entries will be made for site acquisition costs to the HA, e.g., appraisals (line 32) where required (see item g below). The Total Developer's Price will be agreed upon at the Feasibility Conference by the developer and the HA (and HUD-assisted method only). The amounts entered for site, architectural and engineering services should be the amounts to be included with the Preliminary Contract of Sale for the eventuality of separate purchase by the HA. The amount entered for Other should be the sum of (1) the Developer's Fee and Overhead, (2) Interim Financing, and (3) Closing Costs. In the case of turnkey projects, planning costs reviewed by the Area or Division ONAP will allow for entries in lines 23 and 24 as well as in line 6, in addition to the required services for which entry will be made in line 26.

      2) Conventional. For conventional projects, lines 1 through 8 will remain blank. The Schematic Design Documents and Architect's Estimate of Project Construction Cost will provide a basis for reasonable estimates for costs of Site Improvements - Account 1450, Dwelling Structures - Account 1460, and Nondwelling Structures - Account 1470. The Area or Division ONAP may be requested to assist in preparing appropriate estimates for Dwelling and Nondwelling Equipment - Accounts 1465 and 1475. The estimate shall be accompanied by supporting data showing items and the cost of each.
b. 1410 Administration (lines 9 through 18). HAs with experience in the development and management of low-income housing should estimate administration costs on the basis of such experience, as applicable, for the current development method. For turnkey projects, there will be less administration activity normally than for conventional projects. The amounts for the various subaccounts shall be the costs of the items of expense which are directly traceable to and essential in the planning, construction and completion of the project, and the prorata amounts of the HA’s total administration costs in respect to the items which are not wholly traceable to the project. Administration (1410) and Planning (1430) Costs ordinarily terminate with the End of the Initial Operating Period (EIOP). After this date only costs of personnel employed in development work specifically applicable to the particular project (e.g., employee or architect engaged in warranty inspections) may be charged to these accounts.

1) 1410.3 Work-MH Contribution (line 11). This account shall be charged with that portion, if any, of the MH contribution attributed to work furnished to the HA (for which the contractor is not responsible) for administrative purposes by or on behalf of the Homebuyer Families.

2) 1410.1 and 1410.2 Nontechnical and Technical Salaries (lines 9 and 10). The following supporting data shall accompany the estimates for Nontechnical and Technical Salaries: List, by job title, each HA employee whose salary, or portions thereof, will be chargeable to these accounts. For each, show the annual rate of the gross salary, the estimated length of time the employee will spend in connection with the development of the project, and the total of the gross salary which is properly chargeable to either of these accounts. If only a portion of the employee’s time will be chargeable to this project, show the percentage that will be so chargeable and show, in a footnote, the percentage distribution to other projects and the accounts to which distributed.

3) 1410.11 Audit (line 15). This expense has been separated from account 1410.19 Sundry and should reflect the prorata amount of audit expense chargeable to the project.

4) 1410.17 Insurance (line 16). This expense has been separated from account 1410.19 Sundry and should reflect the prorata amount of insurance expense chargeable to the project.

5) 1410.19 Sundry (line 17). The estimate for this account shall include supporting data as follows: List and show the cost of each item of administrative and general expense for which a specific account is not provided in the 1410 group of accounts. This includes expenses for publications, membership dues, and telephone, which are no longer separate 1410 subaccounts. If only a portion of the cost of any item will be chargeable to this project, show the percentage and amount that will be so chargeable and show, in a footnote, the percentage distribution to other projects.

c. 1418 Counseling Costs (line 20). This account shall be charged with the cost of counseling to be provided to participating families.

d. 1420 Total Interest (line 21). Actual or estimated interest expense for loan projects (reserved prior to FY 1987) is reflected on this line. Grant projects (reserved FY 1987 or after) do not have interest expense.

e. 1425 Initial Operating Deficit (line 22). In the absence of dependable previous experience data on which to base a preliminary estimate of the initial operating deficit, an allowance not to exceed $50 per dwelling unit may be used.
be entered in column (4) as an actual cost incurred. The Final Budget shall be accompanied by supporting data listing (a) the name of the contractor and type of work performed under each construction contract executed; (b) each original contract amount established and shown on form HUD-52396 at Contract Award stage; (c) a listing and identification of account classification for each change order approved for each construction contract; and (d) each final contract amount, including all change orders.

j. 1406 Management Cost Allocation (line 74). This account shall be charged with not more than 10 percent of the approved development grant amount for any operating subsidy purpose. This amount is in addition to HA Administration costs allocated to the development grant. See Notice (in clearance at this time) for additional information.

k. 1499 MOD Costs Funded by Development (line 75). This account shall be charged with any amount approved to fund allowable modernization activities of any active modernization project. See Notice (in clearance at this time) for additional information.

l. Contingency (line 76). Typically, not more than 5 percent for conventional projects, nor more than 1 percent for turnkey, of line 73 Subtotals.

m. Donations (line 78). For donations, see account 2850 in the PIH Low-Rent Technical Accounting Guide, 7510.1. A donation represents a cash donation and the reasonable value of property donated to the project. A Mutual Help contribution is not a donation. Any cost met from cash donations and the value of any donations in kind will be included under the appropriate cost account.

D. Subpart II. TDC Cap Calculation

Bring forward the totals from lines 44, 74, 75, and 78 from Subpart I, column 7. Identify any 1498 Development Costs Funded by MOD accounts for the identified project from approved form HUD-52825, CIAP Budget/Progress Report, or form HUD-52837, Annual Statement/Performance and Evaluation Report. See Notice (in clearance at this time) for additional information.

E. Subpart III. Mutual Help Contribution Calculation

Identify the amount of cash provided as Mutual Help Contribution. Bring forward the totals from lines 11, 34, 53, and 66 from Subpart I, column 7. Calculate the sums of lines 41-43, 47-49, and 56-58 from Subpart I, column 7, and bring forward the totals.
Development Cost Budget - Standard Method
Native American Low-Income Housing Program

1. Legal Name of Housing Authority

2. Project Location

5. Development Method

6. Program Type

7. No. of Units:

8. Purpose

9. Budget Sequence Number

10. Costs Incurred through / / 

Subpart I. Budget

<table>
<thead>
<tr>
<th>Line No. (1)</th>
<th>Account Classification (2)</th>
<th>Latest Approved Budget (round to the nearest $) (3)</th>
<th>Total Development Cost (round to the nearest $) (4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1482 Total Developer's Price</td>
<td></td>
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<td>2</td>
<td>1410 Total Administration</td>
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<td>3</td>
<td>1415 Liquidated Damages</td>
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<td>4</td>
<td>1418 Counseling Costs</td>
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<td>5</td>
<td>1420 Total Interest</td>
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<td>6</td>
<td>1425 Initial Operating Deficit</td>
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<td>7</td>
<td>1430 Total Planning</td>
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<td>8</td>
<td>1440 Total Site Acquisition</td>
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<td>9</td>
<td>1450 Total Site Improvement</td>
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<td>10</td>
<td>1460 Total Dwelling Structures</td>
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<td>11</td>
<td>1465 Total Dwelling Equipment</td>
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<td>12</td>
<td>1470 Total Nondwelling Structures</td>
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<td>13</td>
<td>1475 Total Nondwelling Equipment</td>
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<td>14</td>
<td>1480 Contract Work in Progress</td>
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<td>15</td>
<td>1485 Demolition Costs</td>
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<td>16</td>
<td>1495 Relocation Costs</td>
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<tr>
<td>17</td>
<td>Subtotal (sum of lines 1 thru 16)</td>
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<tr>
<td>18</td>
<td>1406 Management Cost Allocation</td>
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<td>19</td>
<td>1499 MOD Costs Funded by Development</td>
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<tr>
<td>20</td>
<td>Contingency (1% or 5% or less of line 17)</td>
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<tr>
<td>21</td>
<td>1300.2 Total Development Cost (sum of lines 17 thru 20)</td>
<td></td>
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<tr>
<td>22</td>
<td>Donations</td>
<td></td>
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<tr>
<td>23</td>
<td>Development Cost Including Donations (lines 21 plus 22)</td>
<td></td>
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</tbody>
</table>

Subpart II. TDC Cap Calculation

1. Line 23 Development Cost Including Donations


3. 1450.9 IHS Off-site Water and Sewer

4. Line 19 1499 MOD Costs Funded by Development

5. Line 22 Donations

6. Plus: Form HUD-52825 or HUD-52837

7. Total Development Cost Cap

Subpart III. Mutual Help Contribution Calculation

1. Cash

2. 1410.3

3. 1440.7

4. Sum of Accounts 1450.1, 1450.2, and 1450.3

5. Sum of Accounts 1460.1, 1460.2, and 1460.3

6. Account 1465.3

7. Sum of Accounts 1470.1, 1470.2, and 1470.3

8. Account 1475.10

9. Total Mutual Help Contribution (sum of all lines should equal $1,500 times the number of units)

The HA approving official hereby certifies and ensures that it will comply with the regulations and requirements with respect to the acceptance and use of Federal funds for this Federally-assisted program.

Signature of HA Approving Official

Signature of HUD Reviewing Official

Page 1 of 3
Instructions for Preparing Development Cost Budget

A. General
1. Form HUD-53045-B may be used by HA's who are processing development under the "Standard" or "Non-Assisted" method. HA's who are receiving HUD assistance in the development process, either voluntarily or as the result of a corrective action order, must continue to submit form HUD-53045-A.

2. Prepare an original and two copies for all Development Cost Budgets and submit to the appropriate Area or Division ONAP.

3. Detailed information for the accounts included in this form can be found in the instructions for form HUD-53045-A or the Public and Indian Housing Low-Rent Technical Accounting Guide, 7510.1.

4. To ensure the accurate entry of budget information into LOCCS by ONAP Offices, all Subparts of the form must be completed.

B. Heading
1. Legal Name of Housing Authority: Enter the full legal name of the Housing Authority.

2. Project Location: Identify the location of the project.
   Example: Window Rock, AZ

3. Reserved.

4. Project Number: Enter the complete project number.
   Example: AZ99B001099

5. Development Method: Identify the predominant development method used: Conventional, Turnkey, Modified Turnkey, Acquisition, Force Account, or Self Help

6. Program Type: Identify the program type:
   LR - Low Rent
   NMH - New Mutual

7. Number of Units: Specify the number of units which are being developed as Elderly units and the number being developed Nonelderly. The sum of the two numbers should equal the total number of units being constructed for that project.

8. Purpose: Place an X next to the description(s) which most closely matches the purpose of the submission.

9. Budget Sequence Number:
   a. If submitting a budget, identify the budget sequence number. If it is the first budget for that project enter number 1. The next budget submission for that project should be identified as budget sequence number 2 and so forth.
   b. If submitting a cost statement, leave blank.

10. Costs Incurred Through:
   a. If submitting an Actual Development Cost Statement, identify the date through which the actual development costs were incurred.
   b. If submitting semi-annual cost statements, enter the date on which the reporting period ended (i.e., 6/30/96 or 12/31/96).
   c. If submitting a budget, leave blank.

C. Subpart I. Budget
1. Latest Approved Budget, Column 3:
   Enter the amounts from the most recent HUD reviewed budget. This column should only be left blank if the housing authority is submitting the project's first budget (Budget Sequence Number 1).

2. Total Development Cost, Column 4:
   a. When submitting a budget, enter the requested budget amounts in this column.
   b. When submitting a cost statement, enter the actual development costs incurred up to and including the date identified in box 10.

3. Line 1, 1482 Total Developer's Price, should include all costs incurred for the developer's price under a turnkey development method.

4. Line 2, 1410 Total Administration, should reflect the total of all 1410 subaccounts.

5. Line 3, 1415 Liquidated Damages, should reflect the balance from account 1415.

6. Line 4, 1418 Counseling Costs, should reflect the balance from account 1418.

7. Line 5, 1420 Total Interest, should reflect the total of all 1420 subaccounts.

8. Line 6, 1425 Initial Operating Deficit, should reflect the debit or credit balance from account 1425.

9. Line 7, 1430 Total Planning, should reflect the total of all 1430 subaccounts.

10. Line 8, 1440 Total Site Acquisition, should reflect the total of all 1440 subaccounts.

11. Line 9, 1450 Total Site Improvement, should reflect the total of all 1450 subaccounts.

12. Line 10, 1460 Total Dwelling Structures, should reflect the total of all 1460 subaccounts.

13. Line 11, 1465 Total Dwelling Equipment, should reflect the total of all 1465 subaccounts.

14. Line 12, 1470 Total Nondwelling Structures, should reflect the total of all 1470 subaccounts.

15. Line 13, 1475 Total Nondwelling Equipment, should reflect the total of all 1475 subaccounts.

16. Line 14, 1480 Contract Work In Progress, should reflect the balance from account 1480.

17. Line 15, 1485 Demolition Costs, should reflect the balance from account 1485.

18. Line 16, 1495 Relocation Costs, should reflect the balance from account 1495.

19. Line 17, Subtotal, is the sum of lines 1 thru 16.

20. Line 18, 1406 Management Cost Allocation, should be charged with the amount of development funds, not to exceed 10% of the approved development grant, allocated by the housing authority to be used for operating expenses of projects included under Section 9 of the U.S. Housing Act, as amended.
21. Line 19, 1499 MOD Costs Funded by Development, should reflect any funds originally reserved for this project which are to be used for modernization activities. See Notice (notice in clearance at this time) for further information.

22. Line 20, Contingency, should include any funds set aside for contingency purposes.

23. Line 21, 1400.2 Total Development Cost, is the sum of lines 17 thru 20.

24. Line 22, Donations, should include any donations to the project. A Mutual Help contribution is not a donation.

25. Line 23, Total Development Cost, is the total of lines 21 thru 22.

D. Subpart II. TDC Cap Calculation
1. Use figures from column 4 if submitting the project's first budget or a budget revision. Use figures from column 3 for all other submissions.

2. Line 1, transfer the total from Subpart I, Line 23.

3. Line 2, transfer the total from Subpart I, Line 18.

4. Line 3, should reflect the total of account 1450.9, IHS Off-Site Water and Sewer as budgeted.

5. Line 4, transfer the total from Subpart I, Line 19.

6. Line 5, transfer the total from Subpart I, Line 22.

7. Line 6, should reflect the total of any funds included in account 1498, Development Costs Funded by MOD, for this project as identified on approved form HUD-52825, CIAP Budget/Progress Report, or form HUD-52837, Annual Statement/Performance and Evaluation Report. See Notice (notice in clearance at this time) for further information.

8. Line 7, the sum of lines 1 and 6, minus lines 2 thru 5.

E. Subpart III. Mutual Help Contribution Calculation
1. Use figures from column 4 if submitting the project's first budget or a budget revision. Use figures from column 3 for all other submissions.

2. Line 1, should reflect any MH Contributions of cash.

3. Line 2, should reflect the total of account 1410.3, Administration, Work-MH Contribution.

4. Line 3, should reflect the total of account 1440.7, Site Acquisition, Site-MH Contribution.

5. Line 4, should reflect the total of accounts 1450.1, 1450.2, and 1450.3, respectively; Site Improvement, Work, Materials and Equipment, and Other-MH Contributions.

6. Line 5, should reflect the total of accounts 1460.1, 1460.2, and 1460.3, respectively; Dwelling Structures, Work, Materials and Equipment, and Other-MH Contributions.

7. Line 6, should reflect the total of account 1465.3, Dwelling Equipment-MH Contribution.

8. Line 7, should reflect the total of accounts 1470.1, 1470.2, and 1470.3, respectively; Nondwelling Structures, Work, Materials and Equipment, and Other-MH Contributions.

9. Line 8, should reflect the total of account 1475.10, Nondwelling Equipment-MH Contribution.

10. Line 9, the sum of line 1 thru 8.
DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget (OMB) for Emergency Approval Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to OMB for emergency approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service Information Collection Clearance Officer at the address listed below or the Office of Management and Budget, Paperwork Reduction Project (1018-0075), Washington, D.C. 20503, telephone 202/395-3561.

Title: Federal Subsistence Hunt Application and Permit and Designated Hunter Permit Application and Permit.

OMB Approval Number: 1018-0075.

Form Number: 7-FS 1 (Federal Subsistence Hunt Application) and 7-FS 2 (Federal Subsistence Application for the Designated Hunter).

Abstract: The Alaska National Interest Lands Conservation Act (ANILCA) and Fish and Wildlife Service regulations, found in 50 CFR 100, require that persons engaged in taking fish and wildlife must comply with reporting provisions of the Federal Subsistence Board. The harvest activity must be reported.

The harvest information is needed in order to evaluate subsistence harvest success; the effectiveness of season length, harvest quotas, and harvest restrictions; hunting patterns and practices; and hunter use. Once harvest success information is evaluated, the Federal Subsistence Board utilizes this information, along with other information, to set future seasons and harvest limits for federal subsistence resource users. These seasons and harvest limits are set in order to meet the needs of subsistence hunters without adversely impacting the health of existing wildlife populations. The Federal Subsistence Hunt Application and Permit also provides a mechanism to allow Federal subsistence users the opportunity to participate in special hunts that are not available to the general public but are mandated by Title VIII of ANILCA. Both reports provide for the collection of the necessary information; however, the Designated Hunter Report is unique in that it allows the reporting of the harvest of multiple animals by a single hunter who is acting for others. The Designated Hunter Application and Permit also serves as a special permit allowing qualified subsistence users to harvest fish or wildlife for others.

The collection of information is needed prior the expiration of time periods established under 5 CFR 1320, and is essential to the missions of the Fish and Wildlife Service and the Federal Subsistence Board. Without this information public harm would occur as a result of the Service's inability to set subsistence seasons and harvest limits to meet users' needs without adversely impacting the health and the animal population. The Service has initiated steps to begin the standard OMB clearance process.

Frequency: On occasion.

Description of Respondents:

Individuals or households.

Estimated Completion Time: .25 hours or 15 minutes each.

Annual Responses: 4,500 (Federal Subsistence Hunt Application and Permit); 7,000 (Designated Hunter Permit Application and Report).

Total Annual Burden Hours: 2,875 hours.

Service Clearance Officer: U.S. Fish and Wildlife Service, (MS 224 ARLSQ); 1849 C Street, NW., Washington, D.C. 20240, telephone, 703/358-1943.

Dated: August 22, 1996.

Phyllis H. Cook,
Information, Collection Clearance Officer.

[FR Doc. 96-22080 Filed 8-28-96; 8:45 am]
BILLING CODE 4310-84-M

Bureau of Land Management

[WO-300–1310–00]

Green River Basin Advisory Committee, Colorado and Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Meeting of the Green River Basin Advisory Committee.

SUMMARY: This notice announces the dates, time, and schedule and initial agenda for a meeting of the Green River Basin Advisory Committee (GRBAC).

DATES: September 18, 1996, the business portion from 8:00 a.m. until 4:00 p.m., at which time oral comments will be heard, and September 19, 1996, from 8:00 a.m. until 3:00 p.m.

ADDRESSES: Wyoming National Guard Armory, 923 3rd St., Rawlins, WY 82301.

FOR FURTHER INFORMATION CONTACT: Terri Trevino, GRBAC Coordinator, Bureau of Land Management, P.O. Box 1828, Cheyenne, WY 82003, telephone (307) 775-6020.

SUPPLEMENTARY INFORMATION: The topics for the meeting will include:

(1) Subgroup reports.
(2) Presentations on existing road density and transportation planning.
(3) Briefing on cumulative impacts.
(5) Public comment.

This meeting is open to the public. Persons interested in making oral comments or submitting written statements for the GRBAC's consideration should notify the GRBAC Coordinator at the above address by September 13. Persons wishing to orally address the GRBAC must register by 4:00 p.m. The GRBAC will hear oral comments beginning at 4:00 p.m. on September 18 and will continue until all speakers have been heard. The GRBAC may establish a time limit for oral statements.

Dated: August 22, 1996.

Mat Millenbach,
Acting Director, Bureau of Land Management.

[FR Doc. 96-21995 Filed 8-28-96; 8:45 am]
BILLING CODE 4310-84-M

[CA-060–06–1430–00, CACA 36825]

Notice of Realty Action; Classification of Public Lands for Recreation and Public Purposes, San Diego County, California

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of realty action; Recreation and Public Purpose Act Classification, San Diego County, California.

SUMMARY: The following described land has been examined and found suitable for classification for conveyance to the City of San Diego under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq). San Bernardino Meridan T.17S., R.4W., Section 1, a portion of lot 37, containing 5.445 acres of withdrawn public land, more or less, which is north and adjacent to existing Tract 38.

SUPPLEMENTARY INFORMATION: The City of San Diego has applied to acquire approximately 5.445 acres of withdrawn public land for uses associated with the Point Loma Wastewater Treatment Plant. The land will be immediately conveyed and developed in accordance with the plan of development. The
lands are not needed for Federal purposes, and conveyance would be consistent with the 1994 South Coast Resource Management Plan. The conveyance of the land would be subject to the following terms and conditions:

1. Provisions of the Recreation and Public Purpose Act and applicable regulations of the Secretary of the Interior.
2. A right of way to the United States for ditches and canals, pursuant to the Act of August 30, 1890 (43 U.S.C. 945).
3. A reservation of all minerals to the United States, and the right to prospect, mine remove the minerals.

Publication of this Notice in the Federal Register segregates the public lands from all other forms of appropriation under the public land laws and the general mining laws, but not the Recreation and Public Purpose Act.

Detailed information concerning this action, including a metes & bounds description of the land, is available for review at the California Desert District, 6221 Box Springs Blvd., Riverside, CA 92507. For a period of 45 days after publication of this notice in the Federal Register interested parties may submit comments to the District Manager, California Desert District, in care of the above address. Objections will be reviewed by the State Director, who may resolve the objections. In the absence of any adverse comments, the classification will become effective 60 days after publication of this notice in the Federal Register.

Dated: August 21, 1996.
Alan Stein,
Acting District Manager.

[FR Doc. 96–22084 Filed 8–28–96; 8:45 am]
BILLING CODE 4310–70–M

National Park Service

Proposed Collection of Information—Opportunity for Public Comment

The National Park Service Visitor Services Project, based at the Cooperative Park Studies Unit of the University of Idaho, is proposing to conduct visitor studies at the following parks during 1997:

<table>
<thead>
<tr>
<th>Park</th>
<th>Est. No. of responses</th>
<th>Burden hrs.</th>
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<tbody>
<tr>
<td>Virgin Islands National Park</td>
<td>600</td>
<td>96</td>
</tr>
<tr>
<td>Washington Monument</td>
<td>500</td>
<td>80</td>
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<tr>
<td>Martin Luther King, Jr.</td>
<td>400</td>
<td>64</td>
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<tr>
<td>Mojave National Preserve</td>
<td>600</td>
<td>96</td>
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Abstract: NPS goal is to learn visitor demographics and visitors' opinions about services and facilities in these parks. Results will be used by managers to improve services, protect resources, and better serve the visitors.

Bureau Form Number: None.

Burden hours: The burden hour estimates are based on 12 minutes to complete each questionnaire and the 80% return rate goal.

Frequency: 7 days at each park.

Description of Respondents: Visitor groups are contacted as they enter the park and are given a mail-back questionnaire if they agree to participate in the survey.

Estimated Completion Time: 12 minutes.

Automated Data Collection: At the present time, there is no automated way to gather this information, since it includes asking visitors to evaluate services and facilities that they used in the parks. The burden is minimized by only contacting visitors during a 7 day period at each park.

The National Park Service is soliciting comments on the need for gathering the information in the proposed visitor studies listed above. The NPS is also asking for comments on the practical utility of the information being gathered, the accuracy of the burden hour estimate, the clarity of the information to be collected, and ways to minimize the burden to visitors to these parks. To obtain information or to make comments, contact: Dr. Gary E. Machlis, Visiting Chief Social Scientist, National Park Service, Main Interior Building, Room 3412, 1849 C Street, N.W., Washington, D.C. 20240, phone: 202–208–5391 or 208–885–7129; or Margaret Littlejohn, Visitor Services Project Coordinator, Cooperative Park Studies Unit, College of Forestry, Wildlife and Range Sciences, University of Idaho, Moscow, Idaho 83844–1133, phone: 208–885–7863.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003 (d), of the completion of an inventory of human remains and associated funerary objects in the control of the Alaska State Office, Bureau of Land Management, Anchorage, AK.

A detailed assessment of the human remains was made by the Bureau of Land Management professional staff and University of Alaska Museum professional staff in consultation with representatives of the Native Village of Savoonga.

Between 1931–1958, human remains representing 79 individuals were recovered from the Kukulik mounds by Otto Geist, Froliech Rainey, Wendell Oswalt, Ivar Skarland, and Albert Morton. No known individuals were identified. In 1934, a total of 2,190 associated funerary objects were recovered from the same burial sites, including; stone, bone, wood, iron, and ivory tools; walrus tooth and tusks; seal skull fragment; clay pottery sherds; bone armor plate fragments; walrus hide rope; baleen pieces; wooden bowls; bone spoons and meat forks; wooden effigy figures; and can, bottle, and window glass fragments.

Between 1931–1933, human remains representing four individuals were recovered from the Savoonga Village area or the Kukulik site by Otto Geist. No known individuals were identified. No associated funerary objects were present.

The Kukulik sites have been identified as burial sites of the 1879 epidemic and famine based on oral history, manner of interment, types of associated funerary objects, and historical documents. Oral history presented by Savoonga representatives indicates traditional knowledge of these burial sites and the direct descendancy of the present-day Native residents of Savoonga to the survivors of the 1879
epidemic and famine at Savoonga Village.

In 1934 and 1948, human remains representing seven individuals were recovered from Punguuk Island by Otto Geist and Wendell Oswalt. No known individuals were identified. The one associated funerary object is a sample of unknown material.

In 1974, human remains representing two individuals were recovered by Zorro Bradley from the Kiyalighaq site. No known individuals were identified. No associated funerary objects were present.

The Punguuk Island and Kiyalighaq sites in the vicinity of Savoonga, AK listed above have been identified as occupied from approximately during the Okvik, Old Bering Sea, and Punuk periods based on site organization, habitation structures, and manner of interments. This ethnological data indicates these occupations represent a continuity of cultural occupation of the Savoonga vicinity of St. Lawrence Island from approximately 300 AD to 1879 AD. Oral tradition presented by representatives of the Native Village of Savoonga supports this evidence.

Based on the above mentioned information, officials of the Bureau of Land Management have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 92 individuals of Native American ancestry. Officials of the Bureau of Land Management have also determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 2,191 objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Bureau of Land Management have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Native Village of Savoonga.

This notice has been sent to officials of the Native Village of Savoonga. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Dr. Robert E. King, Alaska State NA GPR A Coordinator, Bureau of Land Management, 222 W. 7th Avenue, Anchorage, AK 99513-7599; telephone: (907) 271-5510, before September 30, 1996. Repatriation of the human remains and associated funerary objects to the Native Village of Savoonga may begin after that date if no additional claimants come forward.

Dated: August 26, 1996.

Francis P. McManamon,
Departmental Consulting Archeologist,
Chief, Archeology & Ethnography Program.
[FR Doc. 96-22115 Filed 8-28-96; 8:45 am]
BILLING CODE 4310-70-F

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-384]

Certain Monolithic Microwave Integrated Circuit Downconverters and Products Containing the Same, Including Low Noise Block Downconverters; Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement


ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has decided not to review the presiding administrative law judge’s (ALJ’s) initial determination (ID) terminating the above-captioned investigation on the basis of a settlement agreement.


SUPPLEMENTARY INFORMATION: On February 7, 1996, Anadigics Inc. filed a complaint with the Commission alleging violations of section 337 of the Tariff Act of 1930 (19 USC 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain monolithic microwave integrated circuit downconverters and products containing the same, including low noise block downconverters, that allegedly infringe certain U.S. Registered Mask Works. The investigation was instituted March 14, 1995. Four firms were named as respondents: Raytheon Company; New Japan Radio Co., Ltd.; Nichimen Corp.; and Nichimen America Inc. See 61 FR 10595 (Mar. 14, 1996).

On July 9, 1996, the complainant and the respondents filed a joint motion for termination of the investigation on the basis of a settlement agreement (Motion No. 384–5). The Commission investigative attorney filed a response supporting the motion, on July 15, 1996. On July 19, 1996, the ALJ issued the ID (Order No. 10) granting the motion. No other Federal agency commented on the ID, and no party filed a petition for review. The Commission decided that a self-initiated review of the ID under 19 CFR 210.44 was not warranted. In light of that decision, the ID became the Commission’s determination effective August 20, 1996. See 19 CFR 210.42(h)(3). This action was taken under the authority of 19 USC 1337(c) and 19 CFR 210.21(b).

All public documents that were filed in the investigation—including nonconfidential copies of the ID, the joint motion for termination, the settlement agreement, and the Commission investigative attorney’s response to the joint motion—are or will be made available for public inspection, upon request, during official business hours (8:45 a.m. to 5:15 p.m.) in the Commission’s Office of the Secretary, Dockets Branch, 500 E Street, SW., Room 112, Washington, D.C. 20436, telephone 202-205-1802.

Issued: August 23, 1996.

By Order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 96–22133 Filed 8–28–96; 8:45 am]
BILLING CODE 7020–02–P

[Investigation No. 332–345]

Shifts in U.S. Merchandise Trade in 1996


EFFECTIVE DATE: August 21, 1996.

ACTION: Re-authorization of and retitling of investigation.

SUMMARY: The Commission has prepared and published annual reports on U.S. trade shifts in selected industries/commodity areas under investigation No. 332–345 since 1993. The Commission plans to publish the next report in September 1997, which will cover shifts in U.S. trade in 1996 compared with trade in 1995.

FOR FURTHER INFORMATION CONTACT: Questions about the trade shifts report may be directed to the project leader, Carl Seastrum, Office of Industries (202–205–3493) or the assistant project leader, John Cutchin, Office of Industries (202–205–3396). For questions on the legal aspects, please contact Mr. William Gearhart, Office of General Counsel (202–205–3091). The media should contact Ms. Margaret
DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with Department of Justice Policy, 28 C.F.R. 50.7, notice is hereby given that on August 15, 1996, a proposed Consent Decree was lodged with the United States District Court for the District of Kansas in United States v. Farmland Industries, Inc., Civil Action No. 96±2360±KHV. The proposed Consent Decree settles claims asserted by the United States at the request of the United States Environmental Protection Agency ("EPA") in a Complaint filed on the same day. The United States filed its complaint pursuant to Section 113(b) of the Clean Air Act ("the Act"), 42 U.S.C. 7413(b), requesting the assessment of civil penalties against Defendant Farmland Industries, Inc. ("Farmland") for violations of Section 111 of the Act, 42 U.S.C. 7411, and of the provisions of the New Source Performance Standards ("NSPS") codified at 40 C.F.R. Parts 60, Subparts QQ and GGG. The United States alleges that the violations occurred in connection with certain equipment at Farmland's Coffeyville, Kansas refinery which is subject to the "Standards of Performance for VOC Emissions from Petroleum Refinery Wastewater Systems," codified at 40 C.F.R. Part 60, Subpart QQ, and the "Standards of Performance for Equipment Leaks of VOC in Petroleum Refineries," codified at 40 C.F.R. Part 60, Subpart GGG.

Under the proposed Consent Decree, Farmland will pay a civil penalty of $780,000 to the United States. Farmland will also purchase equipment and devices that will be installed and operated at Farmland's Coffeyville, Kansas facility as Supplemental Environmental Projects ("SEPs"). These SEPs shall cost a minimum of $2,150,000 for Farmland to purchase and install. In return for the payments by Farmland, the proposed Consent Decree provides that the settlement resolves the claims alleged by the United States in its complaint, as well as certain other specified claims for violations of 40 C.F.R. Subpart QQ of the NSPS regulations that occurred at Farmland's Coffeyville, Kansas facility.

The Department of Justice will receive written comments relating to the proposed Consent Decree for thirty (30) days from the date of publication of this notice. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530, and should refer to United States v. Farmland Industries, Inc., D.J. Ref. No. 90±5±2±1±1948. The proposed Consent Decree may be examined at the Region VII Office of EPA, 726 Minnesota Avenue, Kansas City, Kansas 66101. A copy of the Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005, (202) 624±0892. In requesting copies, please enclose a check in the amount of $5.00 (25 cents per page reproduction cost) payable to the "Consent Decree Library."

Bruce S. Gelber,
Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 96±22085 Filed 8±28±96; 8:45 am]
BILLING CODE 4410±01±M

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—"Environmental Research Institute of Michigan"

Notice is hereby given that, on August 5, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), Environmental Research Institute of Michigan, has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are Case Western Reserve University, Cleveland, OH; Chrysler Corporation, Auburn Hills, MI; Delaware Machinery and Tool Company, Inc., Muncie, IN; Doehler Jarvis, Toledo, OH; EDCO Engineering, Toledo, OH; Environmental Research Institute of Michigan, Ann Arbor, MI; Ford Motor Company, Dearborn, MI; General Motors Corporation, Warren, MI; Ohio State University, Columbus, OH; Prince Machine, Holland, MI; and its general areas of planned activities is to improve the efficiency of Aluminum Die Casting operations.

Specifically, studies will be conducted to determine the causes of porosity in transmission cases and modifications defined for the production process. A second task on the project will focus on die steel composition and heat treatment procedures in order to improve the useful life of steel dies in aluminum die casting applications. The activities of this project are coordinated under the direction of the Partnership for a New Generation of Vehicles (PNGV).

Membership in the program remains open, and Environmental Research Institute of Michigan intends to file additional written notifications disclosing all changes in the membership or planned activities.

Constance K. Robinson,
Director of Operations, Antitrust Division.

[FR Doc. 96±22088 Filed 8±28±96; 8:45 am]
BILLING CODE 4410±01±M

O'Laughlin, Public Affairs Officer (202±205±1819). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on (202±205±1810).

Background

The initial notice of institution of this investigation was published in the Federal Register of September 8, 1993 (58 FR 47287). The Commission expanded the scope of this investigation to cover service trade in a separate report, which it announced in a notice published in the Federal Register of December 28, 1994 (59 FR 66974). The merchandise trade report has been published in the current series under investigation No. 332±345 annually since September 1993. The report, originally entitled "U.S. Trade Shifts in Selected Commodity Areas, 1992 Annual Report," has undergone a change to more clearly and concisely identify the contents of the report.

As in past years, each report will summarize and provide analyses of the major trade developments that occurred in the preceding year, and is expected to be published in September of each year. The reports will also provide summary trade information and basic statistical profiles of nearly 300 industry/commodity groups.

Issued: August 26, 1996.

By order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 96±22134 Filed 8±28±96; 8:45 am]
Notice Pursuant to the National Cooperative Research and Production Act of 1993—Mobile Information Infrastructure for Digital Video and Multimedia Applications Joint Venture

Notice is hereby given that, on August 1, 1996, pursuant to § 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), the Mobile Information Infrastructure for Digital Video and Multimedia Applications Joint Venture ("MII Joint Venture") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties are: The Association for Maximum Service Television, Inc., Washington, DC; and the Electronic Industry Association, Arlington, VA.

The general area of planned activity is to conduct cooperative research in the design, installation and operation of the first High Definition Digital Television ("HDTV") station in the United States (the "Model Station"). Design and operation of the Model Station shall include evaluation and performance of a wide range of digital studio, distribution, transmission, and reception equipment and services. The Model Station may also conduct propagation, interference and coverage experiments and is intended for use as a training facility for the broadcast community and a demonstration for the public.

Constance K. Robinson,
Director of Operations, Antitrust Division.
[FR Doc. 96–22089 Filed 8–28–96; 8:45 am]
BILLING CODE 4410–01–M

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Center for Manufacturing Sciences, Inc. (NCMS)

Notice is hereby given that, on August 1, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), the National Center for Manufacturing Sciences, Inc. ("NCMS") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the identity of the new member is: Lucent Technologies Inc., Murray Hill, NJ. In addition, AT&T Corp. has withdrawn from the joint venture.

No other changes have been made in either the membership or planned activity of the joint venture. Membership in this joint venture remains open. MII Joint Venture intends to file additional written notifications disclosing all membership changes.

On September 28, 1995, the MII Joint Venture filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on February 15, 1996 (61 Fed. Reg. 6039).

Constance K. Robinson,
Director of Operations, Antitrust Division.
[FR Doc. 96–22087 Filed 8–28–96; 8:45 am]
BILLING CODE 4410–01–M

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Model HDTV Station Project, Inc.

Notice is hereby given that, on June 28, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), the Model HDTV Station Project, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are: The Association for Maximum Service Television, Inc., Washington, DC; and the Electronic Industry Association, Arlington, VA.

The general area of planned activity is to conduct cooperative research in the design, installation and operation of the first High Definition Digital Television ("HDTV") station in the United States (the "Model Station"). Design and operation of the Model Station shall include evaluation and performance of a wide range of digital studio, distribution, transmission, and reception equipment and services. The Model Station may also conduct propagation, interference and coverage experiments and is intended for use as a training facility for the broadcast community and a demonstration for the public.

Constance K. Robinson,
Director of Operations, Antitrust Division.
[FR Doc. 96–22087 Filed 8–28–96; 8:45 am]
BILLING CODE 4410–01–M

Office of Justice Programs

Bureau of Justice Assistance; Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice of information collection under review; local application form for local law enforcement block grant program.

This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days from the date listed at the top of this page in the Federal Register. Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Patricia Dobbs-Mendaris, (202) 305-
2088, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 633 Indiana Avenue, NW, Washington, DC 20531.

Overview of this information collection:
(1) Type of information collection: New collection.
(2) The title of the form/collection: Local Law Enforcement Block Grants Program, Local Application Form.
(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.
(4) Affected public who will be asked or required to respond, as well as a brief abstract. Primary: State and local Governments. Other: None. Public Law 104–134 enacted the Local Law Enforcement Block Grants Program. This program awards grant money to local units of governments and States and territories to reduce crime and improve public safety. The Local Application Form will be completed by each eligible Local applicant and will provide information for application review and award processing.
(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond. 3,200 respondents, at approximately 10 responses each: At 1 hour per response.
(6) An estimate of the total public burden (in hours) associated with the collection: 5,600 annual burden hours.

Bureau of Justice Assistance; Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice of information collection under review; State application form for Local Law Enforcement Block Grant Program.

This proposed information collection is published to obtain comments from the public and affected agencies.

Comments are encouraged and will be accepted for 60 days from the date listed at the top of this page in the Federal Register. Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following points:
(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;
(2) Evaluate the accuracy of the agencies/components estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
(3) Enhance the quality, utility, and clarity of the information to be collected; and
(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Patricia Dobbs-Mendaris, (202) 305–2088, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 633 Indiana Avenue, NW, Washington, DC 20531.

Overview of this information collection:
(1) Type of information collection: New collection.
(2) The title of the form/collection: Local Law Enforcement Block Grants Program, State Application Form.
(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.
(4) Affected public who will be asked or required to respond, as well as a brief abstract. Primary: State and Local Governments. Other: None. Public Law 104–134 enacted the Local Law Enforcement Block Grants Program. This program awards grant money to local units of governments and States and territories to reduce crime and improve public safety. The State Application Form will be completed by each eligible State applicant and will provide information for application review and award processing.

An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond. 56 respondents, at approximately 10 responses each: At 1 hour per response.

An estimate of the total public burden (in hours) associated with the collection: 28 annual burden hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: August 26, 1996.

Robert B. Briggs,
Department Clearance Officer, United States Department of Justice.

RIN 1218–AB58

DEPARTMENT OF LABOR
Occupational Safety and Health Administration

[Doct No. H–372]

RIN 1218–AB58

Occupational Exposure to Metalworking Fluids

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Notice of intent to form a Standards Advisory Committee; Request for committee membership nominations.

SUMMARY: OSHA announces its intent to establish a Standards Advisory Committee ("the Committee") to make recommendations regarding a proposed rule for occupational exposure to metalworking fluids under Sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970. The Committee will consist of a maximum of 15 members and will include a cross-section of individuals representing the following affected interests: industry; labor; federal and state safety and health organizations; professional organizations; and national standards-setting groups. OSHA invites interested parties to submit nominations for membership on the Committee.

DATES: Nominations for membership must be postmarked by September 30, 1996.

ADDRESSES: Nominations for membership on the Committee should be sent to: OSHA, U.S. Department of
Labor, Directorate of Health Standards Programs, Metalworking Fluids Project Officer, Rm. N–3718, 200 Constitution Avenue, N.W., Washington, D.C. 20210.


SUPPLEMENTARY INFORMATION:

I. Background

The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) petitioned OSHA to take emergency regulatory action to protect workers from the risks of occupational cancers and respiratory illnesses due to exposure to metalworking fluids (Exhibit #1). Subsequently, OSHA sent an interim response to the UAW stating that the decision to proceed with rulemaking would depend on the results of the OSHA Priority Planning Process, a participatory activity designed to set an agenda for the Agency to pursue high-priority occupational health and safety hazards.

Following the final Priority Planning Process report, which identified metalworking fluids as an issue worthy of Agency action, the Assistant Secretary asked the National Advisory Committee on Occupational Safety and Health (NACOSH) for a recommendation about how to proceed with a rulemaking for metalworking fluids. In May 1996, NACOSH unanimously recommended that OSHA form a Standards Advisory Committee to address the problems caused by occupational exposure to metalworking fluids. The Assistant Secretary accepted the recommendation of NACOSH.

II. Committee Formation

Section 7 (b) of the Occupational Safety and Health Act of 1970 describes the requirements for creating a Standards Advisory Committee. The Committee is appointed by the Secretary to assist him in standard-setting under section 6 of the Act. The Standards Advisory Committee will consist of not more than 15 members. The Agency recognizes the complex issues surrounding metalworking fluids and encourages the nomination of academics and other experienced professionals to the Committee. The Agency is particularly concerned with the impact a rule on metalworking fluids could have on small employers; therefore OSHA specifically requests nominations for Committee membership from the small business community.

III. Public Participation

Applicants should be qualified by experience, knowledge, and affiliation, and meet the following criteria:

- Labor—must be recommended by a labor organization representing employees who are exposed to metalworking fluids;
- Industry—must be recommended by an industry or association representing companies whose employees are exposed to metalworking fluids;
- State or Federal Safety and Health Organization—must be a Federal or State employee with responsibilities in occupational health and safety and have experience in the safe use of metalworking fluids;
- Professional Organizations/National Standards-Setting Groups—must be recommended by a professional organization/national standards-setting group that regulates or represents occupational safety and health interests in the safe use of metalworking fluids.

Interested persons may apply for or nominate other persons for membership on this committee. Such nominations should be submitted to OSHA, Directorate of Health Standards Programs, Metalworking Fluids Project Officer, Rm. N3718, 200 Constitution Ave., N.W. Washington, D.C. 20210.

Each application or nomination must include:

1. The name of the applicant or nominee and a description of the interest such person seeks to represent;
2. The social security number, address, phone number, title, position, experience, qualifications and resume of the nominee;
3. Evidence that the applicant or nominee is qualified to represent parties having the same interest the person proposes to represent; and
4. A written commitment that the applicant or nominee shall be able to attend regular meetings of the Committee and participate in good faith.

IV. Authority

This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, pursuant to Sections 6 (b) (1) and 7 (b) of the Occupational Safety and Health Act of 1970 and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Signed at Washington, D.C., this 22nd day of August, 1996.

Joseph A. Dear,
Assistant Secretary of Labor.

[FR Doc. 96–21926 Filed 8–28–96; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Design, Manufacture, and Industrial Innovation; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Design, Manufacture, and Industrial Innovation—(1194)

Date and Time: September 16, 1996, 8:30 a.m.–5:00 p.m.
Place: Rooms 340, 375, and 380, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.


Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to the NSF for financial support. Agenda: To review and evaluate SBIR Phase I proposals concerning Knowledge Representation and Processing, Robotics and Intelligent Perception and User-System Interfaces, as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c)(4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.

[FR Doc. 96–22097 Filed 8–28–96; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Design, Manufacture, and Industrial Innovation—(1194)
Special Emphasis Panel in Design, Manufacture, and Industrial Innovation; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Design, Manufacture, and Industrial Innovation—(1194)

Date and Time: September 16, 1996, 8:30 a.m.–5:00 p.m.

Place: Room 530, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed


Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to the NSF for financial support.

Agenda: To review and evaluate SBIR Phase I proposals concerning Astronomy as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 USC 552(b)(4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.
[FR Doc. 96–22098 Filed 8–28–96; 8:45 am]
BILLING CODE 7555–01–M

Special Emphasis Panel in Design, Manufacture, and Industrial Innovation; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Design, Manufacture, and Industrial Innovation—(1194) submitted to the Phase I Small Business Innovation Research Program in the areas of Electrical and Communications Systems: Quantum Electronics, Plasmas, and Electronics Magnetics, Civil Mechanical Systems Structures, Electronics Magnetics, Neural Engineering, Lightwave Technology, and Chemical Characterization. In order to review the large volume of proposals, panel meetings will be held on September 23 and 24, 1996 in rooms 320, 340, 360, 370, and 530, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. All meetings will be closed to the public and will be held at the National Science Foundation, 4201 Wilson Blvd., Arlington, VA from 8:30 a.m. to 5:00 p.m. each day.


Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552(b)(4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.
[FR Doc. 96–22107 Filed 8–28–96; 8:45 am]
BILLING CODE 7555–01–M

Earth Sciences Proposal Review Panel; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Earth Sciences Proposal Review Panel—(1569)

Date: September 18, 19, & 20, 1996

Time: 8:00 a.m. to 6:00 p.m. each day.

Place: Rooms 320, 330, 365, 370, & 390, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.
Special Emphasis Panel in Mathematical Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name and Committee Code: Special Emphasis in Mathematical Sciences (1204).

Date and Time: Thursday, September 18–19, 1996; 8:30 a.m. until 5:00 p.m.

Place: Offices of Strategic Analysis, Inc., 4001 North Fairfax Drive, Suite 175, Arlington, VA 22203.

Type of Meeting: Closed.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data, such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.

[FR Doc. 96–22104 Filed 8–28–96; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Special Emphasis Panel in Physics (1208).

Date and Time: Tuesday, September 17 thru Wednesday, September 18, 1996.

Place: Room 970, 4201 Wilson Blvd., Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. John W. Lightbody, Jr., Program Director for Nuclear Physics, Division of Physics, Rm 1015, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data, such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.

[FR Doc. 96–22103 Filed 8–28–96; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Research, Evaluation and Communication; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Research, Evaluation and Communication.

Date and Time: September 18, 1996; Noon to 6:00 p.m. September 17, 1996; 8:00 a.m. to Noon.

Place: Room 830, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Nora Sabelli, Senior Program Director, 4201 Wilson Boulevard, Room 855, Arlington, VA 22230. Telephone (703) 306–1651.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information, financial data, such as salaries, and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler,
Committee Management Officer.

[FR Doc. 96–22104 Filed 8–28–96; 8:45 am]

BILLING CODE 7555–01–M
Date and Time: September 16-17, 1996 from 9:00 a.m. to 5:00 p.m.
Place: National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230, Rm. 1060.

Type of Meeting: Closed.
Contact Person: Boris Kayser, Program Director for Theoretical Physics, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone (703) 306-1890.

Purpose of Meeting: To advise the National Science Foundation on the best way to support the future health and vitality of theoretical physics.

Agenda: Discussion of the future directions of theoretical physics, the optimum balance between different components of the theoretical physics grant portfolio, and the appropriate levels of support of students, postdoctoral fellows, computation, and other aspects of individual projects.

Reason for Closing: The project plans being reviewed include information of a proprietary or confidential nature, including technical information; information on personnel and proprietary date for present and future subcontracts. These matters are exempt under 5 U.S.C. 552(b)(4) and (6) of the Government in the Sunshine Act.

Dated: August 26, 1996.

M. Rebecca Winkler
Committee Management Officer.

[FR Doc. 96–22109 Filed 8–28–96; 8:45 am]
BILLING CODE 7555–01–M

RAILROAD RETIREMENT BOARD

Proposed Data Collection Available for Public Comment and Recommendations

SUMMARY: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and purpose of information collection: Gross Earnings Reports; OMB 3220–0132.

In order to carry out the financial interchange provisions of section 7(c)(2) of the Railroad Retirement Act (RRA), the RRB obtains annually from railroad employer's the gross earnings for their employees on a one-percent basis, i.e., 1% of each employer's railroad employees. The gross earnings sample is based on the earnings of employees whose social security numbers end with the digits "30." The gross earnings are used to compute payroll taxes under the financial interchange.

The gross earnings information is essential in determining the tax amounts involved in the financial interchange with the Social Security Administration and Health Care Financing Administration. Besides being necessary for current financial interchange calculations, the gross earnings file tabulations are also an integral part of the data needed to estimate future tax income and corresponding financial interchange amounts. These estimates are made for internal use and to satisfy requests from other government agencies and interested groups. In addition, cash flow projections of the social security equivalent benefit account, railroad retirement account and cost estimates made for proposed amendments to laws administered by the RRB are dependent on input developed from the information collection.

The RRB utilizes Form BA–11 or its electronic equivalent to obtain gross earnings information from railroad employers. One response is requested of each railroad employer. Completion is mandatory.

The RRB proposes minor, non-burden impacting editorial revisions to Form BA–11.

Estimate of Annual Respondent Burden: Gross earnings reports are required annually from all employers reporting railroad service and compensation. There are approximately 633 railroad employers who currently report gross earnings to the RRB. Most large railroad employers include their railroad subsidiaries in their gross earnings reports. This results in the RRB collection less than 633 earnings reports. Also, there are a large number of railroad employers having work forces so small that they do not have employees with social security numbers ending in "30." Currently, there are 399 such employers in this category who file "negative" BA–11 responses to the RRB. Overall, on an annual basis, the RRB receives 28 reports consisting of computer prepared tapes or listings and 104 by means of manually prepared Form BA–11. The RRB estimates an average preparation time of 5 hours for each gross earnings report submitted by computer tape or listing and 30 minutes for each manually prepared BA–11.

ADDITIONAL INFORMATION OR COMMENTS: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092. Written comments should be received within 60 days of this notice.

Chuck Mierzwa,
Clearance Officer.
[FR Doc. 96–22090 Filed 8–28–96; 8:45 am]
BILLING CODE 7905–01–M

Privacy Act of 1974; Proposed Changes to Systems of Records

AGENCY: Railroad Retirement Board.

ACTION: Notice of proposed new system of records.

SUMMARY: The purpose of this document is to give notice of a proposed new Privacy Act system of records.

DATES: The proposed new system of records shall become effective as proposed without further notice in 40 calendar days from the date of this publication unless comments are received before this date which would result in a contrary determination.

ADDRESS: Send comments to Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092.


SUPPLEMENTARY INFORMATION: The Railroad Retirement Board has had for some time a computerized system for capturing telephone call detail information. It had been used only to verify the correctness of telephone service billing. This system may also be used to detect and deter possible improper use of agency telephones by agency employees and contractors which will require query by personal identifier. The Office of Management and Budget (OMB) has issued guidelines on the Telephone Call Detail Program. They were published at 52 FR 12990 (April 20, 1987) and encouraged agencies to establish Privacy Act systems of records to cover information pertaining to the monitoring of telephone usage to determine the use and/or abuse of Government telephone systems. The RRB is publishing this notice of its intent to establish a new
system of records in order to comply with the OMB guidance.

On August 19, 1996 the Railroad Retirement Board filed a new system report for this system with the Speaker of the House of Representatives, the President of the Senate, and the Office of Management and Budget. This was done to comply with section 3 of the Privacy Act of 1974 and OMB Circular No. A-130, Appendix I.

By authority of the Board.

Beatrice Ezerski,
Secretary to the Board.

RRB—49

SYSTEM NAME:
Telephone Call Detail Records.

SYSTEM LOCATION:

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:
Individuals (generally agency employees and contractor personnel) who make or receive telephone calls from agency owned telephones at the agency’s 844 North Rush Street headquarters building.

CATEGORIES OF RECORDS IN THE SYSTEM:
Name of employee, telephone number, location of telephone, date and time phone call made or received, duration of call, telephone number called from agency telephone, city and state of telephone number called, cost of call made on agency phone.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:
31 U.S.C. 1348(b)

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. Records may be released to agency employees on a need to know basis.

b. Relevant records may be released to a telecommunications company providing support to permit servicing the account.

c. Relevant records relating to an individual may be disclosed to a Congressional office in response to an inquiry from the Congressional office made at the request of that individual.

d. Relevant information may be disclosed to the Office of the President for responding to an individual pursuant to an inquiry from that individual or from a third party on his/her behalf.

3. Relevant records may be disclosed to representatives of the General Services Administration or the National Archives and Records Administration who are conducting records management inspections under the authority of 44 U.S.C. 2904 and 2906.

f. Records may be disclosed in response to a request for discovery or for the appearance of a witness, to the extent that what is disclosed is relevant to the subject matter involved in a pending judicial or administrative proceeding.

h. Records may be disclosed in a proceeding before a court or adjudicative body to the extent that they are relevant and necessary to the proceeding.

i. Relevant records may be disclosed to respond to a Federal agency’s request made in connection with the hiring or retention of an employee, the letting of a contract or issuance of a grant, license or other benefit by the requesting agency, but only to the extent that the information disclosed is relevant and necessary to the requesting agency’s decision on the matter.

SAFEGUARDS:
Only designated personnel in the Bureau of Supply and Service have access to the computerized records. Access to the PC database containing call detail information is password protected. An additional password is required for access to the personal computer on which the database is housed.

RETENTION AND DISPOSAL:
Computerized records are retained for approximately 180 days and then are written over by more current call detail information. Paper reports, when issued, are disposed of as provided in National Archives and Records Administration General Records Schedule 12.

SYSTEM MANAGER(S) AND ADDRESS:

NOTIFICATION PROCEDURE:
Requests for information regarding an individual’s record should be in writing addressed to the Systems Manager identified above, including the full name and social security number of the individual. Before information about any record will be released, the System Manager may require the individual to provide proof of identity or require the requester to furnish an authorization from the individual to permit release of information.

RECORD ACCESS PROCEDURES:
See Notification section above.

CONTESTING RECORD PROCEDURES:
See Notification section above.

RECORD SOURCE CATEGORIES:
Telephone assignment records; computer software that captures telephone call information and permits query and reports generation.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:
None.

[FR Doc. 96-22111 Filed 8-28-96; 8:45 am]
BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 22167; 812–9866]

BT Investment Portfolios and Bankers Trust Company; Notice of Application

August 22, 1996.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: BT Investment Portfolios (the "Portfolio Trust") and Bankers Trust Company ("BT").

RELEVANT ACT SECTIONS: Order requested under section 17(d) of the Act and rule 17d-1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to permit a series of the Portfolio Trust, Liquid Assets Portfolio (the "Portfolio"), and BT, the Portfolio’s investment adviser, to jointly enter into repurchase agreements and time
deposits with non-affiliated financial institutions.

FILING DATES: The application was filed on November 22, 1995 and amended on July 17, 1996. Applicants have agreed to file an amendment, the substance of which is incorporated herein, during the notice period.

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 September 16, 1996 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 may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Kirkpatrick & Lockhart LLP, 1251 Avenue of the Americas, 45th Floor, New York, NY 10020.

FOR FURTHER INFORMATION CONTACT: David W. Grim, Staff Attorney, at (202) 942-0571, or Robert A. Robertson, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUMMARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. The Portfolio Trust is a registered investment company that currently has eleven series, one of which is the Portfolio. BT serves as the Portfolio's custodian, transfer agent, administrator, and investment adviser. The Portfolio is a money market fund and serves as the master fund for Institutional Liquid Assets Fund (the "Fund"), a feeder fund holding itself out as a money market fund. The Fund is a series of BT Institutional Funds (the "Trust"). BT serves as the Fund's custodian, transfer agent, administrator, and as one of its shareholder servicing agents. The Trust seeks to achieve the investment objective of the Fund by investing all of the Fund's assets not earmarked forexpérience customer distributions in the Portfolio. The Portfolio, in turn, invests its assets in securities in accordance with its investment objective and investment policies and limitations. Through the master/feeder structure, the Fund acquires an indirect interest in the securities held by the Portfolio. BT and the Portfolio will jointly enter into repurchase agreements and purchase time deposits from non-affiliated financial institutions pursuant to the procedures described below.

2. Applicants request that the relief requested herein extend to any other series of the Portfolio Trust now existing or established in the future, and any other registered open-end-investment company or series thereof (i) which holds itself out as a money market fund (whether in a stand-alone or master-feeder structure); and (ii) for which BT or any person directly or indirectly controlling, controlled by, or under common control with BT, serves as investment adviser, or administrator for any BT money market fund that invests its assets into a master money market fund advised by BT. Applicants understand that the requested relief does not apply to joint repurchase agreement or time deposit arrangement among two or more money market funds.

3. A portion of the shares of the Fund will be purchased by customers of BT and those of its affiliates through automatic investment orders placed by BT, acting as agent for its customers and those of its affiliates, where such customers have signed an application or an agreement or have otherwise given directions expressly authorizing BT, as their agent, to automatically invest cash balances in excess of any required minimum balance in shares of the Fund. These standing “sweep” orders will be effected automatically by computer each business day on or before the time the Fund’s net asset value is calculated ("Pricing Time"), currently 4:00 p.m. Eastern Time for the Fund. The program governing BT's customer accounts also provides for automatic redemption of Fund shares held in the account as of the Pricing Time if the cash balance in the account is less than zero or the minimum balance specified for the customer. The daily computer processing required to tabulate the day’s transaction activity in BT’s customer accounts is completed later in the day and recorded prior to the opening of business on the following business day (“Completion Time”). Based on BT’s orders for Fund share, the Fund will, in turn, invest all cash expected to be received through the "Sweep" program in the Portfolio.

4. BT, acting as agent for its customers and those of its affiliates, prior to Pricing Time on each business day, will place an order for Fund shares in the amount of excess cash expected to be available to be swept in the customer accounts on that business day. The amount expected to be available to be swept in the customer accounts is the amount of excess cash in the customer accounts at or before Pricing Time on each business day, plus the amount of cash that BT estimates will be wired into the customer accounts prior to the close of the FedWire on that business day. To the extent one or more customer accounts have not yet received money anticipated to be wired and necessary to pay for the customer accounts’ orders in full, BT, on behalf of the applicable customer, will advance such amount to fill such orders. Because of its past experience and close relationship with its customers, BT anticipates that it will be able to forecast on a daily basis the amounts that will be wired into the customer accounts between 4 p.m. and the close of the FedWire so that it can also forecast the total amount that will be swept directly into the Fund, and indirectly into the Portfolio.

5. The actual amount of money swept into the Fund, and then invested in the Portfolio by the Fund, may vary above or below the forecast. The forecast variance at the customer account level results from many factors, such as counterparty difficulties, delivery failures, and unanticipated purchases and sales of securities. BT, on behalf of applicable customers, will forward an amount to the Fund to cover such forecast variance.

6. BT and the Portfolio propose to enter into repurchase agreements and/or purchase time deposits in an amount to cover situations in which the actual amount of money swept into the Fund, and then invested in the Portfolio by the Fund, varies above or below the forecasted amount of sweep money. For example, assume that, based on BT’s past experience, the actual amount of money available in the customer accounts is less than the forecast.

**Note:** The FedWire is open until 6:00 p.m. each business day. From time to time, at the direction of the Federal Reserve Board, its hours are extended until as late as 7:30 p.m. As a condition of eligibility to participate in the sweep program, each customer has agreed to notify BT by 2:00 p.m. on each business day of any large amounts of funds it expects its account to receive or send out that business day through the FedWire. These notifications will assist BT in estimating the amount that will be wired into the accounts between 4 p.m. and the close of the FedWire, the period during which the system is settling.

accounts participating in the “sweep” program has a variance of $±25 million. To ensure that the Fund is fully invested, BT, on behalf of the applicable customers, would forward $25 million to the Fund, which would invest such assets in the Portfolio. BT, as the Portfolio’s investment adviser, would cause the Portfolio to invest on that day a total of $50 million (the $25 million forwarded from BT plus $25 million in investable assets received from other investors) in “sweep” repurchase agreements and/or “sweep” time deposits to account for the most extreme tails of the “sweep” program’s variance of $±25 million.

7. To the extent that the Portfolio’s “sweep” repurchase transactions or “sweep” time deposits were sufficient to make the Portfolio fully invested, the Portfolio’s records will reflect the specific amount it had in fact invested in such investments (including in the case of “sweep” repurchase transactions, its ownership of eligible securities purchased in the transaction). If the Portfolio’s “sweep” repurchase transactions or “sweep” time deposits were not sufficient to make the Portfolio fully invested, the Portfolio’s records will continue to reflect its investment in the entire amount of “sweep” repurchase agreements and “sweep” time deposits and an uninvested cash position. (This is an unlikely occurrence, as BT expects to approximate the likely aggregate amount of “sweep” funds such that the “sweep” investment transaction(s) will be greater than the amount received by BT.) If any amount of “sweep” repurchase transactions or “sweep” time deposits exceeds amounts available to the Portfolio for investment, BT will be deemed to have purchased such excess securities or investments for its own account.

8. In connection with the “sweep” program, the Portfolio intends to purchase time deposits issued by U.S. or foreign banks, or foreign branches and subsidiaries of U.S. and foreign banks. With respect to “sweep” repurchase transactions, the Portfolio Trust will use a master repurchase agreement (“Master Agreement”). The Master Agreement will require the other party to the transaction (“Seller”) on a given day to sell to the Portfolio, and, on the same day, transfer to the Portfolio’s designated custodian or sub-custodian the particular eligible securities which are subject to the repurchase transaction against crediting to an account of the Seller (in immediately available funds) the proceeds thereof. At the time of the Seller’s transfer of securities to the Portfolio, the Seller will be required to take the action necessary to perfect a security interest in favor of the Portfolio in all of the transferred securities. Prior to the reconciliation of the “sweep” activity, the Portfolio will have a perfected security interest in all of the transferred securities. The Portfolio will comply with the SEC’s position concerning repurchase agreements set forth in Investment Company Act Release No. 13005 (February 2, 1983) and with other existing and future positions taken by the SEC or its staff by rule, interpretive release, no-action letter, any release adopting any new rule, or any release adopting any amendments to any existing rule. Each “sweep” repurchase transaction will be “collateralized fully” as that term is defined in Rule 2a-7 under the 1940 Act.

9. With respect to both “sweep” repurchase transactions and “sweep” time deposits, BT, as the Portfolio’s adviser, will receive prompt confirmation of the total amount invested in behalf of the Portfolio and other investor after the completion of the transaction on the business day of the transaction. The confirmation most likely will not agree with the final allocation of the repurchase transactions or time deposits between BT and the Portfolio on the business day immediately following the transaction. To create a written record of the dollar amounts actually allocated to the Portfolio and the specific securities actually purchased and time deposits actually invested in the Portfolio, BT will issue to the Seller an adjusted trade ticket on the business day immediately following the transaction, after the final allocation between BT and the Portfolio is known. Some Sellers may choose to subsequently send corrected confirmations to the Portfolio showing the final allocation of the “sweep” repurchase transaction or the “sweep” time deposit between BT and the Portfolio. Also, prior to the opening of business on the business day immediately following the transaction, BT, as agent for its customers, will provide the Fund’s transfer agent and shareholder servicing agent(s) with records relating to the automatic investment transactions.

10. In the event that any “sweep” repurchase agreement involves two or more issues of securities differing as to maturity or rate, each security will be apportioned between the Portfolio and BT pro-rata to the extent possible. To the extent that time deposits have been purchased from more than one institution, each “sweep” time deposit will be apportioned between the Portfolio and BT pro-rata to the extent possible. Where such pro-rata apportionment is not possible, securities and time deposits will be apportioned in a manner that BT, as the Portfolio’s adviser, believes will leave each party in a comparable position.

Applicants’ Legal Analysis

1. Section 17(d) of the Act makes it unlawful for an affiliated person of a registered investment company, acting as principal, to effect any transaction in which the registered investment company is a joint or a joint and several participant with such person in contravention of rules and regulations the SEC may prescribe. Rule 17d-1(a) provides that an affiliated person of a registered investment company, acting as principal, shall not participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement in which the registered investment company is a participant unless the SEC has issued an order approving the arrangement.

2. The Portfolio Trust and BT, as its adviser, wish to adopt the proposed investment procedures in the interests of the Fund and all of its shareholders in response to the demands placed on portfolio management by automatic purchase and redemption transactions by Fund shareholders. The effect of the proposed procedures will be to permit BT, as agent for its customers, to purchase shares of the Fund even though the exact number of shares acquired by BT as agent is not determined until prior to the opening of business the following day. The proposed procedures also will permit BT and the Portfolio Trust, on behalf of the Portfolio, to jointly enter into repurchase agreements and time deposits prior to Pricing Time, based upon amounts estimated to be received by the Fund on that day through the operation of the “sweep” program, with determination of the exact allocation of the principal amount of each repurchase agreement and time deposit for the Fund occurring prior to the opening of business the following day. These special arrangements for the investment of “sweep” assets by the Portfolio allow such assets to be invested on the same day that dividends become payable on shares of the Fund purchased with such assets.

3. To the extent that assets of BT are used with those of the Portfolio to enter into “sweep” repurchase transactions or purchase “sweep” time deposits, BT may be deemed to be participating in, as principal, a transaction in connection with a joint enterprise in which the Portfolio is a participant. A violation of section 17(d) and rule 17d-1.

Applicants believe that the relief...
request on behalf of the Portfolio is appropriate and in the public interest because it will permit the investment of cash immediately when it is available and will thereby reduce any dilution in daily dividends declared by the Fund.

4. With respect to "sweep" repurchase transactions, the Portfolio's rights vis-a-vis Sellers under "sweep" repurchase agreement transactions will be protected under the "sweep" repurchase agreement, which is a standard industry agreement. Pending reconciliation of the day's transaction activity, BT, as the Portfolio's custodian, will segregate and hold for the exclusive benefit of the Portfolio all securities transferred to BT in connection with "sweep" repurchase transactions entered into for the Portfolio. The Portfolio also will have a perfected security interest in all such securities. With respect to "sweep" time deposits, pending reconciliation of the day's transaction activity, BT, as the Portfolio's custodian, will hold for the exclusive benefit of the Portfolio the entire time deposit investment.

5. Applicants believe that the interest of BT in negotiating the maximum interest rate available on any "sweep" repurchase agreement or "sweep" time deposit for the Portfolio will be the same as that of the Portfolio. To the extent that BT, as the Portfolio's investment adviser, is deemed to have any participation in the proposed investment procedure within the meaning of section 17(d) and rule 17d-1, the Portfolio's participation is consistent with the provisions, policies, and purposes of the Act and not on a basis different from or less advantageous than that of BT. Thus, applicants believe that the requested relief meets the standards of rule 17d-1.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 96-22006 Filed 8-28-96; 8:45 am]
BILLING CODE 8010-01-M

[Release No. IC-22163; File No. 811-8534]

Pruco Life Individual Variable Annuity Account

August 22, 1996.

AGENCY: The Securities and Exchange Commission (the "Commission").

ACTION: Notice of Application for an Order under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: Pruco Life Individual Variable Annuity Account ("Applicant").

RELEVANT 1940 ACT SECTIONS: Order requested under Section 8(f) of the 1940 Act.

SUMMARY OF THE APPLICATION: Applicants seek an order declaring that it has ceased to be an investment company, as defined by the 1940 Act.

FILING DATES: The application was filed on August 2, 1996.

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 Secretary of the SEC and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 16, 1996, and should be accompanied by proof of service on Applicant in the form of an affidavit or, for lawyers, a certificate of service.

Persons may request notification of a hearing by writing to the Secretary of the Commission.


FOR FURTHER INFORMATION CONTACT: Veena K. Jain, Attorney, or Patrice M. Pitts, Special Counsel, Office of Insurance Products (Division of Investment Management), at (202) 942–0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from the Public Reference Branch of the SEC.

Applicant's Representations

1. Applicant is a unit investment trust established by Pruco Life Insurance Company ("Pruco Life") as a separate account under the laws of the State of Arizona on May 9, 1994.

2. Applicant filed a notification of registration under Section 8(a) of the 1940 Act, and a registration statement on Form N–4 pursuant to Section 8(b) of the 1940 Act and the Securities Act of 1933 on May 31, 1994, in connection with the offering by Pruco Life of certain flexible payment individual variable annuity contracts ("Contracts"). Such Form N–4 registration statement did not become effective, and no public offering commenced.

3. For business reasons, Pruco Life determined not to go forward with the offering of the Contracts, and there have been no sales made by Applicant of securities of which it is the issuer.

4. At the time of the application, Applicant had no security holders, assets or liabilities, and Applicant is not a party to any litigation or administrative proceeding.

5. There have been no distributions to security holders of Applicant in connection with the winding-up of Applicant's affairs pursuant to any dissolution, liquidation or merger.

6. Within the last 18 months, Applicant has not transferred its assets to a separate trust, the beneficiaries of which were or are the security holders of Applicant.

7. Applicant is not engaged in, nor does it propose to engage in, any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 96–22007 Filed 8–28–96; 8:45 am]
BILLING CODE 8010–01–M

[Release No. 34–37586; File No. SR–CSE–96–04]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Cincinnati Stock Exchange Relating to Transaction Fees

August 20, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78s(b)(1), notice is hereby given that on August 14, 1996, the Cincinnati Stock Exchange ("CSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CSE hereby proposes to amend its trading fee rules to codify its longstanding practice concerning the collection and payment of an annual transaction fee required under Section 31 of the Act to be paid to the
B. Self-Regulatory Organization’s Statement on Burden on Competition

The CSE does not believe that the proposed rule change will impose any burden on competition that is unnecessary or inappropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and, therefore, has become effective pursuant to Section 19(b)(3)(a) of the Act and subparagraph (e) of Rule 19b-4 thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, 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 Exchange. All submissions should refer to File No. SR-CSE-96-04 and should be submitted by September 19, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[Release No. 34–37592; File No. SR-PSE-96–26]

Self-Regulatory Organizations; Pacific Stock Exchange Incorporated; Notice of Filing of Proposed Rule Change Relating to Its Minor Rule Plan

August 21, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder, notice is hereby given that on August 7, 1996, the Pacific Stock Exchange Incorporated ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The PSE is proposing to amend its disciplinary rules to provide Exchange staff with the authority to make findings of rule violations and to impose fines pursuant to the Exchange’s Minor Rule Plan ("MRP"). Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

PACIFIC STOCK EXCHANGE INCORPORATED

RULES OF BOARD OF GOVERNORS

* * * * *

Rule 10.13(c)

(c) The Executive Committee, the Ethics and Business Conduct Committee, the Options Floor Trading Committee, [and] the Equity Floor Trading Committee and Exchange regulatory staff designated by the Exchange, shall have the authority [jurisdiction] to impose a fine pursuant to this Rule.

* * * * *

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included
statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The Exchange is proposing to amend its MRP, which provides that the Exchange may impose a fine not to exceed $5,000 on any member, member organization, or person associated with a member organization, for any violation of an Exchange rule that has been deemed to be minor in nature and approved by the Commission for inclusion in the MRP. PSE Rule 10.13, subsections (h)–(j), sets forth the specific Exchange rules deemed to be minor in nature.

PSE Rule 10.13(c) currently provides that the Executive Committee, the Ethics and Business Conduct Committee, the Options Floor Trading Committee and the Equity Floor Trading Committee have jurisdiction to impose a fine pursuant to Rule 10.13. The Exchange is proposing to amend Rule 10.13(c) to specify that Exchange regulatory staff designated by the Exchange shall also have the authority to impose a fine pursuant to Rule 10.13.

Under the proposal, Regulatory staff would be authorized to make determinations of whether minor rule violations have occurred and to impose a fine under the Recommended Fine Schedule for any MRP violations. Nevertheless, the Exchange may follow the current procedure of having a committee consisting of Exchange members adjudicate a MRP disciplinary case if the individual situation warrants such action.

The purpose of the proposal is to make the Exchange’s disciplinary process more efficient. The majority of MRP cases currently decided by committees involve facts that are easily verifiable and rules that are objective or technical in nature. In such situations, currently, Exchange committees typically reaffirm staff determinations by approving staff recommendations.

Under the proposal, Exchange members and member organizations found in violation of a rule or rules under the MRP will continue to have a right of appeal under Rule 10.11, which provides for a hearing before three members or for a review “on the papers.” A further appeal of decisions pursuant to such hearings or reviews on the papers is available pursuant to Rule 10.11(e). The Exchange does not intend to modify its current procedure for adjudicating non-MRP disciplinary cases pursuant to Rule 10.3 involving the issuance of formal complaints. Finally, the Exchange will continue to notify its membership, by regulatory bulletin distributed on a quarterly basis, of all fines imposed pursuant to the MRP.

(2) Statutory Basis

The proposal is consistent with Section 6(b) of the Act, in general, and Section 6(b)(5), in particular, in that it is designed to promote just and equitable principles of trade. The proposal is also consistent with Section 6(b)(7) in that it is designed to provide a fair procedure for the disciplining of members and persons associated with members.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will—

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written communications relating to the proposed rule change and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room, 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 PSE. All submissions should refer to File No. SR–PSE–96–26 and should be submitted by September 19, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 96–22054 Filed 8–28–96; 8:45 am]
BILLING CODE 8010–01–M
**Department of State**

**[Public Notice No. 2434]**

**United States International Telecommunications Advisory Committee; Radiocommunication Sector Study Group 8—Mobile Services; Meeting Notice**

The Department of State announces that the United States International Telecommunications Advisory Committee (ITAC), Radiocommunication Sector Study Group 8—Mobile Services will meet on 16 September 1996 at 9:30 AM to 11:30 AM, in Room 2533A at the Department of State, 2201 C Street, N.W., Washington, DC 20520.

Study Group 8 studies and develops recommendations concerning technical and operating characteristics of mobile, radiodetermination, amateur and related satellite services.

Members of the General Public may attend these meetings and join in the discussions, subject to the instructions of the Chairman, John T. Gilsenan.

**Note:** If you wish to attend please send a fax to 202-647-7407 not later than 24 hours before the scheduled meeting. On this fax, please include subject meeting, your name, social security number, and date of birth.

Dated: August 20, 1996.


[FR Doc. 96-22092 Filed 8-28-96; 8:45 am]

BILLING CODE 4710-45-M

**[Public Notice No. 2431]**

**Shipping Coordinating Committee, Subcommittee on Standards of Training and Watchkeeping; Notice of Meeting**

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 09:30 AM on Monday, September 9, 1996, in Room 2416 of the United States Coast Guard Headquarters Building, 2100 2nd Street SW., Washington, DC 20593-0001. The primary purpose of the meeting is to prepare for the twenty-eighth session of International Maritime Organization (IMO) Sub-Committee on Standards of Training and Watchkeeping (STW) to be held at IMO from September 17 to 21, 1996.

The primary matters to be discussed include:

2. New work emanating from the 1995 STCW Conference, including consideration of training requirements for maritime pilots, Vessel Traffic System (VTS) personnel, and personnel on passenger ships;
3. Maritime safety training for personnel on Mobile Offshore Units (MOU/MODUs); and Bulk carrier safety, including a review of the IMO resolution on the principles of safe manning.
5. Training of personnel responsible for cargo handling on ships carrying dangerous or hazardous substances in solid form in bulk or in packaged form;

Members of the public may attend the meeting up to the seating capacity of the room. Interested persons may seek information by writing Mr. Christopher Young, U.S. Coast Guard (G–MSO–1), Room 1210, 2100 Second Street SW, Washington, DC or by calling (202) 267-0229.

Dated: August 16, 1996.

**Russell A. La Matina,** Chairman, Shipping Coordinating Committee.

[FR Doc. 96-2200 Filed 8-28-96; 8:45 am]

BILLING CODE 4710-07-M
provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR Part 150. The existing noise compatibility program was approved May 10, 1990. The proposed revision to the noise compatibility program will be approved or disapproved on or before February 18, 1997.

EFFECTIVE DATE: The effective date of the FAA's review of the revision to the noise compatibility program is August 22, 1996. The public comment period ends October 21, 1996.

FOR FURTHER INFORMATION CONTACT: Cynthia K. Willis, 2851 Directors Cove, Suite 3, Memphis, Tennessee 38131–0301; 901–544–3495. Comments on the proposed revision to the noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed revision to the noise compatibility program for Blue Grass Airport which will be approved or disapproved on or before February 18, 1997. This notice also announces the availability of this program for public review and comment.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposed for the reduction of existing incompatible uses and for the prevention of the introduction of additional noncompatible uses.

The FAA has formally received the proposed revision to the noise compatibility program for Blue Grass Airport, effective August 22, 1996. It was requested that the FAA review this material and that the noise mitigation measures proposed by the airport be approved as a revision to the noise compatibility program under Section 104(b) of the Act. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review, limited by law to a maximum of 180 days will be completed on or before February 18, 1997.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR Part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise compatibility program, and the proposed revisions to the noise compatibility program are available for examination at the following locations: Federal Aviation Administration, 800 Independence Avenue, SW., Room 621, Washington, D.C. 20591; Federal Aviation Administration, Memphis Airports District Office, 2851 Directors Cove, Suite 3, Memphis, Tennessee 38131; Administrative Office, Lexington-Fayette Urban County Airport Board, Blue Grass Airport, 4000 Versailles Road, Lexington, Kentucky 40510.

Questions may be directed to the individual named above under the heading, FOR FURTHER INFORMATION CONTACT.

Issued in Memphis, Tennessee, August 22, 1996.

Wayne R. Miles,
Assistant Manager, Memphis Airports District Office.

[FR Doc. 96–22130 Filed 8–28–96; 8:45 am]

BILLING CODE 4910–13–M

Intent To Prepare an Environmental Impact Statement and Conduct a Scoping Meeting for General Mitchell International Airport, Milwaukee, WI

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Aviation Administration (FAA) is issuing this notice to advertise to the public that an Environmental Impact Statement (EIS) is planned to be prepared and considered for the proposed extension of Runway 7L/25R by 700 feet; the implementation of approved FAR Part 150 Noise Abatement Measures NA–4 and NA–5; modifying departure procedures for aircraft departing Runway 19R in lieu of disapproved FAR Part 150 Noise Abatement Measure NA–7; for updating the airport's Noise Exposure Maps (NEM's); and for evaluating other cumulative or connected actions at the General Mitchell International Airport (MKE), Milwaukee Wisconsin. The FAA plans to hold scoping meetings to obtain input from Federal, State, and local agencies and the general public regarding the EIS. If it is determined during the course of the study that the environmental impacts are not significant, FAA will terminate the EIS process, complete the study as an Environmental Assessment (EA) and issue a Finding of No Significant Impact (FONSI).

FOR FURTHER INFORMATION CONTACT: Mr. Daniel J. Millenacker, Program Manager, Federal Aviation Administration, Airports District Office, 6020 28th Avenue South, Room 102, Minneapolis, Minnesota, 55450. Phone: (612) 725–4221.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA, in cooperation with the Wisconsin Department of Transportation and Milwaukee County, Wisconsin, will prepare an EIS for a proposed project to lengthen general aviation Runway 7L/25R by 700 feet at the General Mitchell International Airport (MKE) for a total length of 4,800 feet for use by general aviation type aircraft. The existing runway (4,100 feet) accommodates most general aviation aircraft currently using the airport, but the Airport Master Plan Update (MPU) and Airport Layout Plan (ALP), approved October 20, 1994, indicates that the runway extension would accommodate additional aircraft such as light commuter turboprops and light business jets. This will help concentrate general aviation operations in the northern portion of the airport, and allow Runways 1L/19R and 7R/25L additional capacity to better accommodate the existing and forecast air carrier and commuter aircraft operations on these runways during VFR conditions. The proposed project would entail construction activity on airport property (i.e., site preparation, drainage, paving, marking, lighting, and other associated work required for the runway extension). The extended runway is planned as a visual approach runway (Visual) with Medium Intensity Runway Lighting (MIRL) and 20:1 approach slopes on both the 7L and 25R runway ends.

The EIS will include evaluation of two approved FAR Part 150 Noise Abatement Measures, NA–4 and NA–5, as specified in MKE’s Noise Compatibility Program Record of Approval dated March 22, 1995, and an evaluation of a modified departure procedure for aircraft departing Runway 19R in lieu of disapproved FAR Part 150 Noise Abatement Measure NA–7. Specifically, Noise Abatement Measure
Two scoping meetings are scheduled for Thursday, October 10, 1996. The first meeting will start at 12:30 p.m. for the convenience of Federal, State and local agencies. It will start with a brief presentation describing the Scoping and EIS process, and the proposed project and schedule. Following the meeting, a driving tour of the affected portions of the airport property will be offered to interested individuals. The agency meeting will be held in the East and Center Mitchell Rooms at the Best Western Midway Hotel, located at 5105 South Howell Avenue, Milwaukee, Wisconsin. The second meeting, for the convenience of the general public, will be held on the same date, at the same location, from 4:30 p.m. to 7:30 p.m. This will be an informal meeting where participants will be able to view project related presentation boards and speak directly with FAA, WisDOT and Airport staff.

Written comments and suggestions on the scope may be mailed to the informational contact listed above no later than October 24, 1996.

Issued in Minneapolis, Minnesota, August 21, 1996.

Franklin D. Benson,
Manager, Minneapolis Airports District Office, FAA Great Lakes Region.

[FR Doc. 96-22129 Filed 8-28-96; 8:45 am]
BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement:
Rockland County, NY

AGENCY: Federal Highway Administration (FHWA), New York State Department of Transportation (NYSDOT), New York State Thruway Authority/Canal Corporation (NYSTA).

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for the proposed construction of landside facilities in Rockland County to support a Rockland County to Manhattan ferry service.

FOR FURTHER INFORMATION CONTACT: Harold J. Brown, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building 9th floor, Clifton Avenue and North Pearl Street, Albany, New York, 12207, Telephone (518) 472-4126, or Phillip J. Clark, Director, Design Division, New York State Department of Transportation, W. Averell Harriman State Office Building Campus, 1220 Washington Avenue, Building 5, Albany, New York, 12232, Telephone (518) 457-6452, or Keith E. Giles, Director/Chief Engineer, New York State Canal Corporation, P.O. Box 189, Albany, New York, 12201-0189, Telephone (518) 436-3055.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with NYSDOT and NYSTA will prepare an Environmental Impact Statement (EIS) and a 4(f) statement related to the use of park lands, if necessary, on a proposal to construct landside facilities to support a high speed ferry service between Rockland County and Manhattan. The purpose of this project is to help alleviate traffic congestion on the Tappan Zee Bridge by providing an alternate form of transportation for commuters. The project may involve the construction of some type of parking facility to accommodate approximately 500 cars; docking facilities; a terminal building; and pedestrian and vehicular access.

Alternatives under consideration include:
1. Rockland Lake State Park to Manhattan
2. Village of Nyack to Manhattan
3. Rockland Lake State Park/Village of Nyack Combination to Manhattan
4. No Ferry, No Build

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies, and to private organizations and citizens who have previously expressed interest in this proposal. It is anticipated that public information meetings will be held in the affected communities. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearings. A formal NEPA scoping meeting will be held at Nyack High School on September 30, 1996 at 7:30 PM.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues defined, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the NYSTA, NYSDOT or FHWA at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: August 21, 1996.

Robert Arnold,
District Engineer, Federal Highway Administration.

[FR Doc. 96-22093 Filed 8-28-96; 8:45 am]
BILLING CODE 4910-22-M
DEPARTMENT OF THE TREASURY

Customs Service

Quota Categories From Hong Kong Being Monitored for Transshipment Concerns

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public that for the period commencing on September 1, 1996, and through September 30, 1996, certain textile quota categories from Hong Kong will be placed on a “watch list” and monitored by Customs because of transshipment concerns. If the monitoring indicates the probability of transshipment during that 30-day monitoring period, Customs will impose additional entry requirements on importers to address the problem.

FOR FURTHER INFORMATION CONTACT: Richard Crichton, Office of Strategic Trade (202) 927–0162.

SUPPLEMENTARY INFORMATION:

Background

Merchandise that is the product of a country to which restraint levels (quotas) or textile visa requirements apply may be entered, or attempted to be entered, with a false declaration of country of origin. The false claim that the merchandise is the product of a country other than the actual country of origin may result in the entered merchandise not being subjected to any quota level/visa requirement or being subject to a more lenient quota level/visa requirement. The entry of textiles and textile products into the commerce of the United States under such circumstances violates the bilateral and multilateral textile agreements to which the United States is a party, and causes significant injury to domestic producers of textiles and textile products, thereby compromising orderly international trade in textiles and textile products.

Customs has reason to believe that merchandise in categories 331 (cotton gloves), 338/339 (cotton knit shirts), 348 (women’s cotton pants), and 350 (cotton nightwear), may be falsely claimed as country of origin Hong Kong. Effective September 1, 1996, and through September 30, 1996, entries of goods falling under these quota categories will be monitored by Customs to determine if transshipment may be occurring. If the 30-day monitoring period points to the probability of transshipment, Customs will take the following actions: (1) Require the importer to file a single entry bond for all merchandise imported into the United States under the listed categories that are claimed to be of Hong Kong origin; (2) require original signatures by factories/subcontractors on textile declarations filed by the importer; and (3) require the importer to certify that the textile declarations are accurate.

Dated: August 26, 1996.

George Heavey,
Acting Assistant Commissioner, Office of Strategic Trade.

[FR Doc. 96–22110 Filed 8–28–96; 8:45 am]
BILLING CODE 4820–02–P

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is 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 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, “Corot” (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 Metropolitan Museum of Art in New York, New York from on or about October 21, 1996, to on or about January 19, 1997, is in the national interest. Public Notice of this determination is ordered to be published in the Federal Register.

Dated: August 23, 1996.

Les Jin,
General Counsel.

[FR Doc. 96–22094 Filed 8–28–96; 8:45 am]
BILLING CODE 8230–01–M

Culturally Significant Objects Imported for Exhibition; Determination

Notice is 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 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, “Georges de La Tour and His World” (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 Kimbell Art Museum, Ft Worth, Texas from February 2, 1997 to May 10, 1997, is in the national interest. Public Notice of this determination is ordered to be published in the Federal Register.

Dated: August 23, 1996.

Les Jin,
General Counsel.

[FR Doc. 96–22095 Filed 8–28–96; 8:45 am]
BILLING CODE 8230–01–M

Culturally Significant Objects Imported for Exhibition; Determination

Notice is 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 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, “Eugene Cuvelier, Photographer in the Circle of Corot” (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 Metropolitan Museum of Art from on or about October 7, 1996, through January 13, 1997, is in the national interest. Public Notice of this determination is ordered to be published in the Federal Register.

Dated: August 23, 1996.

Les Jin,
General Counsel.

[FR Doc. 96–22096 Filed 8–28–96; 8:45 am]
BILLING CODE 8230–01–M

Culturally Significant Objects Imported for Exhibition; Determination

Notice is 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 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, “Eugene Cuvelier, Photographer in the Circle of Corot” (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 Metropolitan Museum of Art from on or about October 7, 1996, through January 13, 1997, is in the national interest. Public Notice of this determination is ordered to be published in the Federal Register.

Dated: August 23, 1996.

Les Jin,
General Counsel.

[FR Doc. 96–22095 Filed 8–28–96; 8:45 am]
BILLING CODE 8230–01–M
Part II

Federal Communications Commission

47 CFR Parts 1, 20, 51, and 90
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act; Final Rule
FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 20, 51 and 90
[CC Docket No. 96–98, CC Docket No. 95–185, GN Docket No. 93–252; FCC 96–325]

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Report and Order released August 8, 1996 promulgates national rules and regulations implementing the statutory requirements of the Telecommunications Act of 1996 (the 1996 Act) intended to encourage the development of competition in local exchange and exchange access markets. The Report and Order adopts certain national rules that are consistent with the terms and goals of the 1996 Act and adopts minimum requirements which states may adopt with their own requirements to ensure that these national rules are consistent with the 1996 Act and the Commission’s rules thereunder. The Report and Order also incorporates and resolves issues concerning the information concerning the information collections contained in this Report and Order contact Dorothy Conway at 202–418–3017, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Report and Order adopted August 1, 1996, and released August 8, 1996. The full text of this Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M St., NW., Washington, DC. The complete text also may be obtained through the World Wide Web, at http://www.fcc.gov/Bureaus/Common Carrier/Orders/fcc96325.wp, or may be purchased from the Commission’s copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M St., NW., Suite 140, Washington, DC 20037.


EFFECTIVE DATE: September 30, 1996.

FOR FURTHER INFORMATION CONTACT: Lisa Gelb, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580, or David Sieradzki, Attorney, Common Carrier Bureau, Competitive Pricing Division, (202) 418–1520. For additional information concerning the information collections contained in this Report and Order contact Dorothy Conway at 202–418–0217, or via the Internet at dconway@fcc.gov.

Access to Unbundled Elements

Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The Commission identified the seven following network elements: network interface devices, local loops, local and tandem switches (including all software features provided by such switches), interoffice transmission facilities, signaling and call-related database facilities, operations support systems and information and operator and directory assistance facilities. Incumbent LECs must provide requesting carriers nondiscriminatory access to operations support systems and information. The Order requires incumbent LECs to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose. Incumbent LECs may not impose restrictions upon the use of network elements.

Methods of Obtaining Interconnection and Access to Unbundled Elements

Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC’s premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. Incumbent LECs are required to provide any technically feasible method of interconnection or access requested by a telecommunications carrier, including...
physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts, with certain modifications, the physical and virtual collocation requirements it adopted earlier in the Expanded Interconnection proceeding. The Commission also establishes rules interpreting the requirements of section 251(c)(6).

Pricing Methodologies

The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission has concluded that the state commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission has concluded that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies' Total Element Long-Run Incremental Cost (TERI) of providing a particular network element, plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. If states are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission has established default ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2–0.4 cents per minute for switching, plus access charges as discussed below. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also will establish default ceilings for the other unbundled network elements. These default provisions might provide an administratively simpler approach for state establishment of prices, for a limited interim period, and states, in the exercise of their discretion, select the specific price within that range, or subject to that ceiling.

Access Charges for Unbundled Switching

Nothing in the Commission’s Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission’s rules, when the interexchange LEC provides exchange access service to an interexchange carrier, either directly or through service resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission is continuing to provide for access charge recovery with respect to use of an incumbent LEC's unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Under this Order, incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers pay unbundled network element charges. This aspect of the Order expires at the earliest of: 1) June 30, 1997; 2) issuance of final decisions by the Commission in the universal service and access reform proceedings; or 3) if the incumbent LEC is a Bell Operating Company (BOC), the date on which that BOC is authorized under section 271 of the Act to provide inter-LATA service, for any given state.

Resale

The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. The 1996 Act’s pricing standard for wholesale rates requires state commissions to identify what marketing, billing, collection, and other costs will be avoided or that are avoidable by incumbent LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. To define clearly a wholesale service, the Commission has identified certain avoidable costs. The application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17–25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

Transport and Termination

The 1996 Act requires that charges for transport and termination of traffic be cost-based. The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company’s forward-looking costs. The state commissions would also use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range of 0.2–0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the ranges. In addition, the Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

Commercial Mobile Radio Service

In the Order, the Commission concludes that CMRS providers are telecommunications carriers, and therefore are entitled to reciprocal compensation arrangements under section 251(b)(5). The Commission also concludes that under section 251(b)(5) a LEC may not charge a CMRS provider, including a paging company, or any other carrier for terminating LEC-originated traffic. The Commission also states that CMRS providers (specifically commercial mobile, broadband PCS, and covered specialized mobile radio (SMR) providers) offer telephone exchange services, and such providers therefore may request interconnection under section 251(c)(2). The Commission determines that CMRS providers should not be classified as LECs at this time. In this decision, the Commission applied sections 251 and 252 to LEC-CMRS interconnection. The Commission acknowledges that section 332 is also a basis for jurisdiction over LEC-CMRS interconnection, but declined to define the precise extent of that jurisdiction at this time.
Access to Rights of Way

The Commission also amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable television systems and telecommunications carriers to poles, ducts, conduits, and rights-of-way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles, ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

Exemptions, Suspensions, and Modifications of Section 251
Requirements for Rural and Small Telephone Companies

Section 251(f)(1) of the 1996 Act provides for exemption of the requirements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation’s subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c).

States are primarily responsible for interpreting the provisions of section 251(f) through rulemaking and adjudicative proceedings, and are responsible for determining whether a LEC in a particular instance is entitled to exemption, suspension, or modification of section 251 requirements. The Commission establishes a very limited set of rules interpreting the requirements of section 251(f):

- LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified.
- Rural LECs bear the burden of proving that continued exemption of the requirements of section 251(c) is justified, once a bona fide request has been made by a carrier under section 251.
- Only LECs that, at the holding company level, have fewer than 2 percent of the nation’s subscriber lines are entitled to petition for suspension or modification of requirements under section 251(f)(2).

Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, the Report and Order contains a Final Regulatory Flexibility Analysis which is set forth in Appendix C to the Report and Order. A brief description of the analysis follows.

Pursuant to Section 604 of the Regulatory Flexibility Act, the Commission performed a comprehensive analysis of the Report and Order with regard to small entities and small incumbent LECs. This analysis includes: (1) a succinct statement of the need for, and objectives of, the Commission’s decisions in the Report and Order; (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the Commission’s assessment of these issues, and a statement of any changes made in the Report and Order as a result of the comments; (3) a description of and an estimate of the number of small entities and small incumbent LECs to which the Report and Order will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the Report and Order, including an estimate of the classes of small entities and small incumbent LECs which will be subject to the requirement and the type of professional skills necessary for compliance with the requirement; (5) a description of the steps the Commission has taken to minimize the significant economic impact on small entities and small incumbent LECs consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the Report and Order and why each one of the other significant alternatives to each of the Commission’s decisions which affect the impact on small entities and small incumbent LECs was rejected.
A. The Telecommunications Act of 1996—A New Direction

1. The Telecommunications Act of 1996, (Telecommunications Act of 1996, Public Law No. 104–104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code), fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition. 2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefited enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act. 3. Three principal goals established by the telephony portions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition. 4. These three goals are integrally related. Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications—the local exchange and exchange access markets—to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all...
markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscription, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a Carrier Access Charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed. Federal-State Joint Board on Universal Service, Order No. 61 FR 10499 (March 14, 1996) Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96±93, 61 FR 10499 (March 14, 1996) (Universal Service NPRM). The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to implement the first of the goals outlined above—opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will make its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service, access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counterparts at the state level complete implementing and supplementing these rules will the competitive changes that for competition be in place. Completion of the trilogy, coupled with the reduction in burdensome and inefficient regulation we have undertaken pursuant to other provisions of the 1996 Act, will unleash marketplace forces that will fuel economic growth. Until then, incumbents and new entrants must undergo a transition process toward fully competitive markets. We will, however, act quickly to complete the three essential rulemakings. We intend to issue a notice of proposed rulemaking in 1996 and to complete the access charge reform proceeding concurrently with the statutory deadline established for the section 254 rulemaking. This timetable will ensure that actions taken by the Joint Board in November and this Commission by not later than May 1997 in the universal service reform proceeding will be coordinated with the access reform docket.

C. Economic Barriers

10. As we pointed out in our Notice of Proposed Rulemaking in this docket, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96±98, Notice of Proposed Rulemaking, FCC 96±182 (April 19, 1996), 61 FR 18311 (April 25, 1996) (NPRM), the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant. Absent its own switches, trunking and loops to serve its customers. Furthermore, absence of interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

11. Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be
removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices. Congress also recognized that the transition to competition presents special considerations in markets served by smaller telephone companies, especially in rural areas. We are mindful of these considerations, and know that they will be taken into account by state commissions as well.

12. The Act contemplates three paths of entry into the local market—the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously—whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

13. We note that an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers. Sections 251(b)(5) and (c)(2) require incumbent LECs to enter into such agreements on just, reasonable, and nondiscriminatory terms and to transport and terminate traffic originating on another carrier's network under reciprocal compensation arrangements. In this item, we adopt rules for states to apply in implementing these mandates of section 251 in their arbitration of interconnection disputes, as well as their review of such arbitrated arrangements, or a BOC's statement of generally available terms. We believe that our rules will assist the states in carrying out their responsibilities under the 1996 Act, thereby furthering the Act's goals of fostering prompt, efficient, competitive entry.

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service. Joint Managers' Statement, S. Conf. Rep. No. 104–230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121. Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities.

15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable, and nondiscriminatory." We adopt rules herein to implement these requirements of section 251(c)(3).

D. Operational Barriers

16. The statute also directs us to remove the existing operational barriers to entering the local market. Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. Our recently-issued number portability Report and Order addressed one of the most significant operational barriers to competition by permitting customers to retain their phone numbers when they change local carriers. Telephone Number Portability, CC Docket No. 95–116, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96–286 (July 2, 1996) and Order, 41 FR 38605 (July 25, 1996) (Number Portability Order). Consistent with the 1996 Act, 47 U.S.C. § 251(b)(2), we required LECs to implement interim and long-term measures to ensure that customers can change their local service providers without having to change their phone number. Number portability promotes competition by making it less expensive and less disruptive for a customer to switch providers, thus freeing the customer to choose the local provider that offers the best value.

17. Closely related to number portability is dialing parity, which we address in a companion order. Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider. The history of competition in the interexchange market illustrates the critical importance of dialing parity to the successful introduction of competition in telecommunications markets. Equal access enabled customers of non-A T& T providers to enjoy the same convenience of dialing “1” plus the called party’s number that AT&T customers had. Prior to equal access, subscribers to interexchange carriers (IXCs) other than AT&T often were required to dial more than 20 digits to place an interstate long-distance call. Industry data show that, after equal access was deployed throughout the country, the number of customers using MCI and other long-distance carriers increased significantly. Federal Communications Commission, Statistics of Communications Common Carriers 1994–95, at 344, Table 8.8; Federal Communications Commission, Report on Long Distance Market Share, Second Quarter 1995, at 14, table 6 (Oct. 1995). Thus, we believe that equal access had a substantial pro-competitive
impact. Dialing parity should have the same effect.

18. This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets. As an example, customers can voluntarily switch from one interexchange carrier to another extremely rapidly, through automated systems. This has been a boon to competition in the interexchange market. We expect that moving customers from one local carrier to another rapidly will be essential to fair local competition.

19. As competition in the local exchange market emerges, operational issues may be among the most difficult for the parties to resolve. Thus, we recognize with the states, commissions and the courts, we will be called upon to enforce provisions of arbitrated agreements and our rules relating to these operational barriers to entry. Because of the critical importance of eliminating these barriers to the accomplishment of the Act's pro-competitive objectives, we intend to enforce our rules in a manner that is swift, sure, and effective. To this end we will review, with the states, our enforcement techniques during the fourth quarter of 1996.

20. We recognize that during the transition from monopoly to competition it is vital that we and the states vigilantly and vigorously enforce the rules that we adopt today and that will be adopted in the future to open local markets to competition. If we fail to meet that responsibility, the actions that we take today to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective.

E. Transition

21. We consider it vitally important to establish a "pro-competitive, deregulatory national policy framework" for local telephony competition, but we are acutely mindful of existing common carrier arrangements, relationships, and expectations, particularly those that affect incumbent LECs. In light of the timing issues described above, we think it wise to provide some appropriate transitions.

22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets. On those issues where the need to create a factual record distinct to a state or to balance unique local considerations is material, we ask the states to develop their own rules that are consistent with general guidance contained herein. The states will do so in rulemakings and in arbitrating interconnection arrangements. On other issues, particularly those related to pricing, we facilitate the ability of states to adopt immediate, temporary decisions by permitting the states to set proxy prices within a defined range or subject to a ceiling. We believe that some states will find these alternatives useful in light of the strict deadlines of the law. For example, section 252(b)(4)(C) requires a state commission to complete the arbitration of issues that have been referred to it, pursuant to section 252(b)(1), within nine months after the incumbent local exchange carrier received the request for negotiation. Selection of the actual prices within the range or subject to the ceiling will be for the state commission to determine. Some states may use proxies temporarily because they lack the resources necessary to review cost studies in rulemakings or arbitrations. Other states may lack adequate resources to complete such tasks before the expiration of the arbitration deadline. However, we encourage all states to complete the necessary work within the statutory deadline. Our expectation is that the bulk of interconnection arrangements will be concluded through arbitration or agreement, by the beginning of 1997. Not until then will we be able to determine more precisely the impact of this Order on promoting competition. Between now and then, we are eager to continue our work with the states. In this period, as set forth earlier, we should be able to take major steps toward implementing a new universal service system and far-reaching reform of interstate access. These reforms will reflect intensive dialogue between us and the states.

23. Similarly, as states implement the rules that we adopt in this order as well as their own decisions, they may find it useful to consult with us, either formally or informally, regarding particular aspects of these rules. We encourage and invite such inquiries because we believe that such consultations are likely to provide greater certainty to the states as they apply our rules to specific arbitration issues and possibly to reduce the burden of expensive judicial proceedings on states. A variety of formal and informal procedures exist under our rules for such consultations, and we may find it helpful to fashion others as we gain additional experience under the 1996 Act.

F. Executive Summary

1. Scope of Authority of the FCC and State Commissions

24. The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build. The Commission also intends to review and amend the rules it adopts in this Report and Order to take into account competitive developments, states' experiences, and technological changes.

2. Duty to Negotiate in Good Faith

25. In the Report and Order, the Commission establishes some national rules regarding the duty to negotiate in good faith, but concludes that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. The Commission also concludes that, in many instances, whether a party has negotiated in good faith will need to be decided on a case-by-case basis, in light of the particular circumstances. The Commission notes that the arbitration process set forth in section 252 provides one remedy for failing to negotiate in good faith. The Commission also concludes that agreements that were negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to section 252(a).
If the state commission approves such agreements, the terms of those agreements must be made available to requesting telecommunications carriers in accordance with section 252(i).

3. Interconnection

26. Section 251(c)(2) requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The points of interconnection must be at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission concludes that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. The Commission identifies a minimum set of five "technically feasible" points at which incumbent LECs must provide interconnection: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signalling facilities, such as signalling transfer points, necessary to exchange traffic and access call-related databases. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. The Commission finds that telecommunications carriers may request interconnection under section 251(c)(2) to provide telephone exchange or exchange access service, or both. If the request is for such purpose, the incumbent LEC must provide interconnection in accordance with section 251(c)(2) and the Commission's rules thereunder to any telecommunications carrier, including interexchange carriers and commercial mobile radio service (CMRS) providers.

4. Access to Unbundled Elements

27. Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In the Report and Order, the Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems and information, and operator and directory assistance facilities. The Commission concludes that incumbent LECs must provide nondiscriminatory access to operations support systems and information by January 1, 1997. The Commission concludes that access to such operations support systems is critical to affording new entrants a meaningful opportunity to compete with incumbent LECs. The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.

5. Methods of Obtaining Interconnection and Access to Unbundled Elements

28. Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. The Commission concludes that incumbent LECs are required to provide for any technically feasible method of interconnection or access requested by a telecommunications carrier, including physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts, with certain modifications, some of the physical and virtual collocation requirements it adopted earlier in the Expanded Interconnection proceeding. The Commission also establishes rules interpreting the requirements of section 251(c)(6).

6. Pricing Methodologies

29. The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission concludes that the state commissions should provide for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission concludes that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies Total Element Long-Run Incremental Cost (TELRIC) of providing a particular network element, plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. For states that are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission establishes default ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2–0.4 cents per minute for switching, plus access charges as discussed below. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also establishes default ceilings for the other unbundled network elements.

7. Access Charges for Unbundled Switching

30. Nothing in this Report and Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission’s rules, when the incumbent LEC provides exchange access service to an interexchange carrier, either directly or through service resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission continues to provide for access charge recovery with respect to use of an incumbent LEC’s unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers purchase unbundled network element charges. This aspect of the Order expires at the earliest of: (1)
June 30, 1997; (2) issuance of final decisions by the Commission in the universal service and access reform proceedings; or (3) if the incumbent LEC is a Bell Operating Company (BOC), the date on which BOC is authorized under section 271 of the Act to provide in-region interLATA service, for any given state.

8. Resale

31. The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. State commissions must identify marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. The Commission identifies certain avoidable costs, and the application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17–25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

9. Requesting Telecommunications Carriers

32. The Commission concludes that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services directly to the public or to such classes of users as to be effectively available directly to the public, the carrier is a “telecommunications carrier,” and is thus subject to the requirements of section 251(a) and the benefits of section 251(c). The Commission concludes that CMRS providers are telecommunications carriers, and that private mobile radio service (PMRS) providers generally are not telecommunications carriers, except to the extent that a PMRS provider uses excess capacity to provide local, interexchange, or international services for a fee directly to the public. The Commission also concludes that, if a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier.

10. Commercial Mobile Radio Service

33. The Commission concludes that LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2)(a) to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks. The Commission concludes that many CMRS providers (specifically cellular, broadband PCS and covered specialized mobile radio (SMR) providers) offer telephone exchange service and exchange access, and that incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252. The Commission concludes that CMRS providers should not be classified as LECs at this time. The Commission also concludes that it may apply section 251 and 252 to LEC–CMRS interconnection. By opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with section 201, is a basis for jurisdiction over LEC–CMRS interconnection.

11. Transport and Termination

34. The 1996 Act requires that charges for transport and termination of traffic be cost-based. The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company’s forward-looking costs. The state commissions would also use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range of 0.2–0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the ranges. In addition, the Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

12. Access to Rights of Way

35. The Commission amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable television systems and telecommunications carriers to poles, ducts, conduits, and rights-of-way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles, ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

13. Obligations Imposed on non-incumbent LECs

36. The Commission concludes that states generally may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, “Additional Obligations on Incumbent Local Exchange Carriers.” Section 251(h)(2) sets forth a process by which the Commission may decide to treat LECs as non-incumbent LECs, and state commissions or other interested parties may ask the Commission to issue a rule, in accordance with section 251(h)(2), providing for the treatment of a LEC as an incumbent LEC. In addition to this Report and Order, the Commission addresses in separate proceedings some of the obligations, such as dialing parity and number portability, that section 251(b) imposes on all LECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

37. Section 251(f)(1) provides for exemption from the requirements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation’s subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c). In the Report and Order, the Commission establishes a very limited set of rules interpreting the requirements of section 251(f). For example, the Commission finds that LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified. Rural LECs bear the burden of proving that
continued exemption of the requirements of section 251(c) is
justified, once a bona fide request has been
made by a carrier under section 251. The Commission also concludes that only LECs that, at the holding
company level, have fewer than 2 percent of the nation’s subscriber lines are entitled to petition for suspension or
modification of requirements under section 251(f)(2). For the most part, however, the states will interpret
the provisions of section 251(f) through
erulemaking and adjudicative
proceedings, and will be responsible for
determining whether a LEC in a
particular instance is entitled to
exemption, suspension, or modification
of section 251 requirements.

15. Commission Responsibilities Under Section 252

38. Section 252(e)(5) requires the Commission to assume the state’s responsibilities under section 252 if the
state “fails to act to carry out its responsibilities under that section. In the Report and Order, the Commission
adopts a minimum set of rules that will provide notice of the standards and
procedures that the Commission will
use if it has to assume the responsibility of a state commission under section
252(e)(5). The Commission concludes
that, if it arbitrates agreements, it will use a “final offer” arbitration method,
under which each party to the
arbitration proposes its best and final
offer, and the arbitrator chooses among
the proposals. The arbitrator could
choose a proposal in its entirety, or
could choose different parties’ proposals
on an issue-by-issue basis. In addition, the parties could continue to negotiate
an agreement after they submit their proposals and before the arbitrator
makes a decision.

39. Section 252(i) of the 1996 Act

requires that incumbent LECs make available to any requesting
telecommunications carrier any
individual interconnection, service, or
network element on the same terms and
conditions as contained in any
agreement approved under Section 252
to which they are a party. The
Commission concludes that section
252(i) entitles all carriers with
interconnection agreements to “most
favored nation” status regardless of
whether such a clause is in their
agreement. Carriers may obtain any
individual interconnection, service, or
network element under the same terms and
conditions as contained in any
publicly filed interconnection
agreements that they have to agree to
the entire agreement. Additionally, carriers seeking interconnection,

II. Scope of the Commission’s Rules

40. In implementing section 251, we conclude that some national rules are
necessary to promote Congress’s goals
for a national policy framework and
serve the public interest, and that states
should have the major responsibility for
prescribing the specific terms and
conditions that will lead to competition
in local exchange markets. Our
approach in this Report and Order has
been a pragmatic one, consistent with
the Act, with respect to this allocation
of responsibilities. We believe that the
steps necessary to implement section
251 are not appropriately characterized
as a choice between specific national
rules on the one hand and substantial
state discretion on the other. We adopt
national rules to facilitate administration of sections 251 and 252, expedite negotiations and arbitrations
by narrowing the potential range of
dispute where appropriate to do so,
offer uniform interpretations of the law
that might not otherwise emerge until
after years of litigation, remedy
significant imbalances in bargaining
power, and establish the minimum
requirements necessary to implement
the nationwide competition that
Congress sought to establish. This is
consistent with our obligation to
“complete all actions necessary to
establish regulations to implement the
requirements” of section 251. Some of
these rules will be relatively self-
executing. In many instances, however,
the rules we establish call on the states to exercise significant discretion and
to make critical decisions through
arbitrations and development of state-
specific rules. Over time, we will
continue to review the allocation of
responsibilities, and we will reallocate
them if it appears that we have
inappropriately or inefficiently
designated the decisionmaking roles.

41. The decisions in this Report and
Order, and in this Section in particular,
benefit from valuable insights provided
by states based on their experiences in
establishing rules and taking other
actions intended to foster local
competition. Through formal comments,
ex parte meetings, and open forums,
state commissioners and their staffs
provided extensive, detailed
information to us regarding difficult or
complex issues they have encountered, and the various
approaches they have adopted to
address those issues. Information from
the states highlighted both differences
among communities within states, as
well as similarities among states. Recent
state rules and orders that take into
account the local competition provisions of the 1996 Act have been
particularly helpful to our deliberations
about the types of national rules that
will best further the statute’s goal of
encouraging local telephone
competition. See, e.g., Petition of AT&T
for the Commission to Establish Resale
Rules, Rates, Terms and Condition and
the Initial Unbundling of Services,
Docket No. 6352–U (Georgia
Commission May 29, 1996); AT&T
Communications of Illinois, Inc. et al.,
Petition for a Total Local Exchange
Wholesale Service Tariff from Illinois
Bell Telephone Company, Nos. 95–0458
and 95–0531 (consol.) (Illinois
Commission June 26, 1996); Hawaii
Administrative Rules, Ch. 6–80,
“Competition in Telecommunications
Services,” (Hawaii Commission May 17,
1996); Public Utilities Commission of
Ohio Case No. 95–845–TP–COI (Local
Competition) (Ohio Commission June
12, 1996) and Implementation of the
Mediation and Arbitration Provisions of
the Federal Telecommunications Act of
1996, Case No. 96–463–TP–UNC (Ohio
Commission May 30, 1996); Proposed
Rules regarding Implementation of
§§ 40–15–101 et seq. Requirements
relating to Interconnection and
Unbundling, Docket No. 95R–556T
(Colorado Commission April 25, 1996)
(one of a series of Orders adopted by the
Colorado Commission in response to the
local competition provisions of the 1996
Act); Washington Utilities and
Transportation Commission, Fifteenth
Supplemental Order, Decision and
Order Rejecting Tariff Revisions,
Requiring Refiling, Docket No. UT–
950200 (Washington Commission April
1996). These state decisions also offered
useful insights in determining the extent
to which the Commission should set
uniform national rules, and the
extent to which we should ensure that
states can impose varying rules, and
the extent to which we should ensure that
can impose varying rules, and the
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42. We also received helpful advice and assistance from other government agencies, including the National Telecommunications and Information Administration (NTIA), the Department of Justice, and the Department of Defense about how national rules could further the public interest. In addition, comments from industry members and consumer advocacy groups helped us understand better the varying and competing concerns of consumers and different representatives of the telecommunications industry. We benefitted as well by discovering that there are certain matters on which there is substantial agreement about the role the Commission should play in establishing and enforcing provisions of section 251.

A. Advantages and Disadvantages of National Rules

1. Background

43. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, by August 8, 1996), to "establish regulations to implement the requirements of [section 251]." The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement at 1. In addition, section 253 requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide an interstate or intrastate telecommunications service."

44. In the NPRM, we stated our belief that we should implement Congress's goal of a pro-competitive, de-regulatory, national policy framework by adopting national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states. We sought comment on the extent to which we should adopt explicit national rules, and the extent to which permitting variations among states would further Congress's pro-competitive goals. We anticipated that we would rely on actions some states have already taken to address interconnection and other issues related to opening local markets to competition. In the NPRM, we set forth some of the benefits that would likely result from implementing explicit national rules, and some of the benefits that would likely result from allowing variations among states.

2. Discussion

45. Comments and ex parte discussions with state commission representatives have convinced us that we share with states a common goal of promoting competition in local exchange markets. We conclude that states and the FCC can craft a working relationship that is built on mutual commitment to promoting competition throughout the country, in which the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition. In implementing the national rules we adopt in this Report and Order, states will help to illuminate and develop innovative solutions regarding many complex issues for which we have not attempted to prescribe national rules at this time, and states will adopt specific rules that take into account local concerns. In this Report and Order, and in subsequent actions we intend to take, we have and will continue to seek guidance from various states that have taken the lead in establishing pro-competitive requirements. We also expect to rely heavily on state input and experience in other FCC proceedings, such as access reform and petitions concerning BOC entry into inter-LATA markets. Virtually every decision in this Report and Order borrows from decisions reached at the state level, and we expect this close association with and reliance on the states to continue in the future. We therefore encourage states to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a number of policies consistent with the 1996 Act are generated by states.

46. We find that certain national rules are consistent with the terms and the goals of the statute. Section 251 sets forth a number of rights with respect to interconnection, resale services, and unbundled network elements. We conclude that the Commission should define at least certain minimum obligations that section 251 requires, respectively, of all telecommunications carriers, LECs, or incumbent LECs. For example, as discussed in more detail below, we conclude that it is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers. We adopt the standards set forth in sections 251 (c) and (d), while also permitting states to go beyond that minimum list and impose additional requirements that are consistent with the 1996 Act and the FCC's implementing rules. We find no basis for permitting an incumbent LEC in some states not to make available these minimum technically feasible network elements that are provided by incumbent LECs in other states. We point out, however, that a uniform rule does not necessarily mean uniform results. For example, a national pricing methodology takes into account local factors and inputs, and thus may lead to different prices in different states, and different regions within states. In addition, parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251 (b) and (c), including any pricing rules we adopt. We intend to review on an ongoing basis the rules we adopt herein in light of competitive developments, states' experiences, and technological changes.

47. We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets. National (as opposed to state) rules more directly address these competitive circumstances.

48. We emphasize that, under the statute, parties may voluntarily negotiate agreements "without regard to" the rules that we establish under sections 251 (b) and (c). However, fair negotiations will be expedited by the provisions we adopt. Similarly, state arbitration of interconnection agreements now and in
the future will be expedited and simplified by a clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms. Such efficiency and predictability should facilitate entry decisions, and in turn enhance opportunities for local exchange competition. In addition, for new entrants seeking to provide service on a national or regional basis, minimum national requirements may reduce the need for designing costly multiple network configurations and marketing strategies, and allow more efficient competition. More efficient competition will, in turn, benefit consumers. Further, national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.

49. We also believe that some explicit national standards will be helpful in enabling the Commission and the states to carry out other responsibilities under the 1996 Act. For example, national standards will enable the Commission to address issues swiftly if the Commission is obligated to assume section 252 responsibilities because a state commission has failed to act. In addition, BOCs that seek to offer long distance service in their service areas must satisfy, inter alia, a “competitive checklist” set forth in section 271(c)(2)(B). Many of the competitive checklist provisions require compliance with specific provisions of section 251. For example, the checklist requires BOCs to provide “nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” Some national rules also will help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of section 271(c)(2)(B), the competitive checklist. In addition, national rules that establish the minimum requirements of section 251 will provide states with a consistent standard against which to conduct the fact-intensive process of verifying checklist compliance, the DOJ will have standards against which to evaluate the applications, and we will have standards to apply in adjudicating section 271 petitions in an extremely compressed time frame. Moreover, we believe that establishing minimum requirements that arbitrated agreements must satisfy will assist states in arbitrating and reviewing agreements under section 252, particularly in light of the relatively short time frames for such state action. While some states reject the idea that national rules will help the state commissions to satisfy their obligations under section 252 to mediate, arbitrate, and review agreements, other states have welcomed national rules, at least with respect to certain matters.

50. A broad range of parties urge the Commission to adopt minimum requirements that would permit states to impose additional, pro-competitive requirements that are consistent with the 1996 Act and address local or state-specific circumstances. We agree generally that many of the rules we adopt should establish non-exhaustive requirements, and that states may impose additional pro-competitive requirements that are consistent with the purposes and terms of the 1996 Act, including our regulations established pursuant to section 251. In contrast, we conclude that the 1996 Act limits the obligations states may impose on non-incumbent carriers. See infra, Section IV.E. We also agree that the rules we adopt regarding interconnection, services, and access to unbundled elements will evolve to accommodate developments in technology and competitive circumstances, and that we will continue to draw on state experience in applying our rules and in addressing new or additional issues. We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We cannot anticipate all of the potential changes that will occur as a result of technological advancements, competitive developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable. Moreover, we conclude that arbitrated agreements must permit parties to incorporate changes to our national rules, or to applicable state rules as such changes may be effective, without abrogating the entire contract. This will ensure that parties, regardless of when they enter into arbitrated agreements, will be able to take advantage of all applicable Commission and state rules as they evolve.

51. Some parties contend that even minimum requirements may impede the ability of state commissions to take varying approaches to address particular circumstances or conditions. We agree with the contention that, although there are different market conditions from one area to another, such distinct areas do not necessarily replicate state boundaries. For example, virtually all states include both more densely-populated areas and sparsely populated rural areas, and all include both business and residential areas. Although each state is unique in many respects, demographic and other differences among states do not suggest that national rules are inappropriate. Moreover, even though it may not be appropriate to impose identical requirements on carriers with different network technologies, our rules are intended to accommodate such differences. See infra, Section IV.E. (concluding that successful interconnection or access to an unbundled element at a particular point in the network creates a rebuttable presumption that such interconnection or access is technically feasible at networks that employ substantially similar facilities). We agree with parties, such as the Ohio Consumers’ Counsel, that physical networks are not designed on a state-by-state basis. Ohio Consumers’ Counsel comments at 4. Some parties have argued that explicit national standards will delay the emergence of local telephone competition, but none has offered persuasive evidence to substantiate that claim, and new entrants overwhelmingly favor strong national rules. We conclude, for the reasons set forth above, that some national rules will enhance opportunities for local competition, and we have chosen to adopt national rules where necessary to establish the minimum requirements for a nationwide pro-competitive policy framework.

52. We disagree with those parties that claim we are trying to impose a uniformity that Congress did not intend. Variations among interconnection agreements will exist, because parties may negotiate their own terms, states may impose additional requirements that differ from state to state, and some terms are beyond the scope of this Report and Order. We conclude, however, that establishing certain rights that are available, through arbitration, to all requesting carriers, will help advise parties of their minimum rights and obligations, and will help speed the negotiation process. In effect, the Commission’s rules will provide a national baseline for terms and conditions for all arbitrated agreements. Our rules also may tend to serve as a useful guide for negotiations by setting forth minimum requirements that will apply to parties if they are unable to reach agreement. This is consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251.

53. We also believe that national rules will assist smaller carriers that seek to
provide competitive local service. As noted above, national rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state. We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities. In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets. We reject the position advocated by some parties that we should not adopt national rules because such rules will be particularly burdensome for small or rural incumbent LECs. We note, however, that section 251(f) provides relief from some of our rules.

54. We recognize the concern of many state commissions that the Commission not undermine or reverse existing state efforts to foster local competition. We believe that Congress did not intend for us needlessly to disrupt the pro-competitive actions some states already have taken that are both consistent with the 1996 Act and our rules implementing section 251. We believe our rules will in many cases be consistent with pro-competitive actions already taken by states, and in fact, many of the rules we adopt are based directly on existing state commission actions. We also intend to continue to reflect states' experiences as we revise our rules. We also recognize, however, that in at least some instances existing state requirements will not be consistent with the statute and our implementing rules. It will be necessary in those instances for the subject states to amend their rules or to follow a different course, after considering the Commission's decisions and experiences of the states. We also reject the argument of Margaretville Telephone Company that the 1996 Act constitutes an unconstitutional taking because it seeks to deprive incumbent LECs of their "reasonable, investment-backed expectation to hold competitive advantages over new market entrants."

B. Suggested Approaches for FCC Rules

1. Discussion

55. We intend to adopt minimum requirements in this proceeding; states may impose additional pro-competitive requirements that are consistent with the Act and our rules. We decline to adopt a "preferred outcomes" approach, because such an approach would fail to establish explicit national standards for arbitration, and would fail to provide sufficient guidance to the parties' options in negotiations. To the extent that parties advocate "preferred outcomes" from which the parties could deviate in arbitrated agreements, we reject such a proposal, because we conclude that it would not provide the benefits conferred by establishing "default" requirements. To the extent that commenters advocate a regulatory approach that would require parties to justify a negotiated result different from the preferred outcomes, we believe that such an approach would impose greater constraints on voluntarily negotiated agreements than the 1996 Act permits. Under the 1996 Act, parties may freely negotiate any terms without justifying deviation from "preferred outcomes." The only restriction on such negotiated agreements is that they must be deemed by the state commission to be nondiscriminatory and consistent with the public interest, under the standards set forth in section 252(e)(2)(A). In response to the Illinois Commission's suggestion that we adopt a process by which states may seek waivers of our rules, we note that Commission rules already provide for waiver of our rules under certain circumstances. We decline to adopt a special waiver process in this proceeding.

56. We intend our rules to give guidance to the parties regarding their rights and obligations under section 251. The specificity of our rules varies with respect to different issues; in some cases, we identify broad principles and leave to the states the determination of what specifics are necessary to satisfy those principles. In other cases, we find that local telephone competition will be better served by establishing specific requirements. In each of the sections below, we discuss the basis for adopting particular national principles or rules.

57. We also believe that we should periodically review and amend our rules to take into account experiences of carriers and states, technological changes, and market developments. The actions we take will be fully responsive to Congress's mandate that we complete all actions necessary to implement regulations to implement the requirements of section 251 by August 8, 1996. We nevertheless retain authority to refine or augment our rules, or to follow a different course, after developing some practical experience with the rules adopted herein. It is beyond doubt that the Commission has ongoing rulemaking authority. For example, section 4(f) provides that the Commission may impose rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions. Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch and to the ends of justice." We agree with Sprint, the Illinois Commission, and other parties that we should address in this rulemaking the most important issues, and continue to refine our rules on an ongoing basis to address additional or unanticipated issues, and especially to learn from the decisions and experiences of the states. We also reject the argument of Margaretville Telephone Company that the 1996 Act constitutes an unconstitutional taking because it seeks to deprive incumbent LECs of their "reasonable, investment-backed expectation to hold competitive advantages over new market entrants."

C. Legal Authority of the Commission to Establish Rules Applicable to Intrastate Aspects of Interconnection, Services, and Unbundled Network Elements

1. Background

58. In the NPRM, we tentatively concluded that Congress intended sections 251 and 252 to apply, and that our rules should apply, to both interstate and intrastate aspects of interconnection, services, and access to network elements. We stated in the NPRM that it would seem to make little sense, in terms of economics or technology, to distinguish between interstate and intrastate components for purposes of sections 251 and 252. We also believed that such a distinction would appear to be inconsistent with Congress's desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. We sought comment on these tentative conclusions.

59. We further tentatively concluded in the NPRM that section 2(b) of the 1934 Act does not require a contrary conclusion. Section 2(b) states that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934 Act] shall be construed to apply or to give to the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier * * *." We noted in the NPRM that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end users for local exchange service have
traditionally been subject to state authority, and will continue to be.

2. Discussion

60. We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. According to Senator Pressler, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to design a national policy framework—a new regulatory paradigm for telecommunications—which accommodates and accelerates technological change and innovation." 141 Cong. Rec. S7881–2, S7886 (June 7, 1995) (emphasis added). According to Representative Fields, "[Congress] is de compartamentalizing of segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice." 142 Cong. Rec. H1149 (Feb. 1, 1996). That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues. For example, section 253(a) suggests that states may establish regulations regarding interstate as well as intrastate matters. Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.

61. For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252. We believe that this interpretation is the most reasonable one in light of our expectation that marketing and product offerings by telecommunications carriers will diminish or eliminate the significance of interstate-intrastate distinctions.

62. We view sections 251 and 252 as creating parallel jurisdiction for the FCC and the states. These sections require the FCC to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252. Among other things, the fact that the Commission is required to assume the state commission's responsibilities if the state commission fails to carry out its section 252 responsibilities gives rise to the inevitable inference that both the states and the FCC are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252.

63. The only other possible interpretations would be that: (1) sections 251 and 252 address only interstate aspects of interconnection, services, and access to unbundled elements; (2) the provisions address only the interconnection aspects of those issues; or (3) the FCC's role is to establish rules for interstate aspects, and the states' role is to arbitrate and approve agreements on intrastate aspects. As explained below, none of these interpretations withstands examination. Accordingly, we conclude that sections 251 and 252 address both interstate and intrastate aspects of interconnection services and access to unbundled elements.

64. Some parties have argued that our authority under section 251 is limited by section 2(b). Ordinarily, in light of section 2(b), we would interpret a provision of the Communications Act as addressing only the interstate jurisdiction unless the provision (as well as section 2(b) itself) otherwise provided. That interpretation is contradicted in this case, however, by strong evidence in the statute that the local competition provisions of the 1996 Act are directed to both interstate and intrastate matters. For example, section 251(c)(2), the local arrangement requirement, requires LECs to provide interconnection "for the transmission and routing of telephone exchange service and exchange access." Because telephone exchange service is a local, intrastate service, section 251(c)(2) plainly addresses intrastate service, but it also addresses interstate exchange access. In addition, we note that in section 253, the statute explicitly authorizes the Commission to preempt intrastate and interstate barriers to entry.

65. More generally, if these sections are read to address only interstate services, the grant of substantial responsibilities to the states under section 252 is incongruous. A statute designed to develop a national policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also to implement its national policies by enhancing our authority to encompass rulemaking authority over interstate interconnection matters. The legislative history is replete with statements indicating that Congress meant to address intrastate local exchange competition. For instance, Representative Markey noted that "[i]n addressing local and long distance issues, creating an open access and sound interconnection policy was the key objective." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Representative Markey stated that "we take down the barriers of local and long distance and cable company, satellite, computer software and the business they want to get in." 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added).

66. Some parties argue that section 251 addresses solely intrastate matters. We do not find this argument persuasive. Under this narrow view, section 251(c)(6) requiring incumbent LECs to offer physical collocation would apply only to equipment used for intrastate services, while new entrants would be limited to the use of virtual collocation. Under this narrow interpretation, the only reasonable way to reconcile various provisions of sections 251 and 252, and the statute as a whole was to conclude that the FCC's jurisdiction was limited to intrastate matters. Such an interpretation would force new entrants to use different methods of collocation based on the jurisdictional nature of the traffic involved, and would thereby greatly increase their costs. Moreover, such an interpretation would fail to give effect to Congress's intent in
enacting section 251(c)(6) to reverse the result reached in Bell Atlantic. The language in the House bill which closely matches the language that appears in section 251(c)(6), noted that a provision requiring physical collocation was necessary “because a recent court decision indicates that the Commission lacks authority under the Communications Act to order physical collocation.” H.R. Rep. No. 204, pt. I, 104th Cong., 1st Sess., at 73 (1995).

67. Another factor that makes clear that sections 251 and 252 did not address exclusively intrastate matters is the provision in section 251(g), “Continued Enforcement of Exchange Access and Interconnection Requirements.” That section provides that BOCs must follow the Commission’s “equal access and nondiscriminatory interconnection restrictions (including receipt of compensation)” until they are explicitly superseded by Commission regulations after the date of enactment of the 1996 Act. This provision refers to existing Commission rules governing interstate matters, and therefore it contradicts the argument that section 251 addresses intrastate matters exclusively.

68. Nor does the savings clause of section 251(i) require us to conclude that sections 251 and 252 address only intrastate issues. Section 251(i) provides that “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.” This subsection merely affirms the Commission’s preexisting authority under section 201. It continues to apply for purely interstate activities. It does not act as a limitation on the agency’s authority under section 251.

69. As to the third possible interpretation, the FCC’s role is to establish rules for only the interstate aspects of interconnection, and the states’ role is to arbitrate and approve only the intrastate aspects of interconnection agreements. No commenters support this position, and we find that it would be inconsistent with the 1996 Act to read into sections 251 and 252 such a distinction. The statute explicitly contemplates that the states are to comply with the Commission’s rules, and the Commission is required to assume the state commission’s responsibilities if the state commission fails to act to carry out its section 252 responsibilities. Thus, we believe the only logical conclusion is that the Commission and the states have parallel jurisdiction. We conclude, therefore, that sections 251 and 252 can only logically be read to address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements, and thus to grant the Commission authority to establish regulations under 251, binding on both carriers and states, for both interstate and intrastate aspects.

70. Section 2(b) of the Act does not require a different conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, “nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.” As stated above, however, we have found that sections 251 and 252 do apply to “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.” In enacting sections 251 and 252 after section 2(b), and squarely addressing therein the issue of interstate and intrastate jurisdiction, we find that Congress intended for sections 251 and 252 to take precedence over any contrary implications based on section 2(b). We note also, that in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that “[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.” Section 253 directs the FCC to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to “establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call.” Section 276(d) provides that “[t]o the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.” None of these provisions is specifically excepted from section 2(b), yet all of them explicitly give the FCC jurisdiction over intrastate matters. Thus, we believe that the lack of an explicit exception in section 2(b) should not be read to require an interpretation that the Commission’s jurisdiction under sections 251 and 252 is limited to interstate matters. Neither would nullify several explicit grants of authority to the FCC, noted above, and would render parts of the statute meaningless.

71. Some parties find significance in the fact that earlier drafts of the legislation would have amended section 2(b) to make an exception for Part II of Title II, including section 251, but the enacted version did not include that exception. These parties argue that this change in drafting demonstrates an intention by Congress that the limitations of section 2(b) remain fully in force with regard to sections 251 and 252. We find this argument unpersuasive.

72. Parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained. In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement of the Conference Report. According to the Joint Explanatory Statement, all differences between the House Amendment and the substitute reached in conference are noted therein “except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.” Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. Moreover, it seems implausible that, by selecting the final version, Congress intended a radical alteration of the Commission’s authority under section 251, given the total lack of legislative history to that effect. We conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under sections 251 and 252, and would have had no practical effect. 73. Some parties have argued that, to the extent that sections 251 and 252 address intrastate matters, the Commission’s rulemaking authority under those sections is limited to those instances where Commission action regarding intrastate matters is specifically mandated in number administration. We disagrees. There is no language limiting the Commission's
authority to establish rules under section 251. To the contrary, section 251(d)(1) affirmatively requires Commission rules, stating that "the Commission shall complete all actions necessary to implement the requirements of this section." Pursuant to sections 4(i), 201(b), and 303(r) of the Act, the Commission generally has rulemaking authority to implement all provisions of the Communications Act. Courts have held that the Commission, pursuant to its general rulemaking authority, has "expansive" rather than limited powers. Further, where Congress has expressly delegated to the Commission rulemaking responsibility with respect to a particular matter, such delegation constitutes "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." Indeed, to read these provisions otherwise would negate the requirement that states ensure that arbitrated agreements are consistent with the Commission's rules. Thus, the explicit rulemaking requirements pointed out by some of the parties is best read as giving the Commission more jurisdiction than usual, not less. We believe that the delegation of authority set forth in section 251(d)(1) is "expansive" and not limited. We therefore reject assertions that the Commission has authority to establish regulations regarding intrastate matters only with respect to certain provisions of section 251, such as number administration.

Moreover, the Court in Louisiana PSC did not suggest a different result. The reasoning in Louisiana PSC applies to the dual regulatory system of the 1934 Act. As set forth above, however, in sections 251-253, Congress amended the dual regulatory system that the Court addressed in Louisiana PSC. As a result, preemption in this case is governed by the usual rule, also recognized in Louisiana PSC, that an agency, acting within the scope of its delegated authority, may preempt inconsistent state regulation. As discussed above, Congress here has expressed an intent that our rules apply to intrastate interconnection, services, and access to network elements. Therefore, Louisiana PSC does not foreclose our adoption of regulations under section 251 to govern intrastate matters.

75. Parties have raised other arguments suggesting that the Commission lacks authority over intrastate matters. We are not persuaded by the argument that sections 256(c) and 261, as well as section 601(c) of the 1996 Act, evince an intent by Congress to preserve states' exclusive authority over intrastate matters. In fact, section 261 supports the finding that the Commission may establish regulations regarding intrastate aspects of interconnection, services and access to unbundled elements that the states may not supersede. Section 261(b) generally permits states to enforce regulations prescribed prior to the date of enactment of the 1996 Act, and to prescribe regulations after such date, if such regulations are not inconsistent with the provisions of Part II of Title II. Section 261(c) specifically provides that nothing in Part II of Title II "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." We conclude that state access and interconnection obligations referenced in section 251(d)(3) fall within the scope of section 261(c). Section 261(c), as the more specific provision, controls over section 261(b) for matters that fall within its scope. We note, too, that section 261(c) encompasses all state requirements. It is not limited to requirements that were prescribed prior to the enactment of the 1996 Act. By providing that state requirements for intrastate services must be consistent with the Commission's regulations, section 261(c) buttresses our conclusion that the Commission may establish regulations regarding intrastate aspects of interconnection, services, and access to unbundled elements.

76. Section 601 of the 1996 Act and section 256 also are consistent with our conclusion. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." We conclude that section 251(d)(1), which requires the Commission to establish regulations to implement the requirements of this section, and section 261(c), were expressly intended to modify federal and state law and jurisdictional authority.

77. Section 256, entitled "Coordination for Interconnectivity," has no direct bearing on the issue of the Commission's authority under section 251, because it provides only that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under the Act." We conclude that, under the circumstances of the enactment of the Telecommunications Act of 1996. That provision is relevant, however, as a contrast to section 251, which does not contain a similar statement that the scope of the Commission's authority is unchanged by section 251. Russell v. United States, 464 U.S. 16, 23 (1983); Cramer v. Internal Revenue Service, 64 F.3d 1406, 1412 (9th Cir. 1995) (where Congress includes a provision in one section of statute but omits it in another section of the same Act, it should not be implied where it is excluded).

78. We further conclude that the Commission's regulations under section 251 are binding on the states, even with respect to intrastate issues. Section 252 provides that the agreements state commissions arbitrate must comply with the Commission's regulations established pursuant to section 251. In addition, section 253 requires the Commission to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." As discussed above, section 261(c) provides further support for the conclusion that states are bound by the regulations the Commission establishes under section 251.

79. We disagree with claims that section 251(d)(3) "grandfathers" existing state regulations that are consistent with the 1996 Act, and that such state regulations need not comply with the Commission's implementing regulations. Section 251(d)(3) only specifies that the Commission may not exclude enforcement of state access and interconnection requirements that are consistent with section 251, and that do not substantially prevent implementation of the requirements of section 251 or the purposes of Part II of Title II. In this Report and Order, we set forth only such rules that we believe are necessary to implement fully section 251 and the purposes of Part II of Title II. Thus, state regulations that are inconsistent with our rules may "substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title III]."

80. We are not persuaded by arguments that, because other provisions of the 1996 Act specifically require states to comply with the Commission's regulations, the absence of such requirement in section 251(d)(3) indicates that Congress did not intend such compliance. Section 251(d)(3) permits states to prescribe and to enforce access and interconnection requirements only to the extent that such requirements "grandfather" the requirements of this section and the purposes of section 251 and do not "substantially prevent
implementation” of the requirements of section 251 and the purposes of Part II of Title II. The Commission is required to establish regulations to “implement the requirements of the section.” Therefore, in order to be consistent with the requirements of section 251 and not “substantially prevent” implementation of section 251 or Part II of Title II, state regulatory requirements must be consistent with the FCC’s implementing regulations.

D. Commission’s Legal Authority and the Adoption of National Pricing Rules

1. Background

81. In the NPRM, we sought comment on our tentative conclusion that sections 251 (c)(2), (c)(3), and (c)(6) establish the Commission’s legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory. We also sought comment on our tentative conclusion that sections 251(b)(5) and 251(c)(4) establish our authority to define “wholesale rates” for purposes of resale, and “reciprocal compensation arrangements” for purposes of transport and termination of telecommunications services. In addition, we asked parties to comment on our tentative conclusion that the Commission’s statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.

82. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers. We also sought comment on the potential consequences of the Commission not establishing specific pricing rules.

2. Discussion

83. In adopting sections 251 and 252, we conclude that Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled elements. We interpret the Commission’s role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory; in doing so, we believe it to be within our discretion to adopt national pricing rules in order to ensure that rates will be just, reasonable, and nondiscriminatory. The Commission is also responsible for ensuring that interconnection, collocation, access to unbundled elements, resale services, and transport and termination of telecommunications are reasonably available to new entrants. The states’ role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d).

84. While we recognize that sections 201 and 202 create a very different regulatory regime from that envisioned by sections 251 and 252, we observe that Congress used terms in section 251, such as the requirement that rates, terms, and conditions be “just, reasonable, and nondiscriminatory,” that are very similar to language in sections 201 and 202. This lends additional support for the proposition that Congress intended to give us authority to adopt rules regarding the justness and reasonableness of rates pursuant to section 251, comparable in some respects to the authority the Congress gave us pursuant to sections 201 and 202.

85. We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. Congress intended these sections to promote opportunities for local competition, and directed us to establish regulations to ensure that rates under this regime would be economically efficient. This, in turn, should reduce potential entrants’ capital costs, and should facilitate entry by all types of service providers, including small entities. Further, we believe that national rules will help states review and arbitrate contested agreements in a timely fashion. From August to November and beyond, states will be carrying the tremendous burden of setting specific rates for interconnection and network elements, for resale, and for transport and termination when parties bring these issues before them for arbitration. As discussed in more detail below, we are setting forth default proxies for rates to use if they are unable to set these rates using the necessary cost studies within the statutory time frame. After that, both we and the states will need to review the level of competition, revise our rules as necessary, and reconcile arbitrated interconnection arrangements to those revisions on a going-forward basis.

86. We believe that national rules should reduce the parties’ uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252. In addition, under the national pricing rules that we adopt for interconnection and unbundled network elements, states will retain the flexibility to consider local technological, environmental, regulatory, and economic conditions. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to frustrate the potential entrants’ ability to raise capital. In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants.

87. As we observed in the NPRM, section 251 explicitly sets forth certain requirements regarding rates for interconnection, access to unbundled elements, and related offerings. Sections 251 (c)(2) and (c)(3) require that incumbent LECs’ “rates, terms, and conditions” for interconnection and unbundled network elements be “just, reasonable, and nondiscriminatory.” Section 251(c)(4) requires that incumbent LECs offer “for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers,” without unreasonable conditions or limitations. Section 251(c)(6) provides that all LECs must provide physical collocation of equipment, “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” Section 251(b)(5) requires that all LECs “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” Section 251(d)(1) further expressly directs the
Commission, without limitation, to “complete all actions necessary to implement the requirements of [section 251].”

88. Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements. Section 252(c)(1) provides that “in resolving by arbitration * * * any open issues and imposing conditions upon the parties to the agreement, a State commission shall * * * ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.”

89. We conclude that, under section 251(d)(1), Congress granted us broad authority to complete all actions necessary to implement the requirements of section 251, including actions necessary to ensure that rates for interconnection, access to unbundled elements, and collocation are “just, reasonable, and nondiscriminatory.” We also determine that the statute grants us the authority to define reasonable “wholesale rates” for purposes of services to be resold, and “reciprocal compensation” for purposes of transport and termination of telecommunication. The argument advanced by the New York Commission, NARUC, and others that the Commission’s implementing authority under section 251(d)(1) is limited to those provisions in section 251 that mandate specific Commission rules, such as rules regarding number portability, unbundling, and resale, reads into section 251(d)(1) limiting language that the section does not contain. Congress did not confine the Commission’s rulemaking authority to only those matters identified in sections 251(b)(2), 251(c)(4)(B), and 251(d)(2), and there is no basis for inferring such an implicit limitation. A narrow reading of section 251(d)(1), as proposed by the New York Commission, NARUC, and others, would require the Commission to neglect its statutory duty to implement the provisions of section 251 and to promote rapid competitive entry into local telephone markets.

90. We also reject the arguments raised by several state commissions that the language in section 252(c) indicates Congress’ intent for the Commission to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. We do not believe that the statutory directive that state commissions establish interconnection and pricing pursuant to section 252(d) restricts our authority under section 251(d)(1). States must comply with both the statutory standards under section 252(d) and the regulations prescribed by the Commission pursuant to section 252 when arbitrating rate disputes or when reviewing BOC statements of generally available terms. Section 252(c) enumerates three requirements that states must follow in arbitrating issues. These requirements are not set forth in the alternative; rather, states must comply with all three.

91. We further reject the argument that section 251(d)(3) restricts the Commission’s authority to establish national pricing regulations. Section 251(d)(3) provides that the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that, inter alia, is consistent with the requirements of section 251 and does not substantially prevent implementation of the requirements of section 251. This subsection, as discussed in section II.C., supra, is intended to allow states to adopt regulations that are not inconsistent with the Commission’s rules; it does not address state policies that are inconsistent with the pricing rules established by the Commission.

92. We also address the impact of our rules on small incumbent LECs. For example, Rural Tel. Coalition argues that rigid rules, based on the properties of large urban LECs, cannot blindly be applied to small and rural LECs. As discussed above, however, we believe that states will retain sufficient flexibility under our rules to consider local technological, environmental, regulatory, and economic conditions. We also note that section 251(f) may provide relief to certain small carriers.

E. Authority To Take Enforcement Action

1. Background

93. The Commission’s implementation of section 251 must be given full effect in arbitrated agreements and incorporated into all such agreements. There is judicial review of such arbitrated agreements, and one issue surely will be the adherence of these agreements to our rules. The Commission will have the opportunity to participate, upon request by a party or a state or by submitting an amicus filing, in the arbitration or the judicial review thereof. To clarify our potential role, we consider the extent of the Commission’s authority to review and enforce agreements entered into pursuant to section 252. Section 252(e)(6) provides that, in “any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.”

94. In the NPRM, we sought comment on the relationship between sections 251 and 252 and the Commission’s existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding “anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof * * *.” We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252. We also sought comment on the relationship between sections 251 and 252 and any other applicable Commission enforcement authority. We further sought comment on how we might increase the effectiveness of the Commission’s enforcement mechanisms. Specifically, we asked for comment on how private rights of action might be used under the Act, and the Commission’s role in speeding dispute resolution in forums used by private parties.

2. Discussion

95. Consistent with our decision in Telephone Number Portability and the views of most commenters, we conclude that parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court. Commenters also suggest that the statute’s provision for federal district court review of state public utility commission decisions is inconsistent with the 11th Amendment. That issue is not properly before the Commission since it is the federal courts that will have to determine the scope of their jurisdiction and in any case “regulatory agencies are not free to declare an act of Congress unconstitutional.” See Meredith Corp. versus FCC, 809 F.2d 863, 873 (D.C. Cir. 1987). Federal district courts may choose to stay or dismiss proceedings brought pursuant to section 252(e)(6), and refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission under the primary jurisdiction doctrine. We find, however, that federal court review is not the exclusive remedy regarding state determinations under section 252.
96. The Commission also stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory ruling where necessary to remove uncertainty or eliminate a controversy. See 47 CFR § 1.2 (the Commission, in accordance with section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554(e), may issue a declaratory ruling terminating a controversy or removing uncertainty). Because section 251 is critical to the development of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.

97. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act “shall not be construed to modify, impair or supersede” existing federal law—which includes the section 208 complaint process—“unless expressly so provided.” Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

98. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

99. We acting on a section 208 complaint, we would not be directly reviewing the state commission’s decision, but rather, our review would be strictly limited to determining whether the common carrier’s actions or omissions were in contravention of the Communications Act. While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint. Thus, consistent with our past decisions in analogous contexts (See Number Portability Order, supra; Freeman versus AT&T, 59 FR 43125 (August 22, 1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to “bring a civil action in United States district court or any other court of competent jurisdiction” did not bar a complaint under section 208 of the Communications Act); see also Policies Governing the Provision of Shared Telecommunications Service, 54 FR 478 (January 6, 1989) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest)), we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages. We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.

100. Finally, we clarify, as one commenter requested, that nothing in sections 251 and 252 of our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law. In appropriate circumstances, the Commission could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violations with radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a).

F. Regulations of BOC Statements of Generally Available Terms

101. We noted in the NPRM that section 251 and our implementing regulations govern the states’ review of BOC statements of generally available terms and conditions, as well as arrangements reached through compulsory arbitration pursuant to section 252(b). We tentatively concluded that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply.

102. Only a few commenters addressed this issue, and most concurred with the tentative conclusion that we should apply the same requirements to both arbitrated agreements and BOC statements of generally available terms. The Illinois Commission, for example, asserts that, “[s]ince the generally available terms could be viewed as a baseline against which to craft arbitrated arrangements, it is reasonable to hold both arbitrated agreements and the BOC statements of generally available terms to the same standards.” CompTel asserts that, particularly if states require incumbent LECs to tariff the terms and conditions in agreements that are subject to arbitration, there will be few if any distinctions between arbitrated agreements and generally available terms and conditions.

103. We hereby find that our tentative conclusion that we should apply a single set of standards to both arbitrated agreements and BOC statements of generally available terms is consistent with both the text and purpose of the 1996 Act. BOC statements of generally available terms are relevant where a BOC seeks to provide in-region interLATA service, and the BOC has not negotiated or arbitrated an agreement. Therefore, such statements are to some extent a substitute for an agreement for interconnection, services, or access to unbundled elements. We also find no basis in the statute for establishing different requirements for arbitrated agreements and BOC statements of generally available terms. Moreover, a single set of requirements will substantially ease the burdens of state commissions and the FCC in reviewing agreements and statements of generally available terms pursuant to sections 252 and 271.
G. States' Role in Fostering Local Competition Under Sections 251 and 252

104. As already referenced, states will play a critical role in promoting local competition, including by taking a key role in the negotiation and arbitration process. We believe the negotiation/ arbitration process pursuant to section 252 is likely to proceed as follows. Initially, the requesting carrier and incumbent LEC will seek to negotiate mutually agreeable rates, terms, and conditions governing the competing carrier’s interconnection to the incumbent’s network, access to the incumbent’s unbundled network elements, or the provision of services at wholesale rates for resale by the requesting carrier. Either party may ask the relevant state commission to mediate specific issues to facilitate an agreement during the negotiation process.

105. Because the new entrant’s objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent’s market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement. In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission’s rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

106. Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions under which the competing carrier receives access to the incumbent’s loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state commission will establish the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.

107. State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions will identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).

108. The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states, and to have a substantial effect on how the FCC takes in developing a pro-competitive national policy framework.

III. Duty to Negotiate in Good Faith

A. Background

109. Section 251(c)(1) of the statute imposes on incumbent LECs the “duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described” in sections 251(b) and (c), and further provides that “(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.” In the NPRM, we asked parties to comment on the extent to which the Commission should establish national rules defining the requirements of the good faith negotiation obligation.

B. Advantages and Disadvantages of National Rules

1. Discussion

110. We conclude that establishing some national standards regarding the duty to negotiate in good faith could help to reduce areas of dispute and expedite fair and successful negotiations, and thereby realize Congress’ goal of enabling swift market entry by new competitors. In order to address the balance of the incentives between the bargaining parties, however, we believe that we should set forth some minimum requirements of good faith negotiation that will guide parties and state commissions. As discussed above, the requirements in section 251 obligate incumbent LECs to provide interconnection to competitors that seek to reduce the incumbent’s subscribership and weaken the incumbent’s dominant position in the market. Generally, the new entrant has little to offer the incumbent. Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement. In addition, incumbent LECs argue that requesting carriers may have incentives to make unreasonable demands or otherwise fail to act in good faith. The fact that an incumbent LEC has superior bargaining power does not itself demonstrate a lack of good faith, or ensure that a new entrant will act in good faith.

111. We agree with commenters that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. As discussed more fully below, determining whether or not a party’s conduct is consistent with its statutory duty will depend largely on the specific facts of individual negotiations. Therefore, we believe that it is appropriate to identify factors or practices that may be evidence of failure to negotiate in good faith, but...
that will need to be considered in light of all relevant circumstances.

112. Consistent with our discussion in Section II, above, we believe that the Commission has authority to review complaints alleging violations of good faith negotiation pursuant to section 208. We previously have held that parties may raise allegations regarding good faith negotiation pursuant to section 208. Cellular Interconnection Proceeding, 4 FCC Rcd 2369 (1989). The Commission also held in that case that "the conduct of good faith negotiations is not jurisdictionally severable." 1d. at 2371. Penalties may be imposed under sections 501, 502 and 503 for failure to negotiate in good faith. In addition, we believe that state commissions have authority, under section 252(b)(5), to consider allegations that a party has failed to negotiate in good faith. We also reserve the right to amend these rules in the future as we obtain more information regarding negotiations under section 252.

C. Specific Practices That May Constitute a Failure to Negotiate in Good Faith

1. Discussion

113. The Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct of the transaction concerned." U.C.C. § 1-201(19) (1981); see Black's Law Dictionary at 353 (Abridged ed. 1983) ("Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage * * *."). When looking at good faith, the question "is a narrow one focused on the subjective intent with which the person in question has acted." U.C.C. § 1-201 (84). Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply. Steven J. Burton and Eric G. Anderson, Contractual Good Faith, § 8.2.2 at 332 (1995). For example, parties may not use duress or misrepresentation in negotiations. Thus, the duty to negotiate in good faith, at a minimum, prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made. We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach an agreement.

114. Because section 252 permits parties to seek mediation "at any point in the negotiation," and also allows parties to seek arbitration as early as 135 days after an incumbent LEC receives a request for negotiation under section 252, we conclude that Congress specifically contemplated that one or more of the parties may fail to negotiate in good faith, and created at least one remedy in the arbitration process. Section 252(b)(4)(C) requires state commissions to "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." 47 U.S.C. § 252(b)(4)(C). The possibility of arbitration itself will facilitate good faith negotiation. For example, parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information—given that section 252(b)(4)(B) authorizes the state commission to require the parties "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues." That provision also states that, if either party "fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived." The likelihood that an arbitrator will review the positions taken by the parties during negotiations also should discourage parties from refusing unreasonably to provide relevant information to each other or to the arbitrations.

115. We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations. This is consistent with earlier Commission decisions. See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket 95-157, First Report and Order, FCC 96-196, at para. 20, 61 FR 24470 (May 15, 1996). In light of these considerations, we set forth some minimum standards that will offer parties guidance in determining whether they are acting in good faith, but leave specific determinations of whether a party has acted in good faith to be decided by a state commission, court, or the FCC on a case-by-case basis.

116. We find that there may be pro-competitive reasons for parties to enter into nondisclosure agreements. A broad range of commenters, including IXCs, state commissions, and incumbent LECs, support this view. We conclude that there can be nondisclosure agreements that will not constitute a violation of the good faith negotiation duty, but that caution that overly broad, restrictive, or coercive nondisclosure requirements may well have anticompetitive effects. We therefore will not prejudge whether a party has demonstrated a failure to negotiate in good faith by requesting another party to sign a nondisclosure agreement, or by failing to sign a nondisclosure agreement; such demands by incumbents, however, are of concern and any complaint alleging such tactics should be evaluated carefully.

Agreements may not, however, preclude a party from providing information requested by the FCC, a state commission, or in support of a request for arbitration under section 252(b)(2)(B).

117. We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights. For example, we agree with ALTS' contention that an incumbent LEC may not demand that the requesting carrier attest that the agreement complies with provisions of the 1996 Act, federal regulations, and state law, because such a demand would be at odds with the provisions of sections 251 and 252 that are intended to foster opportunities for competition on a level playing field. In addition, we find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit another party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future.

118. We decline to find that other practices identified by parties constitute per se violations of the duty to negotiate in good faith. Time Warner contends that we should find that a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. Time Warner, however, did
not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding quid pro quo concessions in another proceeding. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive. For example, an incumbent LEC that offers video programming may be negotiating for the right to use video programming owned by a cable company while the cable company is negotiating terms for interconnecting with the incumbent LEC. Addressing some or all of the issues in the two negotiations collectively could expand the options for reaching agreement, and would equalize the parties’ bargaining power, because each has something that the other party desires.

119. We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith. The Commission will not condone any actions that are deliberately intended to delay competitive entry, in contravention of the statute’s goals. We agree with SCBA that small entities seeking to enter the market may be particularly disadvantaged by delay. However, whether a party has failed to negotiate in good faith by employing unreasonable delaying tactics must be determined on a specific, case-by-case basis. For example, a party may not refuse to negotiate with a requesting telecommunications carrier, and a party may not condition negotiation on a carrier first obtaining state certification. A determination based upon the intent of a party, however, is not susceptible to a standardized rule. If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith. The Commission has reached a consistent conclusion in other instances. See, e.g., Application of Gross Telecting, Inc., 57 FR 18857 (May 1, 1992); Public Notice, FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations, 57 FR 18857 (May 1, 1992). In particular, we believe that designating a representative authorized to make binding representations on behalf of a party will assist small entities and small incumbent LECs by centralizing communications and thereby facilitating the negotiation process. On the other hand, it is unreasonable to expect an agent to have authority to bind the principal on every issue—i.e., a person may reasonably be an agent of limited authority.

120. We agree with incumbent LECs and new entrants that contend that the parties should be required to provide information necessary to reach agreement. See National Labor Relations Board v. Truitt Mfg Co., 351 U.S. 149, 153 (1956) (the trier of fact can reasonably conclude that a party lacks good faith if it raises assertions about inability to pay without making the slightest effort to substantiate that claim); see also Microwave Facilities Operating in 1850-1900 MHz (2GHz) Band, 61 FR 29679, 29689 (June 12, 1996). Parties should provide information that will speed the provisioning process, and incumbent LECs must prove to the state commission, or in some instances the Commission or a court, that delay is not a motive in their conduct. Review of such requests, however, must be made on a case-by-case basis to determine whether the information requested is reasonable and necessary to resolving the issues at stake. It would be reasonable, for example, for a requesting carrier to seek and obtain cost data relevant to the negotiation, or information about the incumbent’s network that is necessary to make a determination about which network elements to request to serve a particular customer. It would not appear to be reasonable, however, for a carrier to demand proprietary information about the incumbent’s network that is not necessary for such interconnection. This is consistent with previous FCC determinations. See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 FCC Rcd 468 (1989) (good faith negotiations necessitate that, at a minimum, one party must approach the other with a specific request). We conclude that an incumbent LEC may not deny a requesting carrier’s reasonable request for cost data during the negotiation process, because we conclude that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable. We find that this is consistent with Congress’ intention for parties to use the voluntary negotiation process, if possible, to reach agreements. On the other hand, the refusal of a new entrant to provide data about its own costs does not appear on its face to be unreasonable, because the negotiations are not about unbundling or leasing the new entrants’ networks.

121. We also find that incumbent LECs may not require requesting carriers to satisfy a “bona fide request” process as part of their duty to negotiate in good faith. Some of the information that incumbent LECs propose to include in a bona fide request requirement may be legitimately demanded from the requesting carrier; some of the proposed requirements, on the other hand, exceed the scope of what is necessary for the parties to reach agreement, and imposing such requirements may discourage new entry. For example, parties advocate that a “bona fide request” requirement should require requesting carriers to commit to purchase services or facilities for a specified period of time. We believe that forcing carriers to make such a commitment before critical terms, such as price, have been resolved is likely to impede new entry. Moreover, we note that section 251(c) does not impose any bona fide request requirement. In contrast, section 251(f)(1) provides that a rural telephone company is exempt from the requirements of 251(c) until, among other things, it receives a “bona fide request” for interconnection, services, or network elements. This suggests that, if Congress had intended to impose a “bona fide request” requirement on requesting carriers as part of their duty to negotiate in good faith, Congress would have made that requirement explicit.

D. Applicability of Section 252 to Preexisting Agreements

1. Background

122. Section 252(a)(1) provides that, “[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. * * * The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.”
123. In the NPRM, we sought comment on whether sections 252(a)(1) and 252(e) require parties that have negotiated agreements for interconnection, services or network elements prior to the passage of the 1996 Act to submit such agreements to state commissions for approval. We also asked whether one party to such an existing agreement could compel renegotiation and arbitration in accordance with the procedures set forth in section 252.

2. Discussion

124. We conclude that the 1996 Act requires all interconnection agreements, “including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996,” to be submitted to the state commission for approval pursuant to section 252(e). The 1996 Act does not exempt certain categories of agreements from this requirement. When Congress sought to exclude preexisting contracts from provisions of the new law, it did so expressly. For example, section 276(b)(3) provides that “nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intralATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.” Nothing in the legislative history leads us to a contrary conclusion. Congress intended, in enacting sections 251 and 252, to create opportunities for local telephone competition. We believe that this pro-competitive goal is best effected by subjecting all agreements to state commission review.

125. The first sentence in section 252(a)(1) refers to requests for interconnection “pursuant to section 251.” The final sentence in section 252(a)(1) requires submission to the state commission of all negotiated agreements, including those negotiated before the enactment of the 1996 Act. Some parties have asserted that there is a tension between those two sentences. We conclude that the final sentence of section 252(a)(1), which requires that any interconnection agreement must be submitted to the state commission, can and should be read to be independent of the prior sentences in section 252(a)(1). The interpretation suggested by some commenters that preexisting contracts need only be filed if they are amended subsequent to the 1996 Act, or incorporated by reference into agreements negotiated pursuant to the 1996 Act, would force us to impose conditions that were not intended by Congress.

126. As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress’ stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review all agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC’s ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an interconnection agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i). In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is “technically feasible” for interconnection.

127. Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete. In addition, if we exempt agreements between neighboring non-competing LECs, those parties might have a disincentive to compete with each other in the future, in order to preserve the terms of their preexisting agreements. Such a result runs counter to the goal of the 1996 Act to encourage local service competition. Moreover, preserving such “non-competing” agreements could effectively insulate those parties from competition by new entrants. For example, if a new entrant seeking to provide competitive local service in a rural community is unable to obtain from a neighboring BOC interconnection or transport and termination on terms that are as favorable as those the BOC offers to the incumbent LEC in the rural area, the new entrant cannot effectively compete. This analysis does not address the separate question of whether an incumbent LEC in a rural area must offer interconnection, resale services, or unbundled network elements. As discussed infra, Section XII, Congress provided rural carriers with an exemption from section 251(c) requirements until the state commission removes such exemption. 47 U.S.C. § 251(f)(1). This is because the new entrant will have to charge its subscribers higher rates than the incumbent LEC charges to place calls to subscribers of the neighboring BOC.

128. We find that section 259 does not compel us to reach a different conclusion regarding the application of section 252 to agreements between neighboring LECs. Section 259 requires the Commission to prescribe, within one year after the date of enactment of the 1996 Act, regulations that require incumbent LECs “to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier to provide telecommunications services, or to provide access to information services.” 47 U.S.C. § 259(a). A “qualifying carrier” is a telecommunications carrier that “lacks economies of scale or scope,” and that offers telephone exchange service, exchange access, and any other service included in universal service to all consumers in the service area without preference. 47 U.S.C. § 259(d). Section 259 is limited to agreements for infrastructure sharing between incumbent LECs and telecommunications carriers that lack “economies of scale or scope,” as determined in accordance with regulations prescribed by the Commission. We conclude that the purpose and scope of section 259 differ significantly from the purpose and scope of section 251. The Commission plans to initiate a proceeding to establish regulations pursuant to section 259. Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act. Moreover, section 259(b)(7) requires LECs to file with the Commission or the state “any tariffs, contracts or other arrangements showing the rates, terms, and conditions under which such making available public switched network infrastructure and functions under this...
IV. Interconnection

131. This section of the Report and Order, and the three sections that follow it, address the interconnection and unbundling obligations that the Act imposes on incumbent LECs. Beyond the resale of incumbent LECs, it is these obligations that pave the way for the introduction of facilities-based competition with incumbent LECs. The interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers’ costs of, among other things, transport and termination of traffic. The unbundling obligation of section 251(c)(3) further permits new entrants, where economically efficient, to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete. Finally, both the interconnection and unbundling sections of the Act, in combination with the collocation obligation imposed on incumbents by section 251(c)(6), allow competing carriers to choose technically feasible methods of achieving interconnection or access to unbundled elements.

132. Section 251(c)(2) imposes upon incumbent LECs “the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network * * * for the transmission and routing of telephone exchange service and exchange access.”

Such interconnection must be: (1) provided by the incumbent LEC at “any technically feasible point within [its] network;” (2) “at least equal in quality to that provided by the local exchange carrier to itself or * * * to any other party to which the carrier provides interconnection;” and (3) provided on rates, terms, and conditions that are “just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section.”

A. Relationship Between Interconnection and Transport and Termination

1. Background

133. In the NPRM, we sought comment on the relationship between the obligation of incumbent LECs to provide “interconnection” under section 251(c)(2) and the obligation of all LECs to establish reasonable compensation arrangements for the “transport and termination” of
telecommunications pursuant to section 251(b)(5). We stated that the term "interconnection" might refer only to the physical linking of two networks or to both the linking of facilities and the transport and termination of traffic. We noted in the NPRM that section 252(d) sets forth different pricing standards for interconnection and transport and termination.

2. Discussion

134. We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Including the transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under section 251(b)(5). In addition, in setting the pricing standard for section 251(c)(2) interconnection, section 252(d)(1) states it applies when state commissions make determinations "of the just and reasonable rate for interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251." Because section 252(d)(1) states that it only applies to the interconnection of "facilities and equipment," if we were to interpret section 251(c)(2) to refer to transport and termination of traffic as well as the physical linking of equipment and facilities, it would still be necessary to find a pricing standard for the transport and termination of traffic apart from section 252(d)(1).

2. Discussion

136. As discussed more fully above, we conclude that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market. Uniform rules will permit all carriers, including small entities and small incumbent LECs, to plan regional or national networks using the same interconnection points in similar networks nationwide. Uniform rules will also guarantee consistent, minimum nondiscrimination safeguards and "equal in quality" standards in every state. Such rules will also avoid relitigating, in multiple states, the issue of whether interconnection at a particular point is technically feasible. 137. We believe, however, that inflexible or overly detailed national rules implementing section 251(c)(2) may inhibit the ability of the states or the parties to reach arrangements that reflect technological and market advances and regional differences. We also believe that, on several issues, the record is not adequate at this time to justify the establishment of national rules. Therefore, as required by section 251(d)(3) and as discussed in section II.C. above, our rules will permit states to go beyond the national rules discussed below, and impose additional procompetitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the Commission's regulations. We believe that we can benefit from state experience in our ongoing review of these issues.

C. Interconnection for the Transmission and Routing of Telephone Exchange Service and Exchange Access

1. Background

138. Section 251(c)(2) imposes a duty upon incumbent LECs to provide "interconnection with the [LEC's] network * * * for the transmission and routing of telephone exchange service and exchange access." In the NPRM, we sought comment on whether a carrier could request interconnection pursuant to subsection (c)(2) for purposes of transmitting and routing telephone exchange service, exchange access, or both, or whether this provision requires that such a request be solely for purposes of providing both telephone exchange service and exchange access.

2. Discussion

139. We conclude that the phrase "telephone exchange service and exchange access" imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange service or exchange access traffic or both. We believe that this interpretation is consistent with both the language of the statute and Congress's intent to foster entry by competitive providers into the local exchange market. As the U.S. Court of Appeals for the Fifth Circuit stated in Peacock v. Lubbock Compress Company, "the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." The court held that "[i]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'" Peacock v. Lubbock Compress Company, 252 F.2d 892, 893 (5th Cir. 1958) (citing United States v. Fisk, 70 U.S. 445, 448).

Moreover, the term "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service or exchange access." Thus, we believe that Congress intended to facilitate entry by carriers offering either service. In imposing an interconnection requirement under section 251(c)(2) to facilitate such entry, however, we believe that Congress did not want to deter entry by entities that seek to offer either service, or both, and, as a result, section 251(c)(2) requires incumbent LECs to interconnect with carriers providing "telephone exchange service and exchange access." Congress made clear that incumbent LECs must provide interconnection to carriers that seek to offer telephone exchange service and to carriers that seek to offer exchange access. This interpretation is consistent with section 251(c)(2), which imposes an obligation on incumbent LECs, but not requesting carriers. Thus, for example, an analogous requirement might be that incumbent LECs must provide interconnection for the transmission and routing of "electrical and optical signals." Such a hypothetical requirement could not rationally be read to obligate requiring carriers to provide both electrical and optical signals.

140. We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the incumbent LEC's network under subsection (c)(2) would unduly restrict potential competitors. For example, CAPs often enter the
telecommunications market as exchange access providers prior to offering telephone exchange services. Further, applying separate regulatory regimes (i.e., section 251 related-rules for providers of telephone exchange and exchange access services and section 201 related-rules for providers of only exchange access services) with divergent requirements to parties using essentially the same equipment to transmit and route traffic, is undesirable in light of the new procompetitive paradigm created by section 251. We see no convincing justification for treating providers of exchange access services that offer telephone exchange services differently from access providers who do not offer telephone exchange services. We therefore conclude that parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).

D. Interexchange Service is Not Telephone Exchange Service or Exchange Access

1. Background

141. Sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs to provide interconnection and nondiscriminatory access to unbundled network elements to “any requesting telecommunications carrier.” In the NPRM, we tentatively concluded that carriers providing interexchange services are “telecommunications carriers” and thus may seek interconnection and unbundled elements under subsections (c)(2) and (c)(3). We also tentatively concluded, however, that with respect to section 251(c)(2), the statute imposes limits on the purposes for which any telecommunications carrier, including IXC, may request interconnection pursuant to that section. Section 251(c)(2) imposes an obligation upon incumbent LECs to provide requesting carriers with interconnection if the purpose of the interconnection is for the “transmission and routing of telephone exchange service and exchange access.” We tentatively concluded in the NPRM that interchange service does not appear to constitute either “telephone exchange service” or “exchange access.”

“Exchange access” is defined in section 3(16) as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” We stated that an IXC that requests interconnection to originate or terminate an interstate call is not “offering” access services, but rather is “receiving” access services.

2. Discussion

142. We conclude that IXC are telecommunications carriers under the 1996 Act, because they provide telecommunications services (i.e., offering telecommunications services for a fee directly to the public”) by originating or terminating interexchange traffic. IXC are permitted under the statute to obtain interconnection pursuant to section 251(c)(2) for the “transmission and routing of telephone exchange service and exchange access.” Moreover, traditional IXC are a significant potential new local competitor and we conclude that denying them the right to obtain section 251(c)(2) interconnection lacks any legal or policy justification. Thus, all carriers (including those traditionally classified as IXC) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (i.e., non-interexchange calls).

143. We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC’s network is not entitled to receive interconnection pursuant to section 251(c)(2). Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers “for the transmission and routing of telephone exchange service and exchange access.”

A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only—fall within the scope of the phrase “exchange access.” Such a would-be interconnector is not “offering” access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel’s position that IXC are offering exchange access when they offer and provide exchange access as a part of long distance service. We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if it does not offer exchange access services to others. As we stated above, however, providers of competitive access services are eligible to receive interconnection pursuant to section 251(c)(2). Thus, traditional IXC that offer exchange services in competition with an incumbent LEC (i.e., IXC that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2). For example, when an IXC seeks to connect at a local switch, bypassing the incumbent LEC’s transport network, that IXC may offer access to the local switch in competition with the incumbent. In such a situation, the interconnection point may be considered a section 251(c)(2) interconnection point.

E. Definition of “Technically Feasible”

1. Background

144. In addition to specifying the purposes for which carriers may request interconnection, section 251(c)(2) obligates incumbent LECs to provide interconnection within their networks at any “technically feasible point.” Similarly, section 251(c)(3) obligates incumbent LECs to provide access to unbundled elements at any “technically feasible point.” Thus, our interpretation of the term “technically feasible” applies to both sections.

145. In the NPRM, we sought comment on a “dynamic” definition of “technically feasible” that would provide flexibility for negotiating parties and the states in determining interconnection and unbundling points as network technology evolves. We requested comment on the extent to which network reliability concerns should be included in a technical feasibility analysis, and tentatively concluded that, if such concerns were involved, the incumbent LEC had the burden to support such a claim with detailed information. We also sought comment on the role of other considerations, such as economic burden, in determining technical feasibility under sections 251(c)(2) and 251(c)(3).

146. We also tentatively concluded that interconnection or access at a particular point in one LEC network evidences the technical feasibility of providing the same or similar interconnection or access in another, similarly structured LEC network. Finally, we tentatively concluded that incumbent LECs have the burden of...
proving the technical infeasibility of providing interconnection or access at a particular point.

2. Discussion

147. We conclude that the term “technically feasible” refers solely to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible.

148. We find that the 1996 Act bars consideration of costs in determining “technically feasible” points of interconnection or access. In the 1996 Act, Congress distinguished “technical” considerations from economic concerns. Section 251(f), for example, exempts certain rural LECs from “unduly economically burdensome” obligations imposed by section 251(c) even where satisfaction of such obligations is “technically feasible.” Similarly, section 254(h)(2)(A) treats “technically feasible” and “economically reasonable” as separate requirements.

Finally, we note that the House committee that considered H.R. 1555 (which was combined with Senate Bill S.652 to form the 1996 Act) dropped the term “economically reasonable” from its unbundling provision. The House committee explicitly addressed this substantive change, reporting that “this requirement could result in certain unbundled * * * elements * * * not being made available.” H. Rep. 104-204, 71 (1995). Thus, the deliberate and explained substantive omission of explicit economic requirements in sections 251(c)(2) and 251(c)(3) cannot be undone through an interpretation that such considerations are implicit in the term “technically feasible.” Of course, a network carrier that wishes a “technically feasible” but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.

149. USTA and SBC cite the Commission’s 900 Service order (Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 56 FR 56160 (November 1, 1991)) as support for the contention that costs must be considered in a technical feasibility analysis. In that order, the Commission concluded that “[i]n defining ‘technically feasible,’ we balance both technical and economic considerations with a view toward providing [900] blocking capability to consumers without imposing undue economic burdens on LECs.” Our 900 Service order, however, has little bearing on our interpretation of the term “technically feasible” in the 1996 Act. As stated above, the 1996 Act distinguishes technical considerations from the “undue economic burdens” considered in the 900 Service order. Indeed, Congress used virtually the same language—“undue economically burdensome”—in drawing the distinction. If, as SBC contends, we are to presume that Congress was aware of the Commission’s analysis of the technical feasibility of 900 call blocking, the 1996 Act appears squarely to reject that view of technical feasibility. Moreover, unlike the costs of providing 900 call blocking, which we imposed largely on LECs in the 900 Service order, as noted above, to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.

150. In addition to economic considerations, section 251(c)(6) distinguishes considerations of “space limitations” from those of “technical reasons,” and thus, in general, we believe existing space or site restrictions should not be included within a technical feasibility analysis. Of course, under section 251(c)(6) “space restrictions” are considered along with “technical” considerations in determining whether an incumbent LEC must provide for physical collocation. Where physical collocation is not practical because of “space limitations,” however, incumbent LECs must provide for virtual collocation. Section 251 is silent as to whether an incumbent LEC’s duty to provide for virtual collocation or other methods of interconnection or access to unbundled elements is dependent on space constraints. Nonetheless, as a practical matter, that space limitations at a particular network site, without any possibility of expansion, may render interconnection or access at that point infeasible, technically or otherwise. Where such expansion is possible, however, we conclude that, in light of the distinction drawn in section 251(c)(6), site restrictions do not represent a “technical” obstacle. Again, however, the requesting party would bear the cost of any necessary expansion. Nor do we believe the term “technical,” when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3), includes consideration of accounting or billing restrictions.

151. Several parties also attempt to draw a distinction between what is “feasible” under the terms of the statute, and what is “possible.” The words “feasible” and “possible,” however, are used synonymously. Feasible is defined as “capable of being accomplished or brought about; possible.” The statute itself provides a more meaningful distinction. Unlike the “technically feasible” terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term “practical for technical reasons” in determining the scope of an incumbent LEC’s obligation to provide for physical collocation.

“Practical” is defined as “manifested in practice or action * * * not theoretical or ideal” or “adapted or designed for actual use; useful,” and connotes similarity to ordinary usage. Thus, it is reasonable to interpret Congress’ use of the term “feasible” in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely “practical” or similar to what is ordinarily done. That is, use of the term “feasible” implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant’s network architecture by requiring the incumbent to provide interconnection “for the facilities and equipment” of the new entrant.
Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

152. We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. The reports of the Commission’s Network Reliability Council discuss network reliability considerations, and establish templates that list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification.

153. We further conclude that successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards. We also conclude that previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality. Although most parties agree with this conclusion, some LECs contend that such comparisons are all but impossible because of alleged variability in network technologies, even where the ultimate services offered by separate networks are the same. We believe that, if the facilities are substantially similar, the LECs’ contention is adequately addressed.

154. Finally, because sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs, we conclude that incumbent LECs must prove to the appropriate state commission that interconnection or access at a point is not technically feasible. Incumbent LECs possess the information necessary to assess the technical feasibility of interconnecting to particular LEC facilities. Further, incumbent LECs have a duty to make available to requesting carriers general information indicating the location and technical characteristics of incumbent LEC network facilities. Without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects.

155. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, the Rural Telephone Coalition argues that the Commission should set interconnection points at a flexible manner to recognize the differences between carriers and regions. We do not adopt the Rural Telephone Coalition’s position because we believe that, in general, the Act does not permit incumbent LECs to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible. We believe that this interpretation will advance the procompetitive goals of the statute. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

F. Technically Feasible Points of Interconnection

1. Background

156. In the NPRM, we requested comment on which points within an incumbent LEC’s network constitute “technically feasible” points for purposes of section 251(c)(2). Having defined the phrase “technically feasible” above, we now determine a minimum set of technically feasible points of interconnection.

2. Discussion

157. We conclude that we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers. Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC’s network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC’s network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.

158. We conclude that, at a minimum, incumbent LECs must provide interconnection at the line-side of a local switch (at, for example, the main distribution frame), the trunk-side of a local switch, the trunk interconnection points for a tandem switch, and central office cross-connect points in general. This requirement includes interconnection at those out-of-band signaling transfer points necessary to exchange traffic and access call related databases. All of these points of interconnection are used today by competing carriers, noncompeting carriers, or LECs themselves for the exchange of traffic, and thus we conclude that interconnection at such points is technically feasible.

159. A varied group of commenters, including Bell Atlantic and AT&T, agree that interconnection at the line-side of the switch is technically feasible. Interconnection at this point is currently provided to some commercial mobile service (CMRS) carriers and may be necessary for other competitors that have their own distribution plant, but seek to interconnect to the incumbent’s switch. We also agree with numerous commenters that claim that interconnection at the trunk-side of a switch is technically feasible and should be available upon request. Interconnection at this point is currently used by competing carriers to exchange traffic with incumbent LECs. Interconnection to tandem switching facilities is also currently used by IXCs and competing access providers, and is thus technically feasible. Finally, central office cross-connect points, which are designed to facilitate interconnection, are natural points of technically feasible interconnection to, for example, interoffice transmission facilities. There may be rare circumstances where there are true technical barriers to interconnection at the line- or trunk-side of the switch or at central office cross-connect points, however, the parties have not presented us with any such circumstances. Thus,
incumbent LECs must prove to the state commissions that such points are not technically feasible interconnection points.

160. We also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (i.e., points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and thus we incorporate those points by reference here. Finally, as noted above, we have identified a minimum list of technically feasible interconnection points: (1) The line-side of a local switch; (2) the trunk-side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. In addition, we anticipate and encourage parties and the states, through negotiation and arbitration, to identify additional points of technologically feasible interconnection. We believe that the experience of the parties and the states will benefit our ongoing review of interconnection.

G. Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection

1. Background

161. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In the NPRM, we sought comment on whether we should adopt national requirements governing the terms and conditions of providing interconnection. We also sought comment on how we should determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt national guidelines governing installation, service, maintenance, and repair of the incumbent LEC's portion of interconnection facilities.

2. Discussion

162. We conclude that minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection will be in the public interest and will provide guidance to the parties and the states in the arbitration process and thereafter. We believe that national standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations. Negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because new entrants are dependent solely on the incumbent for interconnection.

163. Section 202(a) of the Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, * * * facilities, or services for or in connection with like communication service * * * by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person." By comparison, section 251(c)(2) creates a duty for incumbent LECs "to provide * * * any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.

164. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the procompetitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provides itself, the incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D).

Also, incumbent LECs may not discriminate against parties based upon the identity of the carrier (i.e., whether the carrier is a CMRS provider, a CAP, or a competitive LEC). As long as a carrier meets the statutory requirements, as discussed in this section, it has a right to obtain interconnection with the incumbent LEC pursuant to section 251(c)(2).

165. We identify below specific terms and conditions for interconnection in discussing physical or virtual collocation (i.e., two methods of interconnection). We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate oneway trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.

166. Finally, as discussed below, we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (i.e., section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs). We do note, however, that 251(c)(1) imposes upon a requesting telecommunications carrier a duty to negotiate the terms and conditions of interconnection agreements in good faith. We also conclude that MCI's POI proposal, permitting interconnecting carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between parties. We believe that the record on this issue is not sufficiently persuasive to justify Commission action at this time. As market conditions evolve, we will continue to review and revise our rules as necessary.

H. Interconnection that is Equal in Quality

1. Background

167. Section 251(c)(2)(C) requires that the interconnection provided by an
incumbent LEC be “at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.” In the NPRM, we sought comment on how to determine whether interconnection is “equal in quality.”

2. Discussion

168. We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (e.g., the imposition of disparate conditions between carriers on the pricing and ordering of services).

169. We also note that section 251(c)(2) requires interconnection that is “at least” equal in quality to that enjoyed by the incumbent LEC itself. This is a minimum requirement. Moreover, to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We also conclude that, as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection, competition will be promoted.

V. Access to Unbundled Network Elements

A. Commission Authority to Identify Unbundled Network Elements

1. Background

170. Section 251(c)(3) imposes a duty on incumbent LECs to “provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.” This section also requires incumbent LECs to provide these elements “in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.”

171. Section 251(d)(1) provides that “the Commission shall complete all actions necessary to establish regulations to implement the requirements of” section 251 by August 8, 1996. Section 251(d)(2) further provides that, “[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether (A) Access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”

172. In the NPRM, we sought comment on our tentative conclusion that the 1996 Act requires the Commission to identify network elements that incumbent LECs are required to make available to requesting carriers on an unbundled basis under section 251(c)(3).

2. Discussion

173. We affirm our tentative conclusion in the NPRM that the 1996 Act requires the Commission to identify network elements that incumbent LECs must offer requesting carriers on an unbundled basis under section 251(c)(3). Section 251(d)(1) directs the Commission to establish rules implementing the requirements of section 251(c)(3). Further, section 251(d)(2) contemplates that, pursuant to this direction, the Commission will identify unbundled network elements. We conclude that neither the language in section 251(d), nor any other part of the 1996 Act, is reasonably susceptible to the interpretation advanced by BellSouth that our obligation to identify unbundled network elements arises only when we act under section 252(e)(5).

B. National Requirements for Unbundled Network Elements

1. Background

174. In the NPRM, we noted Congress’ view that, when new entrants begin providing services in local telephone markets, it is unlikely they will own network facilities that completely duplicate those of incumbent LECs because of the significant investment and time required to build such facilities. The statutory requirement imposed on incumbent LECs to provide access to unbundled network elements will permit new entrants to offer competing local services by purchasing from incumbents, at cost-based prices, access to elements which they do not already possess, unbundled from those elements that they do not need.

175. It is possible that there will be sufficient demand in some local telephone markets to support the construction of competing local exchange facilities that duplicate most or even all of the elements of an incumbent LEC’s network. In these markets new entrants will be able to use unbundled elements from the incumbent LEC to provide services until such time as they complete the construction of their own networks, and thus, no longer need to rely on the facilities of an incumbent to provide local exchange and exchange access services. It is also possible, however, that other local markets, now and even into the future, may not efficiently support duplication of all, or even some, of an incumbent LEC’s facilities. Access to unbundled elements in these markets will promote efficient competition for local exchange services because, under the scheme set out in the 1996 Act, such access will allow new entrants to enter local markets by obtaining use of the incumbent LECs’ facilities at prices that reflect the incumbents’ economies of scale and scope.

176. In the NPRM, we tentatively concluded that the Commission should identify a minimum number of elements that incumbent LECs must make available on a competitive basis. We further tentatively concluded that section 252(e)(3) preserves a state’s authority, during arbitration, to impose additional unbundling requirements beyond those we specify, as long as such requirements are consistent with the 1996 Act and our
regulations. Section 252(e) discusses a state commission's obligations regarding the approval or rejection of agreements between incumbent LECs and requesting telecommunications carriers for interconnection, services or network elements. Subparagraph (3) of this section specifically provides that a state commission is not prohibited "from establishing or enforcing other requirements of State law in its review of an agreement," as long as such requirements do not violate the terms of the statute. 47 U.S.C. § 252(e)(3). We further note that under section 252(f)(2) states may impose additional unbundling requirements during review of BOC statements of generally available terms and conditions. Section 252(f)(2) states that "(e)xcept as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement * * * " 47 U.S.C. § 252(f)(2). Finally, we tentatively concluded that we have authority to identify additional or different unbundling requirements in the future, as we learn about changes in technology, the innovation of new services, and the necessities of competition.

2. Discussion

177. We adopt our tentative conclusion and identify a minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request. We believe the procompetitive goals of section 251(c)(3) will best be achieved through the adoption of such a list. As discussed above, we believe that negotiations and arbitrations will best promote efficient, rapid, and widespread new entry if we establish certain minimum national unbundling requirements. As the Department of Justice argues, there is "no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by potential competitors, absent clear legal requirements to do so." Ad Hoc Telecommunications Users Committee notes that "[h]istorically, the [incumbent LECs] have had strong incentives to resist, and have actively resisted, efforts to open their networks to users, competitors, or new technology-driven applications of network technology."

178. National requirements for unbundled elements will allow new entrants, including small entities, seeking markets on a national or regional scale to take advantage of economies of scale in network design. If fifty states were to establish different unbundling requirements, new entrants, including small entities, could be denied the benefits of scale economies in obtaining access to unbundled elements. National requirements will also: reduce the number of issues states must consider in arbitrations, thereby facilitating the states' ability to conduct such proceedings; reduce the likelihood of litigation regarding the requirements of section 251(c)(3) and the costs associated with such litigation; and provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital. In addition, to the extent the Commission assumes a state's arbitration authority under section 252(e)(5), national requirements for unbundled elements will help the Commission to conclude such proceedings expeditiously.

179. We reject the alternative option of developing an exhaustive list of required unbundled elements, to which states could not add additional elements, on the grounds that such a list would not necessarily accommodate changes in technology, and it would not provide states the flexibility they need to deal with local conditions. We also reject the proposal advanced by several parties that we should adopt non-binding national guidelines for unbundled elements that states would not be required to enforce. The parties asserting that differences between incumbent LEC networks militate against the adoption of national standards provide few, if any, specific examples of what those differences are. In addition, they fail to articulate persuasively why those differences are significant enough to weigh against the adoption of national requirements. Accordingly, and as previously discussed, we conclude that any differences that may exist among states are not sufficiently great to overcome the procompetitive benefits that would result from establishing a national set of binding national rules. Moreover, we believe the authority granted the states in section 252(e)(3), as well as our existing rules which set forth a process by which incumbent LECs can request a waiver of the requirements we adopt here, will provide the necessary flexibility in our rules to permit states and parties to accommodate any truly unique state conditions that might exist. We further observed in the NPRM that under the voluntary negotiation paradigm set out in section 252, parties to such negotiations can agree to provide unbundled network elements that differ from those identified by the Commission. See NPRM at para. 78 (citing 47 U.S.C. § 252(a)). Accordingly, we adopt our tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations. This conclusion is consistent with the statement in section 252(e)(3) that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement."

181. We find the arguments presented by parties opposing national rules for unbundled elements unpersuasive especially in light of the 1996 Act's strong procompetitive goals. For example, in light of the incumbent LECs' disincentives to negotiate with potential competitors, we believe national rules will promote competition by making the bargaining strength of potential competitors, including small entities, more equal. We are not persuaded that national rules will discourage incumbent LECs from developing new technologies and services; to the contrary, based on our experience in other telecommunications markets, we believe that competition will stimulate innovation by incumbent LECs. We also believe that any failure of incumbent LECs to develop new technologies or services would have a less significant adverse effect on competition in local exchange markets than a failure to adopt national rules. We are also persuaded that new entrants will seek unnecessary elements merely to raise incumbents' costs because such new entrants must pay the costs associated with unbundling. In addition, the pricing standard of section 252(d)(1)(B), which allows incumbent LECs to receive not only their costs but also a reasonable profit on the provision of unbundled elements, should further alleviate concerns regarding sham requests.

182. We adopt our tentative conclusion that, in addition to identifying unbundled network elements that incumbent LECs must make available now, we have authority to identify additional, or perhaps different, unbundling requirements that would apply to incumbent LECs in the future. The rapid pace and ever changing nature of technological advancement in the telecommunications industry makes it essential that we retain the ability to revise our rules as circumstances change. Otherwise, our rules might impede technological change and frustrate the 1996 Act's overriding goal of bringing the benefits
of competition to consumers of local phone services. For the same reasons that we believe we should adopt national unbundling requirements, as discussed above, we reject the proposal that future unbundling requirements should be determined solely by the parties to voluntary negotiations.

183. Finally, we have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have considered the argument advanced by the Rural Telephone Coalition that national unbundling requirements would be unworkable because of technological, demographic and geographic variations between states. We do not adopt the Rural Telephone Coalition’s position, however, because we believe that the minimum list we adopt can be applied to a broad range of networks across geographic regions and any differences between incumbent LEC networks in different states are not sufficiently great to overcome the procompetitive benefits of a minimum list of required unbundled network elements. We have also considered the argument advanced by GVNW that unbundling requirements imposed on small incumbent LECs should differ from those imposed on large, urban incumbent LECs because of differences in networks and operational procedures. We reject GVNW’s proposal for two reasons. First, some small incumbent LECs may not experience any problems complying with our unbundling rules. Second, we note that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

184. Although we have concluded in this proceeding that we can best achieve the procompetitive aims of the 1996 Act by adopting minimum national unbundling requirements for arbitrated agreements, the 1996 Act envisions that the states will administer those requirements through approval of negotiated agreements and arbitrations. Through arbitrations and review of negotiated agreements the states will add to their significant expertise on issues relating to the provision of access to unbundled network elements. We encourage state commissions to take an active role in evaluating the success or difficulties in implementing any of our requirements. The Commission intends to draw on the expertise developed by the states when we review and revise our rules as necessary.

C. Network Elements

1. Background

185. Section 3(29) of the Communications Act defines the term “network element” to mean both “a facility or equipment used in the provision of a telecommunications service” and “features, functions, and capabilities that are provided by means of such facility or equipment.” Such features, functions, and capabilities include “subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.” The Joint Explanatory Statement explains that “[t]he term ‘network element’ was included to describe the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that a local exchange carrier must provide for certain purposes under other sections of the conference agreement.”

186. In the NPRM, we noted that we could identify “network elements” in two ways. First, we could identify a single “network element,” and then further subdivide it into additional “elements.” Alternatively, we could provide that, once we identify a particular “network element,” it cannot be further subdivided in the NPRM. We asked for comment on these two approaches.

187. We observed in the NPRM that the statutory definition of a “network element” draws a distinction between a “facility or equipment used in the provision of a telecommunications service,” and the “service” itself. We asked for comment on the meaning of this distinction in general, with respect to requirements for unbundling, and in connection with specific unbundled elements. We noted that the definition of a network element, i.e., a facility, function, or capability, is not dependent on the particular types of services that are provided by means of the element (e.g., interstate access, intrastate local exchange), and asked whether a carrier purchasing access to an element is obligated, pursuant to the definition, to provide all services typically carried or provided by that element.

2. Discussion

188. We adopt the concept of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities. Carriers requesting use of unbundled elements within the incumbent LEC’s network seek in effect to purchase the right to obtain exclusive access to an entire facility, or use of some feature, function or capability of that element. For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent’s facilities on a minute-by-minute basis. This concept of network elements, as discussed infra at section V.G., does not alter the incumbent LEC’s physical control or ability or duty to repair and maintain network elements.

189. We conclude that we should identify a particular facility or capability, for example, as a single network element, but allow ourselves and the states (where appropriate) the discretion to further identify, within that single facility or capability, additional required network elements. Thus, for example, in this proceeding, we identify the local loop as a single network element. We also ask the states to evaluate, on a case-by-case basis, whether to require access to subloop elements, which can be facilities or capabilities within the local loop. We agree with those commenters that argue that identifying a particular facility or capability as a single network element, but allowing such elements to be further subdivided into additional elements, will allow our rules (as well as the states) to accommodate changes in technology, and thus better serve the interests of new entrants and incumbent LECs, and the procompetitive purposes of the 1996 Act. We are not persuaded by PacTel’s argument that it is unnecessary for our rules to permit the identification of additional elements, beyond those specifically referenced in parts of the 1996 Act, because our rules must conform to the definition of a network element, and they must accommodate changes in technology. Nor are we persuaded by BellSouth that identification of network elements should be left solely to the parties. We reject this approach for the same reasons that led us to adopt national unbundling requirements. Finally, we agree with NYNEX and others that we should not identify elements in rigid terms, but rather by function.

190. We agree with MCI and MFS that the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch. We further agree with MCI that the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs
must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.

191. The only limitation on the statute imposes on the definition of a network element is that it must be "used in the provision of a telecommunications service." Incumbent LECs provide telecommunications services not only through network facilities that serve as the basis for a particular service, or that accomplish physical delivery, but also through information (such as billing information) that enables incumbents to offer services on a commercial basis to consumers. Our interpretation of the term "provision" finds support in the definition of the term "network element." That definition provides that the type of information that may constitute a feature or function includes information "used in the transmission, routing or other provision of a telecommunications service." Since "transmission," "routing," and "provisioning" refer to physical delivery, the phrase "or other provision of a telecommunications service" goes beyond mere physical delivery.

192. We conclude that the definition of the term "network element" broadly includes all "facilities or equipment used in the provision of a telecommunications service," and all features, functions, and capabilities that are provided by means of such facility or equipment, including switches, networks, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." This definition thus includes, but is not limited to, transport trunks, call-related databases, software used in such databases, and all other unbundled elements that we identify in this proceeding. The definition also includes information that incumbent LECs use to provide telecommunications functions commercially, such as information required for pre-ordering, ordering, provisioning, billing, and maintenance and repair services. (The term "provisioning" includes installation.) This interpretation of the definition of the term "network element" will serve to guide both the Commission and the states in evaluating further unbundling requirements beyond those we identify in this proceeding.

193. We disagree with those incumbent LECs which argue that the features we would directly to end users as retail services, such as vertical features, cannot be considered elements within incumbent LEC networks. If we were to conclude that any functionality sold directly to end users as a service, such as call forwarding or caller ID, cannot be defined as a network element, then incumbent LECs could provide local service to end users by selling them unbundled loops and switch elements, and thereby evade the unbundling requirement in section 251(c)(3). We are confident that Congress did not intend such a result.

194. Moreover, we agree with those commenters that argue that network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services. A single network element could be used to provide many different services. For example, a local loop can be used to provide inter- and intrastate exchange access services, as well as local exchange services. We conclude, consistent with the findings of the Ohio and Oregon Commissions, that the plain language of section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically offered over that element. Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.

D. Access to Network Elements

1. Background

195. In the NPRM, we observed that section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis." We interpreted these terms to mean that incumbent LECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element. We sought comment on this interpretation and any alternative interpretations.

2. Discussion

196. We conclude that we should adopt our proposed interpretation that the terms "access" to network elements "on an unbundled basis" mean that incumbent LECs must provide the functionality of a particular element to requesting carriers, separate from the functionality or other elements, for a separate fee. We further conclude that a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier. The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element. We clarify that title to unbundled network elements will not shift to requesting carriers. We reject PacTel's interpretation of the terms quoted above because it is inconsistent with our definition of the term network element (i.e., an element includes all features and functions embedded in it). Moreover, to the extent that PacTel's argument suggests that the 1996 Act does not require unbundled elements to be provisioned in a way that would make them useful, we find that its statutory interpretation is inconsistent with the statute's goal of providing new entrants with realistic means of competing against incumbents.

197. We further conclude that "access" to an unbundled element refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. Just as section 251(c)(2) requires "interconnection * * * at any technically feasible point," section 251(c)(3) requires "access * * * at any technically feasible point." We conclude, based on the terms of sections 251(c)(2), 251(c)(3), and 251(c)(6), that an incumbent LEC's duty to provide "access" constitutes a duty to provide a connection to a network element independent of any duty imposed by subsection (c)(2). Thus, such "access" must be provided under the rates, terms, and conditions that apply to unbundled elements.

198. Specifically, section 251(c)(6) provides that incumbent LECs must provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements." The use of the term "or" in this phrase means that interconnection is different from "access" to unbundled elements. The text of sections 251(c)(2) and (c)(3) leads to the textual conclusion that section 251(c)(2) requires that interconnection be provided for "the transmission and
routing of telephone exchange service and exchange access.’’ Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide ‘‘a telecommunications service.’’ The term ‘‘telecommunications service’’ by definition includes a broader range of services than the terms ‘‘telephone exchange service and exchange access.’’ Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that ‘‘access’’ to unbundled elements under subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of section 251(c)(3) and standard canons of statutory construction.

E. Standards Necessary To Identify Unbundled Network Elements

1. Background

199. In the NPRM, we raised a number of issues concerning the meaning of technical feasibility in connection with unbundled elements. We also sought comment on the extent to which the Commission should consider the standards set forth in section 251(d)(2) in identifying required unbundled elements, and on how we ought to interpret these standards. Subsection (d)(2) provides that ‘‘(i) in determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum’’ the following two standards, ‘‘whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.’’ We further asked about the relationship between the latter standard and the requirement in section 251(c)(3) that carriers be able to use unbundled elements to provide a telecommunications service.

2. Discussion

200. Sections 251(c)(3) and 251(d)(2) set forth standards the Commission must consider in identifying unbundled network elements that incumbent LECs must make available in connection with arbitrations before state commissions and BOC statements of generally available terms and conditions. These standards guide the unbundling requirements we issue today as well as any different or additional unbundling requirements we may issue in the future. Similarly, the States must follow our interpretation of these standards to the extent they impose additional unbundling requirements during arbitrations or subsequent rulemaking proceedings.

201. Section 251(c)(3) requires incumbent LECs to provide requesting carriers with ‘‘nondiscriminatory access to network elements on an unbundled basis at any technically feasible point.’’ Thus, we find that this clause imposes on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access on an unbundled basis. Because section 251(d)(1) requires us to ‘‘establish regulations to implement the requirements of’’ section 251(c)(3), we conclude that we have authority to establish regulations that are consistent with the plain language of section 251(c)(3) imposes on incumbent LECs.

202. Section 251(d)(2), however, sets forth standards that do not depend on technical feasibility. More specifically, section 251(d)(2) provides that, in identifying unbundled elements, the Commission shall ‘‘consider, at a minimum,’’ whether access to proprietary elements is necessary (the ‘‘proprietary standard’’), and whether requesting carriers’ ability to provide services would be impaired if the desired elements were not provided by an incumbent LEC (the ‘‘impairment standard’’). Thus, section 251(d)(2) gives us the authority to determine require incumbent LECs to provide access to unbundled network elements at technically feasible points if, for example, we were to conclude that access to a particular proprietary element is not necessary. To give effect to both sections 251(c)(3) and 251(d)(2), we conclude that the proprietary and impairment standards in section 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis. The authority we derive from section 251(d)(2) is limited, however, by our interpretation of these standards, and this section, as set forth below.

203. We agree with BellSouth, SBC, and others that the plain import of the ‘‘at minimum’’ language in section 251(d)(2) requires us, in identifying unbundled network elements, to consider the standards enumerated there, as well as other standards we believe to be consistent with the objectives of the 1996 Act. We conclude that the word ‘‘consider’’ means we must weigh the standards enumerated in section 251(d)(2) in evaluating whether to require the unbundling of a particular element.

204. We further conclude that, in evaluating whether to impose additional unbundling requirements during the arbitration process, States must apply our definition of technical feasibility, discussed above in section IV.D. A determination of technical feasibility would then create a presumption in favor of requiring an incumbent LEC to provide the element. If providing access to an unbundled element is technically feasible, a State must then consider the standards set forth in section 251(d)(2), as we interpret them below. Similarly, the Commission will apply this analysis where we must arbitrate specific unbundling issues, under section 252(e)(5), and in future rulemaking proceedings that may consider additional or possibly different unbundling requirements.

205. Section 251(d)(2)(A) requires the Commission and the States to consider whether access to proprietary elements is ‘‘necessary.’’ ‘‘Necessary’’ means, in this context, that an element is a prerequisite for competition. We believe that, in some instances, it will be necessary for new entrants to obtain access to proprietary elements (e.g., elements with proprietary protocols or elements containing proprietary information), because without such elements, their ability to compete would be significantly impaired or thwarted. As noted supra, a number of commenters argue that section 251(d)(2)(A) requires us to protect proprietary information, such as CPNI information, contained in network elements. We intend to treat issues regarding CPNI in our rulemaking proceeding on CPNI information. Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96–115, Notice of Proposed Rulemaking, FCC 96–221, 61 FR 26483 (May 28, 1996). Thus, we adopt a general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services. We are not persuaded, however, that this is a sufficient reason to prohibit generally the unbundling of proprietary elements, because the competition from any such prohibition would far exceed any costs
consumers resulting from reduced innovation by the incumbent LEC. In this proceeding, for example, we are requiring incumbent LECs to provide the local switching element which includes vertical features that some carriers contend are proprietary. See infra, Section V.J. Moreover, the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs.

206. We further conclude that, to the extent new entrants seek additional elements beyond those we identify herein, section 251(d)(2)(A) allows the Commission and the states to require the unbundling of such elements unless the incumbent can prove to a state commission that: (1) The element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and (2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent’s network. We believe this interpretation of section 251(d)(2)(A) will best advance the procompetitive purposes of the 1996 Act. It allows new entrants to obtain proprietary elements from incumbent LECs where they are necessary to offer a telecommunications service, and, at the same time, it gives incumbents the opportunity to argue, before the states or the Commission, against unbundling proprietary elements where a new entrant could offer the same service using other unbundled elements in the incumbent’s network. We decline to adopt the interpretation of section 251(d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent. Requiring new entrants to duplicate unnecessarily even a part of the incumbent’s network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.

207. We further conclude that, to the extent new entrants do not need access to all the proprietary information contained within an element in order to provide a telecommunications service, the Commission and the states may take action to protect the proprietary information. For example, to provide a telecommunications service, a new entrant might not need access to information about a particular customer that is in an incumbent LEC database. The database to which the new entrant requires access, however, may contain proprietary information about all of the incumbent LECs’ customers. In this circumstance, the new entrant should not have access to proprietary information about the incumbent LEC’s other customers where it is not necessary to provide service to the new entrant’s particular customer. Accordingly, we believe the Commission and the states have the authority to protect the confidentiality of proprietary information in an unbundled network element, such as a database, where that information is not necessary to enable a new entrant to offer a telecommunications service to its particular customer.

208. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would “impair” the ability of a new entrant to provide a service it seeks to offer. The term “impair” means “to make or cause to become worse; diminish in value.” We believe, generally, that an entrant’s ability to offer a telecommunications service is “diminished in value” if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises. We believe we must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC’s network. Accordingly, we interpret the “impairment” standard as requiring the Commission and the states, when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC’s network.

209. We decline to adopt the interpretation of the “Impairment” standard advanced by most BOCs and GTE. Under their interpretation, incumbent LECs must provide unbundled elements only when the failure to do so would prevent a carrier from offering a service. We also reject the related interpretations that carriers are not impaired in their ability to provide a service if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC. In general, and as discussed above, subsection 251(c)(3) imposes on incumbent LECs the obligation to offer on an unbundled basis all network elements for which it is technically feasible to provide access. We believe the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by subsection 251(c)(3), but they do not require us to do so. The standards set forth in section 251(d)(2) are minimum considerations that the Commission shall take into account in evaluating unbundling requirements. Accordingly, we conclude that the statute does not require us to interpret the “Impairment” standard in a way that would significantly diminish the obligation imposed by section 251(c)(3).

210. The interpretation advanced by most of the BOCs and GTE, described above, means that, if a requesting carrier could obtain an element from a source other than the incumbent, then the incumbent need not provide the element. We agree with the reasoning advanced by some of the commenters that this interpretation would nullify section 251(c)(3) because, in theory, any new entrant could provide all of the elements in the incumbents’ networks. Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent’s network could delay entry, and could be inefficient and unnecessary. The interpretation proffered by the BOCs and GTE would inhibit new entry and thus restrict the potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act. As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach. Additionally, as discussed above at section IV.C, we believe that allowing incumbent LECs to deny access to unbundled elements on the grounds that an element is equivalent to a service available at resale would lead to impractical results, because incumbents could completely avoid section 251(c)(3)’s unbundling obligations by offering unbundled elements to end users as retail services.

211. Finally, we decline at this time to adopt any of the additional criteria proposed by commenters. We conclude that none of the additional factors suggested by commenters enhances our ability to identify unbundled network elements consistent with the procompetitive goals of the 1996 Act. The additional factors would limit unbundling requirements or make it administratively more difficult for
new entrants to obtain additional unbundled elements beyond those identified in our minimum list of required elements. For example, we believe that the proposal that new entrants must provide detailed estimates regarding projected market demand is not necessary for incumbent LECs to efficiently plan for network growth.

F. Provision of a Telecommunications Service Using Unbundled Network Elements

1. Background

212. Section 251(c)(3) provides that an incumbent LEC must provide access to “unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide” a telecommunications service. In the NPRM, we sought comment on the meaning of this requirement.

2. Discussion

213. Under section 251(c)(3), incumbent LECs must provide access to “unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide” a telecommunications service. We agree with the Illinois Commission, the Texas Public Utility Counsel, and others that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend. For example, incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own. We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element. We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the procompetitive goals of the 1996 Act.

214. We agree with AT&T and Comptel that the quoted text in section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated. We also conclude that the quoted text requires incumbent LECs, if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner either with other elements from the incumbent’s network, or with elements possessed by new entrants, subject to the technical feasibility restrictions discussed below. We adopt these conclusions for two reasons. First, in practice it would be impossible for new entrants that lack facilities and information about the incumbent’s network to combine unbundled elements from the incumbents’ network without the assistance of the incumbent. If we adopted NYNEX’s proposal, we believe requesting carriers would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets. We therefore reject NYNEX’s contention that the statute requires requesting carriers, rather than incumbents, to combine elements. We do not believe it is possible that Congress, having created the opportunity to enter local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet.

215. Second, given the practical difficulties of requiring requesting carriers to combine elements that are part of the incumbent LEC’s network, we conclude that section 251(c)(3) should be read to require incumbent LECs to combine elements requested by carriers. More specifically, section 251(c)(3) requires incumbent LECs must provide unbundled elements “in a manner that allows requesting carriers to combine them” to provide a telecommunications service. We believe this phrase means that incumbents must provide unbundled elements in a way that enables requesting carriers to combine them to provide a service. The phrase “allows requesting carriers to combine them,” does not impose the obligation of physically combining elements exclusively on requesting carriers. Rather, it permits a requesting carrier to combine elements if the carrier is reasonably able to do so. If the carrier is unable to combine the elements, the incumbent must do so. In this context, we conclude that the term “combine” means connecting two or more unbundled network elements in a manner that would allow a requesting carrier to offer the telecommunications service it seeks to offer.

216. Our conclusion that incumbent LECs must combine unbundled elements is consistent with the method we have adopted to identify unbundled network elements. Under our method, incumbents must provide, as a single, combined element, facilities that could comprise more than one element. This means, for example, that, if the states require incumbent LECs to provision subloop elements, incumbent LECs must still provision a local loop as a single, combined element when so requested, because we identify local loops as a single element in this proceeding.

217. We decline to adopt the view proffered by some parties that incumbents must combine network elements in any technically feasible manner requested. This proposal necessarily means that carriers could request incumbent LECs to combine elements that are not ordinarily combined in the incumbent’s network. We are concerned that, in some instances, this could potentially affect the reliability and security of the incumbent’s network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements. Accordingly, incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent’s network, provided that such combination is technically feasible, and such combination would not undermine the ability of other carriers to access unbundled elements or interconnect with the incumbent LEC’s network. As discussed in Section IV, effects on network reliability and security are factors to be considered in determining technical feasibility. Incumbent LECs must prove to state commissions that a request to combine particular elements in a particular manner is not technically feasible, or that the request would undermine the ability of other carriers to access unbundled elements and interconnect because they have the information to support such a claim.

218. We agree with Sprint and the Florida Commission, respectively, that in some cases incumbent LECs may be required to provision a particular element in different ways, depending on the service a requesting carrier seeks to offer; and, in other instances, where a new entrant needs a particular variant of an element to offer a service, that element should be treated as distinct from other variants of the element. This means, for example, that we will treat
local loops with a particular type of conditioning as distinct elements that are different from loops with other types of conditioning. As discussed below, we agree with CompTel that incumbent LECs must provide the operational and support systems necessary for requesting carriers to purchase and combine network elements. Incumbent LECs use these systems to provide services to their own end users, and new entrants similarly must have access to them to provide telecommunications services using bundled elements. Finally, we agree with BellSouth that requesting carriers must specify to incumbent LECs the network elements they seek before they can obtain such elements on an unbundled basis. We do not believe, however, that it will always be possible for new entrants to do this either before negotiations (or arbitrations) begin, or before they end, because new entrants will likely lack knowledge about the facilities and capabilities of a particular incumbent LEC’s network. We further believe that incumbent LECs must work with new entrants to identify the elements the new entrants will need to offer a particular service in the manner the new entrants intend.

G. Nondiscriminatory Access to Unbundled Network Elements and Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements

1. Background

219. Section 251(c)(3) requires incumbent LECs to provide requesting carriers “nondiscriminatory access to network elements on an unbundled basis” on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” In the NPRM, we sought comment on whether we should adopt minimum national requirements governing the terms and conditions for the provision of unbundled network elements. We further asked what rules could ensure that the terms and conditions for access to unbundled network elements are just, reasonable and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt uniform national rules governing provision, service, maintenance, technical standards and nondiscrimination safeguards in connection with the provision of unbundled network elements. We also asked whether we should consider any of the terms and conditions applicable to the provision of access to unbundled elements in evaluating BOC applications to provide in-region interLATA services under section 271(b).

2. Discussion

220. We agree with those commenters, including the Florida, Illinois and Washington Commissions, that to achieve the procompetitive goals of the 1996 Act, it is necessary to establish rules that define the obligations of incumbent LECs to provide nondiscriminatory access to unbundled network elements, and to provide such elements on terms and conditions that are just, reasonable and nondiscriminatory. As discussed above at sections II.A, II.B and V.B, we believe that incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.

221. Consistent with arguments advanced by the Florida and Washington Commissions, incumbent LECs, and potential competitors, and as more fully discussed in the specific sections below, we adopt general, national rules defining “nondiscriminatory access” to unbundled network elements, and “just, reasonable, and nondiscriminatory” terms and conditions for the provision of such elements. We have chosen this approach, rather than allowing states exclusively to consider these issues, because we believe that some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition.

222. We conclude, for example, that national rules defining the 1996 Act’s requirements regarding nondiscriminatory access and provision of, unbundled elements will reduce costs associated with potential litigation over these issues, and will enable states to conduct arbitrations more quickly by reducing the number of issues they must consider. Such rules will also facilitate the ability of the Commission to conduct arbitrations, should we assume a state’s responsibilities under section 252(e)(5). We conclude further that such rules will create some uniformity across states in connection with the terms under which new entrants may obtain access to network elements, thus facilitating the ability of potential competitors, including small entities, to enter local markets on a regional or national scale. Accordingly, for all of these reasons, we reject the arguments of PacTel and USTA that we should not adopt national rules relating to incumbent LEC obligations to provide access to, and provision, unbundled elements in a nondiscriminatory manner.

223. The record compiled in this proceeding supports the adoption of uniform general rules that rely on states to develop more specific requirements in arbitrations and other state proceedings. More significantly, however, we agree with the California and Florida Commissions that the states are best situated to issue specific rules because of their existing knowledge regarding incumbent LEC networks, capabilities, and performance standards in their separate jurisdictions and because of the role they will play in conducting mediations, arbitrations, and approving agreements. We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets. The states will continue to gain expertise in connection with issues relating to just, reasonable, and nondiscriminatory access and provision of unbundled network elements. We expect to turn to the states, and rely on the expertise they develop in this area, when we review and revise our rules as necessary.

224. We agree with those commenters that argue that incumbent LECs should be required to fulfill some type of reporting requirement to ensure that they provision unbundled elements in a nondiscriminatory manner. We believe the record is insufficient at this time to adopt such requirements, and we may reexamine this issue in the future. We encourage the states, however, to adopt reporting requirements. We decline to address whether the Commission should consider any of the terms and conditions adopted here in evaluating BOC applications to provide in-region long distance services. We will consider this issue, as it arises, when we evaluate individual BOC applications.

a. Nondiscriminatory Access to Unbundled Network Elements

225. We conclude that the obligation to provide “nondiscriminatory access to
network elements on an unbundled basis” refers to both the physical or logical connection to the element and the element itself. In considering how to implement this obligation in a manner that would achieve the 1996 Act’s goal of promoting local exchange competition, we recognize that new entrants, including small entities, would be denied a meaningful opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide “nondiscriminatory access” to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same. As discussed above with respect to interconnection, an incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase “nondiscriminatory access” in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself. We note that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an “unjust” or “unreasonable” term or condition.

226. We believe that Congress set forth a “nondiscriminatory access” requirement in section 251(c)(3), rather than an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal-in-quality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters are aware that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent. In the rare circumstances where it is technically infeasible for an incumbent LEC to provide access to elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs provide themselves, and allow for an exception to this requirement only where it is technically infeasible to meet. The exception described here does not excuse incumbent LECs from the obligation to modify elements within their networks to allow requesting carriers to obtain access to such elements where this is technically feasible. See supra, Section IV.D. Where technically feasible, we expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to particular unbundled elements or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself.

227. Our conclusion that an incumbent LEC must provide unbundled elements, as well as access to them, that is “at least” equal in quality to that which the incumbent LEC provides itself, does not excuse incumbent LECs from providing, when requested and where technically feasible, access or unbundled elements of higher quality. An incumbent LEC, in accommodating a carrier’s request for a particular unbundled element, may ultimately provision an element that is higher in quality than what the incumbent LEC provides to itself. See infra, Section V.J.L. As we discuss below, we do not believe that this obligation is unduly burdensome to incumbent LECs because the 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network. (See infra, Section V.J. We require, for example, that incumbent LECs provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent LEC does not itself provide such digital services.) Moreover, to the extent this obligation allows new entrants, including small entities, to offer services that are different from those offered by the incumbent, we believe it is consistent with Congress’s goal to promote local exchange competition. We note that, to the extent an incumbent LEC provides an element with a superior level of quality to a particular carrier, the incumbent LEC must provide all other requesting carriers with the same opportunity to obtain that element with the equivalent higher level of quality. We further note that where a requesting carrier specifically requests access to unbundled elements that are lower in quality to what the incumbent LECs provide to themselves, incumbent LECs may offer such inferior quality if it is technically feasible. Finally, we conclude that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at a level of quality that is superior to or lower than what the incumbent LEC provides to itself.

b. Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements

228. The duty to provide unbundled network elements on “terms, and conditions that are just, reasonable, and nondiscriminatory” means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because section 251(c)(3) includes the terms “just” and “reasonable,” this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act’s goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a
meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.

229. As is more fully discussed below, to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs’ networks, we conclude that incumbent LECs must provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LECs' operations support systems. (The term “provisioning” includes installation.) Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers. We discuss specific terms and conditions applicable to the unbundled elements identified in this order below, in Section V.J.

H. The Relationship Between Sections 251(c)(3) and 251(c)(4)

1. Background

230. Section 251(c)(4) provides that incumbent LECs must offer “for resale at wholesale rates” any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carriers. In the NPRM, we sought comment on the relationship between this provision and section 251(c)(3). Specifically, we asked whether carriers can order and combine network elements to offer the same services that incumbent LECs offer for resale under section 251(c)(4). We observed that different pricing standards under section 252(d) apply to unbundled elements under section 251(c)(3) and resale services under section 251(c)(4), and that section 251(c)(3) contemplates the purchase of unseparated facilities (i.e., facilities that can be used for either inter- or intrastate services) while subsection (c)(4) does not necessarily contemplate this. We asked for comment on the implications or significance of these differences.

2. Discussion

231. The language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements. We conclude, therefore, that Congress did not necessarily contemplate this. We asked to read the requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. We note that the Illinois Commission has reached the same conclusion.

232. We reject the arguments advanced by Bell Atlantic and NYNEX that the language of section 251(c)(3) requires carriers seeking access to unbundled elements to own some local exchange facilities, and that this serves to distinguish section 251(c)(3) from section 251(c)(4). The “at any technically feasible point” language in section 251(c)(3) refers to points in an incumbent LEC’s network where new entrants may obtain access to elements. It does not, however, require that new entrants interconnect local exchange facilities which they own or control at that technically feasible access point. If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new services would be required to connect a single network element to a facility of its own. The 1996 Act, however, does not impose any limitations on carriers’ ability to obtain access to unbundled network elements. Moreover, we conclude that Congress did not intend to limit access to unbundled elements in this manner because such a limit would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thereby undermine the objectives of local exchange competition. We also reject NYNEX’s argument that the phrase “such telecommunications service” excludes services provided by the incumbent. This interpretation is inconsistent with the 1996 Act’s definition of a telecommunications service, which includes all telecommunications services provided by an incumbent.

233. We also reject the argument that language in the Joint Explanatory Statement requires us to conclude that carriers must own facilities to obtain access to unbundled elements. Congress may have recognized that carriers that own some of their own facilities will more likely benefit by entering local markets through unbundled elements rather than resale, but this consideration does not imply that carriers must own their own facilities to obtain access to unbundled elements.

234. We are not persuaded that, in order to give meaning and effect to section 251(c)(4), we would require new entrants to own some local exchange facilities in order to obtain access to unbundled elements. We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

235. The principal distinction between sections 251(c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product.

236. In contrast, a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example, some incumbent LECs have capabilities within their networks, such as the ability to offer Centrex customer service. More specifically, carriers using solely unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent’s existing service offerings increases the requesting carrier’s ability to compete against the incumbent and is likely to
benefit consumers. Additionally, carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.

237. If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks. A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations. It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors. Some new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the terms of section 251(c)(4) irrespective of the fact that they can obtain access to unbundled elements without owning any of their own facilities. Moreover, some markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets carriers will enter through the resale of incumbent LEC services, irrespective of the fact that they could enter exclusively through the use of unbundled elements.

238. We are not persuaded by the argument set forth by Ameritech, NYNEX, and MFS that allowing carriers to use solely recombined network elements would enable Congress to evade a possible marketing restriction in section 271(e)(1). It is true that the terms of section 271(e) do not restrict joint marketing of local and interexchange services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market local and long distance services without concluding that this section prohibits all forms of joint marketing. In other words, we see no basis upon which we could conclude that section 271(e)(1) restricts joint marketing of long distance services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market local and long distance services. Moreover, we do not believe that we have the discretion to read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections.

240. We also reject the argument advanced by BellSouth and Ameritech that allowing carriers to use solely unbundled elements to provide services available through resale would allow carriers to evade a possible prohibition, which is reserved to the discretion of the states, on the sale of certain services to certain categories of consumers. Under section 251(c)(4)(B) states are permitted to restrict resellers from offering certain services to certain consumers, in the same manner that states restrict incumbent LECs. For example, states that prohibit incumbent LECs from selling access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities, we would limit the ability of carriers to enter local markets.

241. We do not believe, however, that carriers using solely unbundled elements to provide local exchange services will be able to evade any potential restrictions states may impose under section 251(c)(4)(B). In this section Congress granted the states the discretion to impose certain limited restrictions on the sale of services available for resale. It did not, however, grant states, in section 251(c)(3), the discretion to impose similar restrictions on the use of unbundled elements. Accordingly, we are not persuaded that allowing carriers to use solely unbundled elements to provide services that incumbent LECs offer for resale would allow competing carriers to evade a possible marketing restriction that Congress intended to reserve to the discretion of the states.

242. We agree with those commenters who argue that it would be administratively impossible to impose a requirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements, and they must use these facilities, in combination with unbundled elements, for the purpose of providing local services. We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition.

Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

243. We reject the argument that requiring carriers to own some local exchange facilities would promote competition for local exchange services, or that we should impose such a requirement for local market reasons. To the contrary, we conclude that allowing carriers to use unbundled elements as they wish, subject only to the maintenance of the key elements of the access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities, we would limit the ability of carriers to enter local markets.
separate group of consumers by reselling an incumbent LEC’s services. With the exception noted in Section VII, infra, we do not address the issue of whether the 1996 Act permits a new entrant to offer services to the same set of consumers through a combination of unbundled elements and services available for resale.

1. Provision of Interexchange Services Through The Use of Unbundled Network Elements

1. Background

245. In the NPRM, we tentatively concluded that interexchange carriers are telecommunications carriers, and thus such carriers are entitled to access to unbundled elements under the terms of section 251(c)(3). We also tentatively concluded that carriers may request unbundled elements for purposes of originating and terminating toll services, in addition to other services they seek to provide, because section 251(c)(3) provides that carriers may request unbundled elements to provide a “telecommunications service,” and interexchange services are a telecommunications service.

246. In the NPRM, we sought comment on whether the 1996 Act permits carriers to use unbundled elements to provide exchange access services only, or whether carriers seeking to provide exchange access services using unbundled elements must provide local exchange service as well. We premised the latter view on the definition of the term “network element,” as a facility and not a service, and on the pricing standard under section 252(d)(1) that requires network elements to be priced based on economic costs (rather than jurisdictionally separated costs.) We also sought comment on whether allowing carriers to purchase unbundled elements to provide exchange access services exclusively would be inconsistent with the terms of sections 251(i) and 251(g) and, further, whether this would result in a fundamental jurisdictional shift of the administration of interstate access charges to state jurisdictions.

247. Finally, in the NPRM, we tentatively concluded that, if carriers purchase unbundled elements to provide exchange access services to themselves, irrespective of whether they provide such services alone or in connection with local exchange services, incumbent LECs cannot assess Part 69 access charges in addition to charges for the cost of the unbundled elements. We based this tentative conclusion on the view that the imposition of access charges in addition to cost-based charges for unbundled elements would depart from the statutory mandate of cost-based pricing of elements.

2. Discussion

248. We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers. Although we conclude below that we have discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements, we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. As we observed in the NPRM, section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a “telecommunications service,” and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers “to combine such elements in order to provide such telecommunications service[s].” Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.

249. We also confirm our conclusion in the NPRM that, for the reasons discussed below in section VJ, carriers purchase rights to exclusive use of unbundled loop elements, and thus, as the Department of Justice and Sprint observe, such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. This means, for example, that, if there is a single loop dedicated to the premises of a particular customer and that customer requests both local and long distance service, then any interexchange carrier purchasing access to that customer’s loop will have to offer both local and long distance services. That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops.

250. We reject the argument advanced by a number of LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges. Section 251(i) provides that nothing in section 251 “shall be construed to limit or otherwise affect the Commission’s authority under section 201.” We conclude, however, that our authority to set rates for these services is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services. Our authority to regulate interstate access charges remains unchanged by the 1996 Act. What has potentially changed is the volume of access services, in contrast to the number of unbundled elements, interexchange carriers are likely to demand and incumbent LECs are likely to provide. When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access “services.” They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along this same line of reasoning, we reject the argument that our conclusion would place the administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than “interstate exchange access services.” Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service. The application of our exchange access rules in the circumstances described will continue beyond the transition period described at infra, Section VII.

251. We also reject the incumbent LECs’ arguments that language contained in bills that were not enacted, or legislative history connected to such bills, demonstrates that carriers cannot purchase access to unbundled elements to provide exchange access services to themselves, for the purpose of providing long distance services to consumers. The incumbent LECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that such limitation survived the Conference Committee’s amendments to the 1996 Act. We conclude, however, that the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service is not ambiguous. Accordingly, we must
interpret it pursuant to its plain meaning and not by referencing earlier versions of the statute that were ultimately not adopted by Congress.

252. Moreover, we do not believe that the Joint Explanatory Statement, which describes the House and Senate versions of the statute, and the 1996 Act as enacted, compels a different conclusion. The Joint Explanatory Statement states that the statute incorporates provisions from the Senate Bill and the House Amendment in connection with the interconnection model adopted in section 251. It notes that the provision in the Senate Bill relating to interconnection did not apply to interconnection arrangements between local and long distance carriers for the purpose of providing long distance services. The text of section 251 of the Senate Bill is consistent with this comment because it states that a local exchange carrier must offer interconnection to other carriers to allow such carriers to provide telephone exchange or exchange access services. The Joint Explanatory Statement, however, does not describe any restriction in the House Amendment regarding the ability of carriers to use unbundled elements to provide long distance service. Indeed, the House Amendment specifically states that carriers may obtain access to unbundled elements to offer "a telecommunications service," which is not limited to telephone exchange and exchange access services. We observe that the Conference Committee incorporated language from the Senate Bill and not the Senate Bill in describing in section 251(c)(3) the services carriers may offer using unbundled elements. Accordingly, we do not believe that the Joint Explanatory Statement’s description of the provision in the Senate Bill controls our interpretation of section 251(c)(3) as enacted.

253. We also reject the argument that allowing carriers to use unbundled elements to provide originating and terminating toll services is inconsistent with the purpose of the 1996 Act. Congress intended the 1996 Act to promote competition for not only telephone exchange services and exchange access services, but also for toll services. Section 251(b)(3), for example, imposes a duty on LECs to provide dialing parity for telephone toll service.

254. We disagree with the incumbent LECs which argue that section 251(g) requires requesting carriers using unbundled elements to continue to pay federal access charges indefinitely. Section 251(g) provides that the federal and state equal access rules applicable before enactment, including the "receipt of compensation," will continue to apply after enactment, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment." We believe this provision does not apply to the exchange access "services" requesting carriers may provide themselves or others after purchasing unbundled elements. Rather, the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.

255. We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, infra, for a temporary period. As we explained in the NPRM, if we were to require indefinitely carriers purchasing unbundled elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1). In addition, we believe this conclusion is consistent with Congress’s overriding goal of promoting efficient competition for local telephony services, because it will allow, in the long term, new entrants using unbundled elements to compete on the basis of the economic costs underlying the incumbent LECs’ networks. The facilities used to provide exchange access services are the same as those used to provide local exchange services. We note, however, as discussed below, that under section VII, discussing an interim mechanism (addressing near-term access charge bypass) that certain additional charges are necessary for a specific, limited duration to smooth the transition to a competitive marketplace. We also note that where new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXC’s originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to such IXC’s because the new entrants, rather than the incumbents, will be providing exchange access services, and to allow otherwise would permit incumbent LECs to receive compensation in excess of network costs in violation of the pricing standard in section 252(d). See 47 U.S.C. § 252. We further note, however, that in these same circumstances the new entrant purchasing access to an unbundled switch element must pay to the incumbent LEC the charges included in the transitional mechanism, described infra, at Section VII, for a temporary period.

256. We further conclude that when a carrier purchases a local loop for the purpose of providing interexchange services or exchange access services, incumbent LECs may not recover the subscriber line charge (SLC) now paid by end users. (As discussed at infra, Section VIII, a different result will occur when interconnecting carriers purchase LEC retail services at wholesale rates under section 251(c)(4).) The SLC recovers the portion of loop costs allocated to the interstate jurisdiction, but as discussed in Section II.C, supra, we conclude that the 1996 Act creates a new jurisdictional regime outside of the current separations process. The unbundled loop charges paid by new entrants under section 251(c)(3) will therefore recover the unseparated cost of the loop, including the interstate component now recovered through the SLC. If end users or carriers purchasing access to local loops were required to pay the SLC in this situation, LECs would enjoy double recovery, and the effective price of unbundled loops would exceed the cost-based levels required under section 251(d)(1).

257. Finally, we have considered the economic impact on small incumbent LECs of our conclusion that carriers purchasing access to unbundled network elements to provide interexchange or exchange access services are not required to pay federal or state exchange access charges, except as described in Section VII, infra, for a temporary period. For example, the Rural Telephone Coalition argues that rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed to bypass access charges through the purchase of unbundled elements before proceedings regarding access reform and universal service are completed. We reject the Rural Telephone Coalition’s argument, however, because our rules, as discussed in Section VII, infra, provide for a limited, transitional plan to address public interest concerns raised by the bypass of access charges through unbundled network elements.
J. Specific Unbundling Requirements

258. Having interpreted the standards set forth in the 1996 Act for the unbundling of network elements, we now apply those standards to incumbent LECs’ networks. Based on the information developed in this proceeding, we require incumbent LECs to provide unbundled access to local loops, network interface devices, end office and tandem switching, and various interoffice facilities, as described below. These network elements represent a minimum set of elements that must be unbundled by incumbent LECs. State commissions, as previously noted, are free to prescribe additional elements, and parties may agree on different or additional network elements in the voluntary negotiation process.

1. Local Loops

(a) Background

259. In the NPRM, we tentatively concluded that incumbent LECs should be required to unbundle local loops. We sought comment on appropriate requirements for loop unbundling that would promote entry and build upon existing state initiatives, and whether we should adopt specific provisioning requirements for loop unbundling. We also sought comment on our tentative conclusion that incumbent LECs should make available as individual network elements various subloop elements such as the feeder, distribution, and concentration equipment.

(b) Discussion

260. We conclude that incumbent LECs must provide local loops on an unbundled basis to requesting carriers. We note that the Joint Explanatory Statement lists local loops as an example of an unbundled network element. As discussed below, the record demonstrates that it is technically feasible for incumbent LECs to provide access to unbundled local loops, and that such access is critical to encouraging market entry. Further, the competitive checklist contained in section 271 requires BOCs to offer unbundled loops separate from switching as a precondition to entry into the in-region, interLATA services market.

261. Requiring incumbent LECs to make available unbundled local loops will facilitate market entry and improve consumer welfare. Without access to unbundled local loops, new entrants would need to invest immediately in duplicative facilities in order to compete for customers. Such investment and building would likely delay market entry and postpone the benefits of local telephone competition for consumers. Moreover, without access to unbundled loops, new entrants would be required to make a large initial sunk investment in loop facilities before they had a customer base large enough to justify such an expenditure. As of year end 1995, Class A carriers reported $268 billion of total plant in service, of which $229 billion was classified as network plant. Local loop plant comprises approximately $109 billion of total plant in service, which represents 41 percent of total plant in service and 48 percent of network plant. See 1995 ARMS Report 43–04. This would increase the risk of entry and raise the new entrant’s cost of capital. By contrast, the ability of a new entrant to purchase unbundled loops from the incumbent LEC allows the new entrant to build facilities gradually, and to deploy loops for its customers where it is efficient to do so. Moreover, in some areas, the most efficient means of providing competing service may be through the use of unbundled loops. In such cases, preventing access to unbundled loops would either discourage a potential competitor from entering the market in that area, thereby denying those consumers the benefits of competition, or cause the competitor to construct unnecessarily duplicative facilities, thereby misallocating societal resources.

262. Section 251(c)(3) requires incumbent LECs to provide access to unbundled elements “at any technically feasible point.” The vast majority of commenters supporting incumbent LECs, agree with our tentative conclusion that it is technically feasible to provide access to unbundled local loops, and a number of commenters identify the main distribution frame in a LEC central office as an appropriate access point. Moreover, access to unbundled loops is currently provided by several LECs pursuant to state unbundling requirements. Thus, we conclude that it is technically feasible for incumbent LECs to provide access to unbundled loops only to the extent technically feasible. That is, if it is not technically feasible to condition a loop facility to support a particular functionality, the incumbent LEC need not provide unbundled access to that loop so conditioned. For example, a local loop that exceeds the maximum length allowable for the provision of a high-bit rate digital service cannot feasibly be conditioned for such service. Such loop conditioning may involve removing load coils or bridged taps that interfere with the transmission of digital signals. Such a situation may necessitate a request for subloop elements.

Nevertheless, section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC.

263. Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we agree with the LECs’ position that requesting carriers “take the LEC networks as they find them”
with respect to unbundled network elements. As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3). The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning.

266. We further conclude that incumbent LECs must provide competitors with access to unbundled loops regardless of whether the incumbent LEC uses integrated digital loop carrier technology, or similar remote concentration devices, for the particular loop sought by the competitor. IDLC technology allows a carrier to aggregate and multiplex loop traffic at a remote concentration point and to deliver that multiplexed traffic directly into the switch without first demultiplexing the individual loops. If we did not require incumbent LECs to unbundle IDLC-delivered loops, end users served by such technologies would not have the same choice of competing providers as end users served by other loop types. Further, such an exception would encourage incumbent LECs to “hide” loops from competitors through the use of IDLC technology.

267. We find that it is technically feasible to unbundle IDLC-delivered loops. One way to unbundle an individual loop from an IDLC is to use a demultiplexer to separate the unbounded loop(s) prior to connecting the remaining loops to the switch. Commenters identify a number of other methods for demultiplexing individual loops from IDLC facilities, including methods that do not require demultiplexing. Again, the costs associated with these mechanisms will be recovered from requesting carriers.

268. We decline to define a loop element in functional terms, rather than in terms of the facility itself. Some parties advocate defining a loop element as merely a functional piece of a shared facility, similar to capacity purchased on a shared transport trunk. According to these parties, this definition would enable an IXC to purchase a loop element solely for purposes of providing interexchange service. While such a definition, based on the types of traffic provided over a facility, may allow for the separation of costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate. Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new and advanced services to end users. In contrast, a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others. For example, carriers wishing to provide solely voice-grade service over a loop would preclude another carrier’s provision of a digital service, such as ISDN or ADSL, over that same loop. Digital services such as ISDN and ADSL occupy the same frequency spectrum on a loop as ordinary voice-grade services. We note that these two types of services could be provided by different carriers over, for example, separate two-wire loop elements to the same end user. 269. Incumbent LECs must provide cross-connect facilities, for example, between an unbundled loop and a requesting carrier’s co-located equipment, in order to provide access to that loop. As we conclude in section IV.D, above, an incumbent LEC must take the steps necessary to allow a competitor to combine its own facilities with the incumbent LEC’s unbundled network elements. We highlight this requirement for unbundled loops because of allegations by competitive providers that incumbent LECs have imposed unreasonable rates, terms, and conditions for such cross-connect facilities in the past. Incumbent LECs may recover the cost of providing such facilities in accord with our rules on the costs of interconnection and unbundling. Charges for all such facilities must meet the cost-based standard provided in section 252(d)(1), and the terms and conditions of providing these facilities must be reasonable and nondiscriminatory under section 252(e).

270. At this time, we decide to adopt additional terms and conditions, such as the five-minute loop cutover requirement proposed by MFS, for loop provisioning. We agree with commenters who contend that the provisioning of unbundled local loops must be subject to close scrutiny to ensure that incumbent LECs do not delay loop cutover or otherwise complicate the acquisition of loops by a competitor. We conclude, however, that the new rules in section 251(d)(2)(A) Unbundled Network Elements section that require nondiscriminatory terms and conditions for provisioning, billing, testing, and repair of unbundled elements, and the availability of electronic ordering systems, adequately address these concerns. We will continue to review and revise our rules in this area as necessary.

271. Section 251(d)(2)(A) requires the Commission to consider whether “access to such network elements as are presently necessary.” Most parties did not identify any proprietary concerns associated with providing unbundled access to local loops. Ericsson notes that some “active” loop equipment, such as channel banks and remote terminal equipment, is often proprietary in nature, and that manufacturers would require time to modify such equipment to create end-to-end network compatibility on a national basis. Ericsson does not contend, however, that any proprietary information would be revealed if loops using such equipment were unbundled, or that use of such equipment should prevent loop unbundling in general. Thus, we conclude that loop elements are, in general, not proprietary in nature under our interpretation of section 251(d)(2)(A). Even if loop elements were proprietary in nature, however, Ericsson does not meet the second consideration in our section 251(d)(2)(A) standard, which requires a showing that a new entrant can offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC’s network. Ericsson merely contends that manufacturers may need time to establish end-to-end compatibility between its proprietary equipment and equipment of other manufacturers. Therefore, we find that Ericsson’s concerns do not justify withholding unbundled loops from requesting carriers pursuant to section 251(d)(2)(A).

272. Section 251(d)(2)(B) directs the Commission to consider whether “the failure to provide access to such network elements would impair the ability of the telecommunications services provider seeking to provide the services that it seeks to offer.” We have interpreted the term “impair” to mean either increased cost or decreased service quality that would result from using network elements of the incumbent LEC other than the one sought. Commenters do not identify alternative facilities that would fulfill requesting carriers’ need for transmission between the central office and the customer premises at the same cost and same quality of service. Accordingly, we conclude that competitors’ ability to provide telephone exchange, exchange access, or other telecommunications services would be significantly impaired if they did not have the opportunity to purchase unbundled loops from incumbent LECs.

273. As a general matter, we believe that subloop unbundling could give competitors flexibility in deploying some portions of loop facilities, while relying on the incumbent LEC’s facilities where necessary. For example, a competitor may seek to minimize its reliance on the LEC’s
facilities by combining its own feeder plant with the incumbent LEC's distribution plant. In addition, some high bandwidth services, such as ADSL, cannot be provided over long loop lengths. ITIC, Compaq, and Intel assert that subloop unbundling would lead to innovative new data services. In these situations, carriers would need access at points along the loop closer to the customer premises. The record presents evidence primarily of logistical, rather than technical, impediments to subloop unbundling. Several LECs and USTA, for example, assert that incumbent LECs would need to create databases for identifying, provisioning, and billing for subloop elements. Further, incumbent LECs argue that there is insufficient space at certain possible subloop interconnection points. We note that these concerns do not represent "technical" considerations under our interpretation of the term "technically feasible."

274. Nonetheless, we decline at this time to identify the feeder, feeder/distribution interface (FDI), and distribution components of the loop as individual network elements. We find that proponents of subloop unbundling do not address certain technical issues raised by incumbent LECs concerning subloop unbundling. Incumbent LECs contend that access by a competitor's personnel to loop equipment necessary to provide subloop elements, such as the FDI, raises network reliability concerns for customers served through that FDI. SBC, for example, asserts that access to its loop concentration points by competitors would increase the risk of error by a competitor's technicians that may disrupt service to customers of one or both carriers. U S West contends that the potential for poor technical implementation of subloop interconnection and the lack of overall responsibility for loop performance is very likely to degrade overall service quality. Proponents of subloop unbundling do not adequately respond to these arguments by incumbent LECs. As discussed above, we have determined that we must take into account specific, demonstrable claims regarding network reliability in determining whether to identify any particular component as an element that must be unbundled. Therefore, we believe that, at this stage, based on the current record evidence, the technical feasibility of subloop unbundling is best addressed at the state level on a case-by-case basis at this time. We encourage states to pursue subloop unbundling in response to requests for subloop elements by competing providers.

Information developed by the parties in the context of a specific request for subloop unbundling will provide a useful framework for addressing the loop maintenance and network reliability matters that we have identified. Based on actions taken by the states or other future developments, and on the importance of subloop unbundling in light of technological advancements, we intend to revisit the specific issue of subloop unbundling sometime in 1997.

275. We require incumbent LECs to offer unbundled access to the network interface device (NID), as a network element, as described below. The NID is a cross-connect device used to connect loop facilities to inside wiring. When a competitor deploys its own loops, the competitor must be able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings. In many cases, inside wiring is connected to the incumbent LEC's loop plant at the NID. In order to provide service, a competitor must have access to this facility. Therefore, we conclude that a requesting carrier is entitled to connect its loops, via its own NID, to the incumbent LEC's NID.

276. Pursuant to section 251(c)(3), we find that this arrangement clearly is technically feasible. Ameritech notes that it currently maintains such connections with competitors that have deployed their own loop facilities. This is persuasive evidence that unbundled access to the NID, in this manner, does not raise network reliability concerns. Under section 251(d)(2)(A), the record contains no evidence of proprietary concerns with unbundled access to the NID. In addition, under our interpretation of the "impair" test of section 251(d)(2)(B), commenters do not contend that new entrants could obtain the same functionality at the same cost and service quality through other network elements of the incumbent LEC. Moreover, the record indicates that certain network architectures used by new entrants, such as fiber rings, can most efficiently connect end users to the new entrant's switching office without use of the incumbent LEC's facilities. Thus, we conclude that the unavailability of access to incumbent LECs' NIDs would impair the ability of carriers deploying their own loops to provide service. Further, we believe that unbundled access to the NID will facilitate entry strategies premised on the deployment of loops. As discussed in section VII above, the new entrant bears the costs connecting its NID to the incumbent LEC's NID.

277. We do not require an incumbent LEC to permit a new entrant to connect its loops directly to the incumbent LEC's NID. MCI contends that directly connecting its loops to incumbent LEC's NIDs is "the only practical solution" for gaining access to inside wiring. According to MCI, there is no extra wiring to connect the incumbent LEC's NID to the new entrant's NID. Ameritech demonstrates, however, that it currently provides access to inside wiring through the type of arrangement that MCI asserts is not practical—that is, by connecting a new entrant's loops to inside wiring via the new entrant's NID and Ameritech's NID. MCI does not demonstrate that its ability to provide competing service is unreasonably limited by the arrangements explained by Ameritech.

278. The record contains conflicting evidence on the technical feasibility of requiring incumbent LECs to permit competitors to connect their loops directly to incumbent LECs' NIDs. Ameritech argues that such a direct connection would allow American's unused loops without overvoltage protection. MCI argues that overvoltage protection is provided through the incumbent LEC's "protector module" that is separate from the NID. Ameritech contends that its NIDs are integrated units providing both overvoltage protection and a demarcation point, and that these two functions of the NID are "inseverable." AT&T contends direct access to incumbent LECs NIDs is technically feasible. According to AT&T, if a competitor connects its loops directly to the incumbent LEC's NID, the incumbent LEC's loops remain connected to the grounding equipment that protects against overvoltage. According to AT&T, when the competitor does not use spare terminals on the NID, the competitor would be required to ground the incumbent LEC's unused loops to protect against overvoltage.

279. We find that the record in this proceeding does not permit a determination on the technical feasibility of the direct connection of a competitor's loops to the incumbent LEC's NID. Our requirement of a NID-to-NID connection addresses the most critical need of competitors that deploy their own loops—obtaining access to the inside wiring of the building. We recognize, however, that competitors may benefit by directly connecting their loops to the incumbent LEC's NID, for example, by avoiding the cost of deploying NIDs. States should determine whether a connection to the NID can be achieved in a technically feasible manner in the context of
specific requests by competitors for direct access to incumbent LECs' NIDs.

2. Switching
   (a) Background

280. In the NPRM, we tentatively concluded that incumbent LECs should be required to make available local switching capability as an unbundled network element. We sought comment on how a local switching element should be defined, and we identified two possible models: the switch “platform” approach, which would enable and require a requesting carrier to purchase all of the features and functions of the switch on a per-line basis, and the port approach used by the New York Commission, which offers local switching capability through the purchase of a port at a retail rate. We also sought comment on other definitions of a local switching element. In addition, we requested that commenters address whether vertical switching functions, such as those enabling the provision of custom local area signaling service (CLASS) features and call waiting, should be considered individual network elements separate from the basic switching functionality.

           (b) Discussion

(i) Local Switching

There are over 23,000 central office switches, the vast majority of which are operated by incumbent LECs. It is unlikely that consumers would receive the benefits of competition quickly if new entrants were required to replicate even a small percentage of incumbent LECs’ existing switches prior to entering the market. The Illinois Commission staff presented evidence in a recent proceeding indicating that it takes between nine months and two years for a carrier to purchase and install a switch. We find this to be persuasive evidence of the entry barrier that would be created if new entrants were unable to obtain unbundled local switching from the incumbent LEC. The ability to purchase unbundled switching will also promote competition in an area until the new entrant has built up a sufficient customer base to justify investing in its own switch. We expect that the availability of unbundled local switching is likely to increase the number of carriers that will successfully enter the market, and thus should accelerate the development of local competition.

282. We define the local switching element to encompass line-side and trunk-side facilities plus the features, functions, and capabilities of the switch. The NPRM used the terms “switch platform” and “port,” as they had been developed by the Illinois and New York Commissions, respectively, to describe two possible approaches to establishing an unbundled local switching element. Parties commenting on the unbundled switching element attributed a variety of functionalities to each of these terms. To avoid confusion, we will not use these terms in discussing the unbundled local switching element. Instead, we will address commenters’ proposals according to the functionality that they recommend be included in the definition of an unbundled local switching element. The line-side facilities include the connection between a loop termination at, for example, a main distribution frame (MDF), and a switch line card. Trunk-side facilities include the connection between, for example, a trunk termination at a trunk-side cross-connect panel and a trunk card. The “features, functions, and capabilities” of the local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks. It also includes the same basic capabilities that are available to the incumbent LEC’s customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance. Purchasing the local switching element does not entitle a requesting carrier to connect its own AIN call processing database to the incumbent LEC’s switch, either directly or via the incumbent LEC’s signal transfer point or database. Section V.I.4, which discusses the unbundling of incumbent LECs’ signaling systems and databases. We also note that E911 and operator services are further unbundled from local switching. In addition, the local switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions. Thus, when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. A requesting carrier will deploy individual vertical features on its customers’ lines by designating, via an electronic ordering interface, which features the incumbent LEC is to activate for particular customer lines.

284. We disagree with commenters who argue that vertical switching features should be classified exclusively as retail services, available to competing providers only through the resale provision of section 251(c)(4). The 1996 Act defines network element as “a facility or equipment used in the provision of a telecommunications service” and “the features, functions, and capabilities that are provided by means of such facility or equipment.” Vertical switching features, such as call waiting, are provided through operation of hardware and software comprising the “facility” that is the switch, and thus are “features” and “functions” of the switch. In some cases vertical features may be provided using hardware and software external to the actual switch. In those instances, the functionality of such external hardware and software is a separate element under section 251(c)(3), and is available to competing providers. We note that the Illinois Commission recently defined an unbundled local switching element to include vertical switching features. Although we find that vertical switching features should be available to competitors through the resale provision of section 251(c)(4), we reject the view that Congress intended for section 251(c)(4) implicitly to remove vertical switching features from the definition of “network element.” Therefore, we find that vertical switching features are part of the unbundled local switching element.

285. At this time we decline to require further unbundling of the local switch into a basic switching element and independent vertical feature elements. Such unbundling does not appear to be necessary to promote local competition. Indeed, most potential competitors do not recommend that vertical switching features be available as
many requests for local switching. Incumbent LECs lack significant excess capacity, technically infeasible because some LECs are 1AESS switches. We conclude that horizontal switching features, such as call load, are technically feasible in many LECs. Customized routing will enable a competitor to direct particular calls to particular outgoing trunks, which will permit a new entrant to self-provide, or select among other providers of, interoffice facilities, operator services, and directory assistance. In addition, we note that the Illinois Commission recently directed Ameritech and Centel to permit a carrier purchasing wholesale local exchange service to designate a provider of operator services and directory assistance other than that of the incumbent LEC. Such access is accomplished through the routing of such calls from the incumbent LEC's switch to the competing provider of the operator service or directory assistance. Bell Atlantic notes that customized routing is generally technically feasible for local calling, although it notes that the technology and capacity constraints vary from switch to switch. SBC contends that customized routing is technically infeasible for older switches, such as the 1AESS switch. AT&T acknowledges that, although the ability to establish customized routing in 1AESS switches may be affected by the "call load" in each office, only 9.8% of the switches used by the seven RBOCs, GTE and SNET are 1AESS switches. We recognize that the ability of an incumbent LEC to provide customized routing to a requesting carrier will depend on the capability of the particular switch in question. Thus, our requirement that incumbent LECs provide customized routing as part of the "functionality" of the local switching element applies, by definition, only to those switches that are capable of performing customized routing. An incumbent LEC must prove to the state commission that customized routing in a particular switch is not technically feasible.

290. Section 251(d)(2)(A) requires the Commission, in determining which network elements should be made available to competing providers, to consider "whether access to such network elements as are proprietary in nature is necessary." To withhold a proposed network element from a competing provider, an incumbent LEC must demonstrate that the element is proprietary that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service. U S West asserts that switch unbundling could raise concerns involving, among other things, "licensing of intellectual property." It cites a request by one interconnectee to be the exclusive provider of particular features in U S West's generic switching software. Bell Atlantic states that it is not at liberty to sublicense the software that operates vertical switching features. We note, however, that these incumbent LECs do not object to providing vertical switching functionalities to requesting carriers under the resale provision of section 251(c)(4). In addition, the vast majority of parties that discuss unbundled local switching do not raise proprietary concerns with the unbundling of either local switching or vertical switching features. Even if we accept the claim of U S West and Bell Atlantic that vertical features are proprietary in nature, these carriers do not meet the second consideration in our section 251(d)(2)(A) standard, which requires an incumbent LEC to show that a new entrant could offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network. Accordingly, we find that access to unbundled local switching is "clearly necessary" under our interpretation of section 251(d)(2)(A).

291. Section 251(d)(2)(B) directs the Commission to consider whether the failure to provide access to an unbundled element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." We have interpreted the term "impair" to mean either increased cost or decreased service quality that would result from using network elements specified by the incumbent LEC other than the one sought. SBC and MFS contend that
access to unbundled local switching may not be essential for new entrants because competitors are likely to deploy their own switches. These parties present no evidence that competitors could provide service using another element in the LEC’s network at the same cost and at the same level of quality. In addition, most commenters that address this issue generally argue that local switching is essential for the provision of competing local service, and we agree. We thus conclude that a requesting carrier’s ability to offer local exchange services would be impaired, if not thwarted, without access to an unbundled local switching element.

292. Section 251(c)(3) requires that incumbent LECs provide access to unbundled network elements on terms and conditions that are “just, reasonable, and nondiscriminatory.” We agree with CompTel and LDDS that new entrants will be disadvantaged if customer switchover is not rapid and transparent. We also note that the Michigan Commission has recognized the significance of customer switchover intervals and has directed Ameritech and GTE to file proposals on how they will “ensure the equal availability of expeditious processing of local, interLATA, and intralATA carrier changes.” Therefore, we require incumbent LECs to switch over customers for local service in the same interval as LECs currently switch end users between interexchange carriers. This requirement applies to switchovers that only require the incumbent LEC to make physical modifications to its network, such as connecting a competitor’s loop to its switch, are not subject to this requirement, and instead are governed by our terms and conditions for all unbundled elements. Today, incumbent LECs routinely change customers’ presubscribed interexchange carriers quickly and transparently, thereby contributing to the competitiveness of the interexchange market. We expect that a similar requirement for local exchange switchovers that require only a software change will similarly contribute to local exchange competition.

293. We reject the proposal by some incumbent LECs to define unbundled local switching as the facilities that provide a point of access to the switch, but that would not actually include switching functionality. Under this definition, the purchaser of the local switching element would not actually obtain the element itself, only the right to purchase local switching functionality and other switching features at wholesale rates. We believe that the unbundled local switching element must include the functionality of connecting lines and trunks. The definition proposed by these incumbent LECs would contravene the requirement in section 251(c)(3) that incumbent LECs provide network elements “in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.” If a competing provider combined its own loops and transport with the local switching element (“point of access”), it would be unable to provide telecommunications service without separately purchasing, at wholesale rates, switching functionality from the incumbent LEC.

294. We also disagree with the proposal to define local switching as a point of access plus basic switching functionality, but that would exclude vertical switching features. As a legal matter, this definition is inconsistent with the 1996 Act’s definition of “network element,” which includes all the “features, functionalities, and capabilities provided by means of such facility or equipment.” In addition, this definition would not fulfill the pro-competitive objectives of the 1996 Act as effectively as the per-line definition we adopt. A competitor that obtains basic and vertical switching features at cost-based rates will have maximum flexibility to distinguish its offerings from those of the incumbent LEC by developing a variety of service packages and pricing plans. Moreover, an upfront purchase of all local switching features may speed entry by simplifying practical issues such as the pricing of individual switching features.

295. We also address the impact on small incumbent LECs. For example, the Illinois Independent Telephone Association and the Rural Telephone Coalition favor rules that recognize the differences between larger and smaller LECs. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly provide for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors that purchase unbundled local switching. As noted by Rural Telephone Coalition and the Illinois Independent Telephone Coalition, this approach is necessary to accommodate the different technical capabilities of large and small carriers. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.

(ii) Tandem Switching

296. We also affirm our tentative conclusion in the NPRM that it is technically feasible for incumbent LECs to provide access to their tandem switches unbundled from interoffice transmission facilities. We note that some states already have required incumbent LECs to unbundle tandem switching. Parties do not contend, pursuant to section 251(d)(2)(A), that tandem switches are proprietary in nature. With regard to section 251(d)(2)(B), we find that competitors’ ability to provide telecommunications service would be impaired without unbundled access to tandem switching. Therefore, we find that the availability of unbundled tandem switching will ensure that competitors can deploy their own interoffice facilities and connect them to incumbent LECs’ tandem switches where it is efficient to do so.

297. We define the tandem switch element as including the facilities connecting the trunk distribution frames to the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching element also includes the functions that are centralized in tandems rather than in separate end office switches, such as call recording, the routing of calls to operator services, and signaling conversion functions.

(iii) Packet Switching

298. At this time, we decline to find, as requested by AT&T and MCI, that incumbent LECs’ packet switches should be identified as network elements. Because so few parties commented on the packet switches in connection with section 251(c)(3), the record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches.

3. Interoffice Transmission Facilities

(a) Background

299. In the NPRM, we proposed to require incumbent LECs to make available unbundled transport facilities in a manner that corresponds to the rate structure for interstate transport charges. We specifically proposed to require unbundled access to links between the end office and the serving wire center (SWC), the SWC and the IXC point of presence (POP), the end office and the tandem switch, and the tandem switch and the SWC. We also tentatively...
concluded that incumbent LECs should be required to unbundle channel termination facilities for special access from the interoffice facilities. In addition, we requested comment on whether and how other interoffice facilities used by incumbent LECs should be un unbundled.

(b) Discussion

300. We conclude that incumbent LECs must provide interoffice transmission facilities on an unbundled basis to requesting carriers. The record supports our conclusion that such access is technically feasible and would promote competition in the local exchange market. We note that the 1996 Act requires BOCs to unbundle transport facilities prior to entering the in-region, interLATA market.

301. We require incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch. Further, incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandem of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers. The incumbent LEC must also provide, to the extent discussed below, all technically feasible transmission capabilities, such as DS1, DS3, and Optical Carrier levels (e.g. OC-3/12/48/96) that the competing provider could use to provide telecommunications services. We conclude that an incumbent LEC may not limit the facilities to which such interoffice facilities are connected, provided such interconnection is technically feasible, or the use of such facilities. In general, this means that incumbent LECs must provide interoffice facilities between wire centers owned by incumbent LECs or requesting carriers, or between switches owned by incumbent LECs or requesting carriers. For example, an interoffice facility could be used by a competitor to connect to the incumbent LEC's switch or to the competitor's collocated equipment. We agree with the Texas Commission that a competitor should have the ability to use interoffice transmission facilities to connect loops directly to its switch. We anticipate that these requirements will reduce entry barriers into the local exchange market by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent LEC.

302. The ability of new entrants to purchase the interoffice facilities we have identified will increase the speed with which competitors enter the market. By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities. We recognize that there are alternative suppliers of interoffice facilities in certain areas. We are convinced, however, that the unbundling will be facilitated if competitors have greater, not fewer, options for procuring interoffice facilities as part of their local networks, and that Congress intended for competitors to have these options available from competitors. Thus, the rules we establish for the unbundled interoffice facilities should maximize a competitor's flexibility to use new technologies in combination with existing LEC facilities.

303. We find that it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements. The interconnection and unbundling arrangements among the larger LECs, IXC, and CAPs that resulted from our Expanded Interconnection rules confirm the technical feasibility of unbundling interoffice facilities used by incumbent LECs to provide special access and switched transport. As AT&T and Telecommunications Resellers Association point out, IXC currently interconnect with incumbent LEC's transport facilities pursuant to standard specifications. We also note that commenters do not identify technical feasibility problems with unbundling interoffice facilities.

304. We also find that it is technically feasible for incumbent LECs to unbundle certain interoffice facilities not addressed in our Expanded Interconnection proceeding. First, we conclude that an incumbent LEC must provide access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, where such interoffice facilities exist. This allows a new entrant to purchase unbundled facilities between two end offices of the incumbent LEC, or between the new entrant's switching office and the incumbent LEC's switching office. Although our Expanded Interconnection rules did not specifically require incumbent LECs to unbundle these facilities, commenters do not identify any potential technical problem with such unbundling. Moreover, some LECs already offer unbundled dedicated interoffice facilities, for example, between their end offices and SWCs for exchange access.

305. In addition, as a condition of offering unbundled interoffice facilities, we require incumbent LECs to provide requesting carriers with access to digital cross-connect system (DCS) functionality. A DCS aggregates and disaggregates high-speed traffic carried between IXC's POPs and incumbent LEC's switching offices, thereby facilitating the use of cost-efficient, high-speed interoffice facilities. AT&T notes that the BOCs, GTE, and other large LECs currently make DCS capabilities available for the termination of interexchange traffic. We find that the use of DCS functionality could facilitate competitors' deployment of high-speed interoffice facilities between their own networks and LECs' switching offices. Therefore, we require incumbent LECs to offer DCS capabilities in the same manner that they offer such capabilities to IXCs that purchase transport services.

306. We disagree with PacTel's assertion that it is not technically feasible for incumbent LECs to provide DCS functionality to competitors that purchase unbundled interoffice facilities. First, contrary to PacTel's assertion, we do not require incumbent LECs to develop new arrangements for the offering of DCS capabilities to competitors. We only require that DCS capabilities be made available to competitors to the extent incumbent LECs offer such capabilities to IXCs. Second, PacTel suggests the provision of DCS capabilities requires physical partitioning of the DCS equipment in order to prevent carriers from gaining control of each other's traffic. We do not require such partitioning for the provision of DCS capabilities. As noted above, we only require incumbent LECs to permit competitors to use DCS functionality in the same manner that incumbent LECs now permit IXCs to use such functionality.

Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are
proprietary in nature is necessary.” Commenters do not identify any proprietary concerns relating to the provision of interoffice facilities that LECs are required to unbundle. We also note that many of these facilities are also currently offered on an unbundled basis to competing carriers. Therefore, the record provides no basis for withholding these facilities from competitors based on proprietary considerations.

308. Section 251(d)(2)(B) requires the Commission to consider whether the failure to provide access to an unbundled element “would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” We have interpreted the term “impair” to mean either increased cost or decreased service quality that would result from using network elements other than the one sought. Certain commenters contend that unbundled access to these facilities would improve their ability to provide competitive local exchange and exchange access service. MCI, for example, argues that its inability to obtain unbundled access to trunks between an incumbent LEC’s end offices raises its cost of providing local service. Accordingly, we conclude that the section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities between the above-identified points in incumbent LECs’ networks, including facilities between incumbent LECs’ end offices, new entrant’s switching offices and LEC switching offices, and DCSS. We believe that access to these interoffice facilities will improve competitors’ ability to design efficient network architecture, and in particular, to combine their own switching functionality with the incumbent LEC’s unbundled loops.

309. We reject Cincinnati Bell’s argument that existing tariffs for transport and special access services filed pursuant to our Expanded Interconnection rules fulfill our obligation to implement the requirements of section 251(c). First, the Expanded Interconnection rules require the unbundling of interstate transport services only by Class A carriers whereas section 251(c) requires network unbundling by all incumbent LECs, except for carriers that are exempt under section 251(f) from our interconnection rules. Consequently, some non-Class A carriers that were not subject to our Expanded Interconnection requirements will be required to comply with the requirements of the Order. Second, we find that the Class A carriers’ existing tariffs for unbundled transport elements do not satisfy the unbundling requirement of section 251(c), as suggested by Cincinnati Bell, because such tariffs are only for interstate access services, not for unbundled interoffice facilities. As such, existing federal tariffs for transport and special access exclude intrastate transport, and therefore are not equivalent to unbundled interoffice facilities, which we have determined to be nonjurisdictional in nature.

310. We also disagree with MECO, GTE, and Ameritech that we should consider “pricing distortions” in adopting rules for unbundled interoffice facilities. Section, below, addresses the pricing of unbundled network elements identified pursuant to section 251(c)(3) as it relates to our current access charge rules. Nor are we persuaded by MECO’s argument that incumbent LECs not subject to the MFJ should not be required to unbundle transport facilities because, according to MECO, such facilities are unnecessary for local competition. As discussed above, the ability of a new entrant to obtain unbundled access to incumbent LECs’ interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor’s ability to provide competing telephone service.

311. We do not impose specific terms and conditions for the provision of unbundled interoffice facilities. We believe that the rules we establish in this Order for all unbundled network elements adequately address ALTS’s concern regarding the provisioning, billing, and maintenance of unbundled transport facilities. We also decline at this time to address the unbundling of incumbent LECs’ “dark fiber.” Parties that address this issue do not provide us with information on whether dark fiber qualifies as a network element under sections 251(c)(3) and 251(d)(2). Therefore, we lack a sufficient record on which to decide this issue. We will continue to review and revise our rules in this area as necessary.

312. Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.

4. Databases and Signaling Systems
   a. Background

313. In the NPRM, we tentatively concluded that incumbent LECs should be required to unbundle access to their signaling systems and databases as network elements. We asked commenters to identify points at which carriers interconnect with SS7 networks today, as well as the technical feasibility of establishing other points of access and interconnection. We also asked commenters to identify those signaling and database functions currently provided by incumbent LECs on an unbundled basis, and other functions not currently offered by incumbent LECs, that the parties believe should be offered on an unbundled basis.

314. In the NPRM, we noted the possibility that competitors that provide local exchange service using resold incumbent LEC services or unbundled elements might want to connect an alternative call processing database to the incumbent LEC’s SS7 network in order to offer services and features not available through the incumbent LEC’s own SS7 network databases.

315. We also sought comment on unbundling access to the Advanced Intelligent Network (AIN), and referenced our separate Intelligent Networks proceeding which deals with related issues. We sought comment on whether to unbundle access to AIN facilities and functionalities.

b. Signaling Network Technology

316. Signaling systems facilitate the routing of telephone calls between switches. Most LECs employ signaling networks that are physically separate from their voice networks, and these “out-of-band” signaling networks simultaneously carry signaling messages for multiple calls. In general, most LECs’ signaling networks adhere to a Bellcore standard Signaling System 7 (SS7) Protocol.

317. SS7 networks use signaling links to transmit routing messages between switches, and between switches and call-related databases. A typical SS7 network includes a signaling link, which transmits signaling information in packets, from a local switch to a signaling transfer point (STP), which is a high-capacity packet switch. The STP switches packets onto other links according to the address information contained in the packet. These additional links extend to other switches, databases, and STPs in the LEC’s network. A switch routing a call to another switch will initiate a series of signaling messages via signaling links.
through an STP to establish a call path on the voice network between the switches.

318. As mentioned above, the SS7 network also employs signaling links (via STPs) between switches and call-related databases, such as the Line Information Database (LIDB), Toll Free Calling (i.e., 800, 888 number) database, and AIN databases. These links enable a switch to send queries via the SS7 network to call-related databases, which return customer information or instructions for call routing to the switch.

319. From the perspective of a switch in a LEC network, the databases discussed above merely supply information or instructions. Updating or populating the information in such databases, however, takes place through a separate process involving different equipment. Carriers input information directly into a service management system (SMS), which in turn downloads such information into the individual databases.

320. The Advanced Intelligent Network (AIN) is a network architecture that uses distributed intelligence in centralized databases to control call processing and manage network information, rather than performing those functions at every switch. An AIN-capable switch halts call progress when a resident software "trigger" is activated, and uses the SS7 network to access intelligent databases, known as Service Control Points (SCPs), that contain service software and subscriber information, for instruction on how to route, monitor, or terminate the call. AIN is being used in the deployment of number portability, wireless roaming, and such advanced services as same number service (i.e., 500 number service) and voice recognition dialing. AIN services are designed and tested in an off-line computer known as a Service Creation Environment (SCE). Once a service is successfully tested, the software is transferred to an SMS that administers and supports SCP databases in the network. The SMS then regularly downloads software and information to an SCP where interaction with the voice network takes place via the signaling links and STPs discussed above.

b. Discussion

321. In the interconnection section above, we conclude that the exchange of signaling information between LECs necessary to exchange traffic and access call-related databases was included within the interconnection obligation of section 251(c)(2). We emphasize below, such exchange of signaling information does not include the exchange of AIN signaling information between networks for the purpose of providing AIN messages to the incumbent LEC's switch from a competitor's SCP database. Thus, notwithstanding any obligations under section 251(c)(3), incumbent LECs are required to accept and provide signaling in accordance with the exchange of traffic between interconnecting networks. We conclude that this exchange of signaling information may occur through an STP-to-STP interconnection.

(1) Signaling Links and STP

322. We conclude that incumbent LECs, upon request, must provide nondiscriminatory access to their signaling links and STPs on an unbundled basis. We believe it is technically feasible for incumbent LECs to provide such access, and that such access is critical to entry in the local exchange market. Furthermore, the 1996 Act requires BOCs to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" as a precondition for entry into in-region interLATA services. Thus, it appears that Congress contemplated the unbundling of signaling systems as network elements.

323. We conclude that access to unbundled signaling links and STPs is technically feasible. The majority of carriers, including incumbent LECs, agree that it is technically feasible to provide unbundled access to signaling links and STPs. Parties note that incumbent LECs and signaling aggregators already provide such access. In addition, several state commissions already require incumbent LECs to provide unbundled elements of SS7 networks. Because of the screening role played by the STP and associated network reliability concerns that were raised in the record, however, we do not require that incumbent LECs permit requesting carriers to link their own STPs directly to the incumbent's switch or call-related databases. We take a deliberately conservative approach here because of significant evidence in the record and we note that mere conclusory objections to technical feasibility would not alone be sufficient evidence.

324. Under section 251(d)(2)(A), the Commission must consider whether access to proprietary network elements is necessary. Commenters did not identify proprietary concerns with signaling protocols for the SS7 network. Moreover, in general, SS7 signaling network interworking is to Bellcore standards, rather then LEC-specific protocols and provide seamless interconnectivity between networks. Thus, we conclude that the unbundling of signaling links and STPs does not present proprietary concerns with respect to the incumbent LEC.

325. Under section 251(d)(2)(B), the Commission must consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Access to signaling systems continues to be a critical element to providing competing local exchange and exchange access service. The vast majority of calls made over incumbent LEC networks are set-up and controlled by separate signaling networks. Incumbent LECs argue that access to signaling systems and associated databases is already available from other providers and therefore, they should not have to unbundle them for access by competitors. As discussed above, section 251(d)(2)(B) only relieves an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality. Because alternative signaling methods, such as in-band signaling, would provide a lower quality of service, we conclude that a competitor's ability to provide service would be significantly impaired if it did not have access to incumbent LECs' unbundled signaling links and STPs.

326. The purchase of unbundled elements of the SS7 network gives the competitive provider the right to use those elements for signaling between its switches (including unbundled switching elements), between its switches and the incumbent LEC's switches, and between its switches and those third party networks with which the incumbent LEC's SS7 network is interconnected. When a competitive provider purchases unbundled switching from the incumbent LEC, the incumbent LEC must provide nondiscriminatory access to its SS7 network from that switch in the same manner in which it obtains such access itself. Carriers that provide their own switching facilities should be able to access the incumbent LEC's SS7 network for each of their switches via a signaling link between their switch and an incumbent LEC's STP. Competitive carriers should be able to make this connection in the same manner as an incumbent LEC connects one of its own switches to the STP. This could be accomplished by the incumbent providing an unbundled signaling link from its STP to the competitor's switch or by a competitor bringing a signaling link from a separate point.
link from its switch to the incumbent LEC's STP.

(2) Call-Related Databases

327. We conclude that incumbent LECs, upon request, must provide nondiscriminatory access on an unbundled basis to their call-related databases for the purpose of switch query and database response through the SS7 network. Query and response access to a call-related database is intended to require the incumbent LEC only to provide access to its call-related databases as is necessary to permit a competing provider's switch (including the use of unbundled switching) to access the call-related database functions supported by that database. The incumbent LEC may mediate or restrict access to that necessary for the competing provider to provide such services as are supported by the database. Thus, for example, we find that it is technically feasible for incumbent LECs to provide access to the Line Instrumentation Database (LIDB), the Toll Free Calling Database and Number Portability downstream databases. The vast majority of parties, including incumbent LECs, agree that it is technically feasible to provide access to the LIDB and the Toll Free Calling databases at an STP linked to the database. Several state commissions also report that they have ordered incumbent LECs to provide such access to the LIDB and the Toll Free Calling databases. We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database. We find that such access is critical to entry in the local exchange market.

328. We conclude that it is not technically feasible to unbundle the SCP from its associated STP. We note that the overwhelming majority of commenters contend that it is not technically feasible to access call-related databases in a manner other than by connection at the STP directly linked to the call-related database. Parties argue that the SCP is designed to provide mediation and screening functions for the SS7 network that are not performed at the switch or database. We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to call-related databases.

329. Several commenters also identified access to call-related databases used by the incumbent's AIN to be important for fair competition in the local market, and some state commissions have ordered incumbent LECs to provide access to AIN databases. We conclude that such access is technically feasible via an STP for those call-related databases used in the incumbent LEC's AIN. First, of course, when a new entrant purchases an incumbent's local switching element it is technically feasible for the new entrant to use the incumbent's SCP element in the same manner, and via the same signaling links, as the incumbent itself. Thus, we find no technical impediments in the record with regard to such access when a requesting carrier is also purchasing a local switching element associated with the AIN call-related database.

330. Further, we conclude that when a new entrant deploys its own switch, and links it to the incumbent LEC's signaling system, it is technically feasible for the incumbent to provide access to the incumbent's SCP to provide AIN-supported services to customers served by the new entrant's switch. Some SS7 network services resellers currently provide such access. Other potential AIN SCPs also present additional evidence supporting the technical feasibility of such access. Unlike the situation where a competitor's SCP would control the incumbent's switch (which is discussed below in section VI.C.4(c)(4)), in this scenario, the incumbent's SCP will respond to and control the competitor's switch, and potential competitors that have commented in the record do not express network reliability concerns with regard to such control. Further, like the switch at the incumbent's STP, the incumbent LEC's applications resident in an SCP are merely part of the overall software and hardware making up the SCP facility. Thus, carriers purchasing access under either scenario above may use the incumbent's service applications in addition to their own.

331. Although we conclude that access to incumbent AIN SCPs is technically feasible, we agree with BellSouth that such access may present the need for mediation mechanisms to, among other things, protect data in incumbent AIN SCPs and ensure against excessive traffic volumes. In addition, there may be mediation issues a competing carrier will need to address before requesting such access. Mediation may be necessary for requesting carriers to ensure that inadvertent feature interactions, network management control and customer privacy concerns do not arise from such access. Accordingly, if parties are unable to agree to appropriate mediation through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuse of the incumbent's AIN facilities. We encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns. Incumbent LECs may establish reasonable certification and testing programs for carriers proposing to access AIN call related databases in a manner similar to those used for SS7 certification.

332. We recognize that providing unbundled access to AIN call-related databases at cost, and in particular providing access to the incumbent LEC's software applications that reside in the AIN databases, may reduce the incumbent's incentive to develop new and advanced services using AIN. In the near term, however, requiring entrants to bear the cost of deploying a fully redundant network architecture, including AIN databases and their application software, would constitute a significant barrier to market entry for competitive carriers. As local service markets develop, however, competition may reduce the incumbent LEC's control over bottleneck facilities and increase the importance of innovation. In those circumstances it is important that incumbent LECs have the incentive to develop unique and innovative services supported by AIN. Therefore at a later date, we will revisit the proper balance between unbundled access and maintaining the incentives of incumbent LECs to innovate.

333. Parties generally do not identify proprietary concerns when access to call-related databases is provided via STPs. In general, signaling protocols used to access call-related databases adhere to open Bellcore standards. Parties also do not raise proprietary concerns with specific call-related databases themselves. Today, many separate carriers access incumbent LEC Toll Free Calling and LIDB databases for the proper routing and billing of calls. Thus, we conclude that, in general, unbundled access to call-related databases does not present proprietary concerns with respect to section 251(d)(2)(A). Incumbent LECs may, however, present such proprietary concerns in the arbitration process with regard to specific databases, and states (or the Commission acting pursuant to section 252(e)(5)) may take action to limit unnecessary access to proprietary information.

334. We also conclude that denying access to call-related databases would
impair the ability of a competing provider to offer services such as Alternative Billing Services and AIN-based services. AIN-based services represent the cutting edge of telephone exchange services, and competitors would be at a significant disadvantage if they were forced to develop their own AIN capability immediately. In addition, the record indicates that deployment of call-related databases in the near term would represent a substantial cost to new entrants. As mentioned above, incumbent LECs argue that access to certain call-related databases is already competitively available and therefore they should not have to unbundled access to them. As discussed above, however, section 251(d)(2)(B) would only relieve an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality.

Because of the absence of such elements, we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to incumbent LECs' call-related databases, including the LIDB, Toll Free Calling, and SMS. We also conclude that access to call-related databases as discussed above, and access to the service management system discussed below, must be provided to, and obtained by, requesting carriers in a manner that complies with section 222 of the Act.

Section 222, which was effective upon adoption, sets out requirements for privacy of customer information. Section 222(a) provides that all telecommunications carriers have a duty to protect the confidentiality of proprietary information of other carriers, including resellers, equipment manufacturers, and customers. Section 222(b) requires that telecommunications carriers that use proprietary information obtained from another telecommunications carrier in providing any telecommunications service "shall use that information only for such purpose, and shall not use such information for its own marketing purposes." Sections 222 (c) and (d) provide protection for, and limitations on the use of, and access to, customer proprietary network information (CPNI). We note that we have initiated a proceeding to clarify the obligations of carriers with regard to sections 222 (c) and (d).

(3) Service Management Systems

336. Finally, we conclude that incumbent LECs should provide access, on an unbundled basis, to the service management systems (SMS), which allow competitors to create, modify, or update information in call-related databases. We believe it is technically feasible for incumbent LECs to provide access to the SMS in the same manner and method that they provide for their own access. We find that such access is necessary for competitors to effectively use call-related databases, which we have already found to be critical to entry in the local exchange market.

337. Commenters argue that they need equal access to incumbent LECs' SMSs to write or populate their own information in call-related databases. As discussed above, the information bound for many call-related databases is already competitively available.

We find that competing provider access to the SMS is technically feasible if it is provided in the same or equivalent manner that the incumbent LEC currently uses to provide such access to itself. For example, if the incumbent LEC inputs information into the SMS using magnetic tapes, the competitive carrier must be able to create and submit magnetic tapes for the incumbent to input into the SMS in the same way the incumbent inputs its own magnetic tapes. If the incumbent accesses the SMS through an electronic interface, the competitive carrier should be able to access the SMS through an equivalent electronic interface. We further conclude that, whatever method is used, the incumbent LEC must provide the competing carrier with the information necessary to correctly enter or format for entry the information relevant for input into the particular incumbent LEC SMS.

338. Specifically with respect to AIN, we find that the record in the Intelligent Networks proceeding supports access to the SMS. A competing carrier seeking access to the SMS that is part of the incumbent LEC's AIN would do so through the incumbent LEC's service creation environment (SCE), an interface used to design, create, and test AIN supported services. Software successfully tested in the SCE is transferred to the SMS, where it is then downloaded into an SCP database for active deployment on the network. We are persuaded that the risk of harm to the public switched network from such access to the SMS is minimized by the technical safeguards inherent in the SCE and SMS. As described in comments filed in the Intelligent Networks docket, competitors accessing the SCE and SMS would not communicate directly with the LEC's database or switch. We therefore conclude that such access is technically feasible, and that incumbent LECs should provide requesting carriers with the same access to design, create, test, and deploy AIN-based services at the SMS that the incumbent LEC provides for itself. While many incumbent LECs express concerns with the technical feasibility of access to AIN, we conclude that those concerns deal primarily with the interconnection of third party AIN SCP databases to the incumbent LEC's AIN and not access to the SCE and SMS.

339. We recognize that, although technically feasible, providing nondiscriminatory access to the SMS and SCE for the creation and deployment of AIN services may require some modifications, including appropriate mediation, to accommodate such access by requesting carriers. We note that BellSouth is currently prepared to tariff and offer such access to third parties, and other incumbent LECs, including Bell Atlantic and Ameritech, indicate that they have made significant progress towards implementing such access. Therefore, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be technically feasible, provide adequate protection against intentional or unintentional misuses of the incumbent's AIN facilities. We again encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns.

340. Parties did identify some proprietary concerns regarding access to the SCE and SMS used in the incumbent LEC's AIN. Some incumbent LECs contend that the interface used at the SCE is proprietary in nature. GVNW argues that specific AIN-based services designed by carriers should be proprietary in nature. Competitors correctly argue that AIN can be used, not only for telecommunication services traditionally supported by the switch, but as a means to deploy advanced services not otherwise possible. We find that competing providers without access to AIN would be at a significant disadvantage to incumbent LECs, because they could not necessarily offer service to all the classes of carrier that the incumbent could. This access will help competing providers without imposing costs on incumbent
LEC's because the entrants will pay the cost. We therefore conclude, under section 251(d)(2)(A), that access to AIN, including those elements that may be proprietary, is necessary for successful entry into the local service market.

341. Most parties generally did not identify proprietary concerns with access to those SMS's used other than for AIN. Some parties, however, argue that there are proprietary interfaces used to enter information into various databases. Competing carriers counter that competitive providers would not need to have direct access to the proprietary methods of data entry used by incumbent LEC's, and as a result we conclude that the unbundled access to SMS's used for other than for AIN does not present proprietary concerns with respect to section 251(d)(2)(A).

342. We also conclude that unbundled access to all SMS's is necessary for a competing provider to effectively use unbundled call-related databases. We find that the inability of competitors to use the SMS's in the same manner that an incumbent LEC uses to input data itself would impair the ability of a competing carrier to effectively offer services to its customers using unbundled call-related databases. Commenters in the record point out that access to call-related databases alone would not allow the competing carrier to provide such services to its customers without access to an SMS. We also conclude that AIN-based services are important to a new entrant's ability to compete effectively for customers with the incumbent LEC, and in developing new business by introducing new AIN based services. Thus we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to an incumbent LEC's SMS, including access to the SMS's used to input data to the LIDB, Toll Free Calling, Number Portability and AIN call-related databases.

343. We reject the contention by several incumbent LEC's that signaling and database access was meant by the 1996 Act to apply only to such access as is necessary for call routing and completion. Although the competitive checklist for BOC entry into in-region interLATA services under section 271 requires "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" the definition of a network element is more comprehensive in scope. A network element as defined by the 1996 Act includes "databases and associated signaling facilities sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." We find that the inclusion of "other provision of a telecommunications service" meant Congress intended the unbundling of databases to be read broadly and could include databases beyond those directly used in the transmission or routing of a telecommunications service.

344. We find that there is not enough evidence in the record to make a determination as to the technical feasibility of interconnection of third party call-related databases to the incumbent LEC's signaling system. Some parties argue that such interconnection, including the interconnection of third party AIN SCP databases, would allow them to provide more efficient or advanced call processing and services to customers, thereby increasing their ability to compete with the incumbent LEC. AT&T and MCI specifically argue that it would not be technically feasible for them to interconnect their AIN SCP database to an incumbent LEC's AIN for the purpose of providing call processing instructions to the incumbent LEC's switch. Incumbent LEC's contend that such interconnection would leave their switch vulnerable to a multitude of potential harms because sufficient mediation for such interconnection does not currently exist at the STP or SCP and has not yet been developed. AT&T counters that there is no need for additional mediation and that sufficient certification and testing of AIN based services before deployment in such a fashion is technically feasible.

345. At this time, in view of this record and the record compiled in the Intelligent Networks docket, we cannot make a determination of the technical feasibility of such interconnection. We do, however, believe that state commissions could find such an arrangement to be technically feasible and we do not intend to preempt such an order through these rules. The Illinois Commission recently ordered access to incumbent LEC's AIN that does allow for this type of interconnection. We intend to address this issue early in 1997, either in the IN docket or in a subsequent phase of this proceeding, taking into account, inter alia, any relevant decisions of state commissions.

346. We also address the impact on small incumbent LEC's. For example, GVNW asserts that any national rule requiring this form of interconnection would force many incumbent LEC's to make uneconomic upgrades of their switches in order to accommodate it. We have considered the economic impact of our rules in this section on small incumbent LEC's. Accordingly, we have not adopted any national standards concerning AIN at this time. We also note that section 251(f) provides relief for certain small LEC's from our regulations implementing section 251.

5. Operation Support Systems

a. Background

347. We sought comment, in the NPRM, on whether national requirements for electronic ordering interfaces would reduce the time and resources required for new entrants to enter and compete in regional markets. We also sought comment on the unbundling of databases generally in our discussion on unbundling database and signaling systems.

b. Discussion

348. We conclude that operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 251(c)(3), as discussed below. Congress included in the definition of "network element" the terms "databases" and "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." We believe that the inclusion of these terms in the definition of "network element" is a recognition that the massive operations support systems employed by incumbent LEC's, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LEC's can market, order, provision, and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."

349. Nondiscriminatory access to operations support systems functions can be viewed in at least three ways. First, operations support systems themselves can be characterized as "databases" or "facilities used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilities." Second, the information contained in, and processed by operations support systems can be classified as...
“Information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.” Third, nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a “term or condition” of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions.

350. Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, interalia, available telephone numbers, service interval information, and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier’s ability to provision and offer competing services to incumbent LEC customers. Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.

351. As noted in the comments above, several state commissions have ordered real-time access or have ongoing proceedings working to develop and implement it within their jurisdictions. The New York Commission, building on its pioneering experience with the Rochester Telephone “Open Market Plan,” has facilitated a working group on electronic interfaces comprised of both incumbent LECs and potential competitors. The New York Commission focused on the issues in response to the frustrations and concerns of resellers in the Rochester market. In particular, AT&T alleged that it was “severely disadvantaged due to the fact that [Rochester Telephone] has failed to provide procedures for resellers to access their databases for on-line queries needed to perform basic service functions [such as] scheduling customer appointments.” The New York Commission has concluded that wherever possible NYNEX will provide new entrants with real-time electronic access to its systems. As another example, the Georgia Commission recently ordered BellSouth to provide electronic interfaces such that resellers have the same access to operations support systems and informational databases as BellSouth does, including interfaces for pre-ordering, ordering and provisioning, service trouble reporting, and customer daily usage. In testimony before the Georgia Commission, a BellSouth witness acknowledged that “[n]o one is happy, believe me, with a system that is not fully electronic.” As noted above, Georgia ordered BellSouth to establish these interfaces within two months of its order (by July 15, 1996), but recently extended the deadline an additional month (to August 15th). Both the Illinois and Indiana Commissions ordered incumbent LECs immediately to provide to competitors access to operational interfaces at parity with those provided to their own retail customers, or submit plans with specific timetables for achieving such access. Several other states have passed laws or adopted rules ordering incumbent LECs to provide interfaces for access equal to that which the LECs provide itself. We recognize the lead taken by these states and others, and we generally rely upon their conclusions in this Order.

352. We conclude that providing nondiscriminatory access to operations support systems functions is technically feasible. Incumbent LECs today provide IXCs with different types of electronic ordering or trouble interfaces that demonstrate the feasibility of such access, and perhaps also provide a basis for adapting such interfaces for use between local service providers. Further, as discussed above, several incumbent LECs, including NYNEX and Bell Atlantic, are already testing and operating interfaces that support limited functions, and are developing the interfaces to support access to the remaining functions identified by most potential competitors. Some incumbent LECs acknowledge that nondiscriminatory access to operations support systems functions is technically feasible. Finally, several industry groups are actively establishing standards for inter-telecommunications company transactions.

353. Section 251(d)(2)(A) requires the Commission to consider whether “access to such network elements as are proprietary in nature is necessary.” Incumbent LECs argue that there are proprietary interfaces used to access these databases and information. Parties seeking to compete with incumbent LECs counter that access to such databases and information is vitally important to the ability to broadly compete with the incumbent. As discussed above, competitors also argue that such access is necessary to order, provision, and maintain unbundled network elements and resold services, and to market competing services effectively to an incumbent LEC’s customers. We find that it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market.

354. Section 251(d)(2)(B) requires the Commission to consider whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” As mentioned above, parties identified access to operations support systems functions as critical to the provision of local service. We find that such operations support systems functions are essential to the ability of competitors to provide services in a fully competitive local service market. Therefore, we conclude that competitors’ ability to provide service successfully would be significantly impaired if they did not have access to incumbent LECs’ operations support systems functions.

355. We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions as pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. We adopt the definition of these terms as set forth in the AT&T-Bell Atlantic Joint Ex Parte as the minimum necessary for our requirements. We note, however, that individual incumbent LEC’s operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the inter-telecommunications company.
any internal gateway systems the incumbent employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.

356. We recognize that, although technically feasible, providing nondiscriminatory access to operations support systems functions may require some modifications to existing systems necessary to accommodate such access by competing providers. Although, as discussed above, many incumbent LECs are actively developing these systems, even the largest and most advanced incumbent LECs have not completed interfaces that provide such access to all of their support systems functions. State commissions such as Georgia, Illinois, and Indiana, however, have ordered that such access be made available to requesting carriers in the near term. As a practical matter, the interfaces developed by incumbents to accommodate nondiscriminatory access will likely provide such access for services and elements beyond a particular state's boundaries, and thus we believe that requirements for such access by a small number of states representing a cross-section of the country will quickly lead to incumbents providing access in all regions.

357. In all cases, however, we conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements under section 251(c)(3) and resold services under section 251(c)(4). Incumbent LECs that currently do not comply with this requirement of section 251(c)(3) must do so as expeditiously as possible, but in any event no later than January 1, 1997. We believe that the record demonstrates that incumbent LECs and several national standards-setting organizations have made significant progress in developing such access. This progress is also reflected in a number of states requiring incumbent LECs to provide access to these transactional functions in the near term. Thus, we believe that it is reasonable to expect that by January 1, 1997, new entrants will be able to compete for end user customers by obtaining nondiscriminatory access to operations support systems functions.

358. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC urges us to recognize the differences between carriers in regards to computerized network administration and operational interfaces. Our requirement of nondiscriminatory access to operations support systems recognizes that different incumbent LECs possess different existing systems. We also note, however, that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations implementing section 251.

359. Ideally, each incumbent LEC would provide access to support systems through a nationally standardized gateway. Such national standards would eliminate the need for new entrants to develop multiple interface systems, one for each incumbent. We believe that the progress made by standards-setting organizations to date evidences a strong national movement toward such a uniform standard. For example, both AT&T and Bell Atlantic agree that, given appropriate guidance from the Commission, the industry can achieve consensus on national standards such that within 12 months 95% of all telecommunications company transactions may be processed via nationally standardized electronic gateways.

360. In order to ensure continued progress in establishing national standards, we propose to monitor closely the progress of industry organizations as they implement the rules adopted in this proceeding. Depending upon the progress made, we will make a determination in the near future as to whether our obligations under the 1996 Act require us to issue a separate notice of proposed rulemaking or take other action to guide industry efforts at arriving at appropriate national standards for access to operations support systems.

6. Other Network Elements

a. Background

361. In the NPRM, we requested comment on other network elements the Commission should require incumbent LECs to unbundle. We tentatively concluded that “subscriber numbers” and “operator call completion services” should be unbundled. We also, under our discussion of section 251(b)(3), sought comment on nondiscriminatory access to telephone numbers, operator services, and directory assistance.

b. Discussion

(1) Operator Services and Directory Assistance

362. We conclude that incumbent LECs are under the same duty to permit competing carriers nondiscriminatory access to operator services and directory assistance as all LECs are under section 251(b)(3). We further conclude that, if a carrier requests an incumbent LEC to unbundle the facilities and functionalities providing operator services and directory assistance as separate network elements, the incumbent LEC must provide the competing provider with nondiscriminatory access to such facilities and functionalities at any technically feasible point. We believe that these facilities and functionalities are important to facilitate competition in the local exchange market. Further, the 1996 Act imposes upon BOCs, as a condition of entry into in-region interLATA services the duty to provide nondiscriminatory access to directory assistance services and operator call completion services. We therefore conclude that unbundling facilities and functionalities providing operator services and directory assistance is consistent with the intent of Congress.

363. As discussed in our section on nondiscriminatory access under section 251(b)(3), the provision of nondiscriminatory access to operator services and directory assistance must conform to the requirements of section 222, which restricts carrier's use of CPNI. In particular, access to directory assistance and underlying directory information does not require incumbent LECs to provide access to unlisted or unpublished telephone numbers, or other information that the incumbent LEC's customer has requested the LEC not to make available. In conforming to section 222, we anticipate that incumbent LECs will provide such access in a manner that will protect against the inadvertent release of unlisted customer names and numbers.

364. We note that several competitors advocate unbundling the facilities and functionalities providing operator services and directory assistance from particular resold services or the unbundled local switching element, so that a competing provider can provide these services to its customers supported by its own systems rather than those of the incumbent LEC. Some incumbent LECs argue that such unbundling, however, is not technically feasible because of their inability to...
route individual end user calls to multiple systems. We find that unbundling both the facilities and functionalities providing operator services and directory assistance as separate network elements will be beneficial to competition and will aid the ability of competing providers to differentiate their service from the incumbent LECs. We also note that the Illinois Commission has recently ordered such access. We therefore find that incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible. As discussed above in our section on unbundled switching, we require incumbent LECs, to the extent technically feasible, to provide customized routing, which would include such routing to a competitor's operator services or directory assistance platform.

365. We also note that some commenters seek access to operator services and directory assistance in order to serve their own customers. Some of these parties argue that nondiscriminatory access to such network elements requires incumbent LECs to provide rebranded operator call completion services and directory assistance to the competing carrier's customers. Incumbent LECs argue that the provision of these services on an unbundled or rebranded basis is not technically feasible because of their inability to provide operator services or directory assistance platforms to identify the carrier serving the end user. As we concluded in our discussion on section 251(b)(3), we find that incumbent LECs must permit nondiscriminatory access to both operator services and directory assistance in the same manner required of all LECs. We make no finding on the technical feasibility of providing branded or unbundled service to competitors based on the record before us. We note, however, that the Illinois Commission has ordered incumbent LECs to provide rebranded operator call completion services and directory assistance to requesting competitive carriers.

366. As discussed above, incumbent LECs must provide access to databases as unbundled network elements. We find that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent LECs. A request for access by a competing provider. In particular, the directory assistance database must be unbundled for access by requesting carriers. Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such a database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information. We clarify, however, that the entry of a competitor's customer information into an incumbent LEC's directory assistance database can be mediated by the incumbent LEC to prevent unauthorized use of the database. We find that the arrangement ordered by the California Commission concerning the shared use of such a database by Pacific Bell and GTE is one possible method of providing such access.

367. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary." Parties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance. Incumbent LECs generally did not claim a proprietary interest in their directory assistance databases. Many parties contend that proprietary interests leading to restrictions on use or sharing of such database information would injure their ability to compete effectively for local service. For the reasons described above, we find that access to the systems supporting both operator call completion services and directory assistance is necessary for new entrants to provide competing local exchange service.

368. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Parties identified access to operator call completion services and directory assistance as critical to the provision of local service. Therefore we conclude that competitors' ability to provide the service would be significantly impaired if they did not have access to incumbent LEC's operator call completion services and directory assistance.

(2) Subscriber Numbers

369. Some commenters argue that the Commission should require incumbent LECs to unbundled access to subscriber numbers. We conclude that no Commission action under section 251(b)(3) is required at this time to ensure access to directory assistance from resold services and other unbundled network elements. We therefore find that there is no need to require access to subscriber numbers. Issues regarding access to subscriber numbers will be addressed by our implementation of section 251(e).

VI. Methods of Obtaining Interconnection and Access to Unbundled Elements

370. In this section, we address the means of achieving interconnection and access to unbundled network elements that incumbent LECs are required to make available to requesting carriers.

A. Overview

371. Section 251(c)(2) requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier." Section 251(c)(6) imposes upon incumbent LECs "the duty to provide * * * for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [LEC], except that the carrier may provide for virtual collocation where:"

1. Background

372. Section 251(c)(2) requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier." Section 251(c)(6) imposes upon incumbent LECs "the duty to provide * * * for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [LEC], except that the carrier may provide for virtual collocation where:"
definitions of physical and virtual collocation.

2. Discussion

372. We conclude that, under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements.

373. Physical and virtual collocation are the only methods of interconnection or access specifically addressed in section 251. Under section 251(c)(6), incumbent LECs are under a duty to provide physical collocation of equipment necessary for interconnection unless the LEC can demonstrate that physical collocation is not practical for technical reasons or because of limitations. In that event, the incumbent LEC is still obligated to provide virtual collocation of interconnection equipment. Under section 251, the only limitation on an incumbent LEC's duty to provide interconnection or access to unbundled elements at any technically feasible point is addressed in section 251(c)(6) regarding physical collocation. Unless a LEC can establish that the specific technical or space limitations in subsection (c)(6) are met with respect to physical collocation, we conclude that incumbent LECs must provide for any technically feasible method of interconnection or access requested by a competing carrier, including physical collocation. If, for example, we interpreted section 251(c)(6) to limit the means of interconnection available to requesting carriers to physical and virtual collocation, the requirement in section 251(c)(2) that interconnection be made available “at any technically feasible point” would be narrowed dramatically to mean that interconnection was required only at points where it was technically feasible to collocate equipment. We are not persuaded that Congress intended to limit interconnection points to locations only where collocation is possible.

374. Section 251(c)(6) provides the Commission with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements. Such authority was previously found lacking by the U.S. Court of Appeals for the D.C. Circuit in Atlantic v. Bell Atlantic v. FCC, Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic v. FCC), which was decided prior to enactment of the 1996 Act. While section 251(c)(6) limits an incumbent LEC’s duty to provide physical collocation in certain circumstances, we find that it does not limit our authority to require, under sections 251(c)(2) and (c)(3), the provision of virtual collocation. We note that under our Expanded Interconnection rules, that were amended subsequent to the Bell Atlantic decision, competitive entrants using physical collocation were required by many incumbent LECs to convert to virtual collocation. If the Commission concluded that subsection (c)(6) places a limitation on our authority to require virtual collocation, competitive providers would be required to undertake costly and burdensome actions to convert back to physical collocation even if they were satisfied with existing virtual collocation arrangements. We conclude that Congress did not intend to impose such a burden on requesting carriers that wish to continue to use virtual collocation for purposes of section 251(c). Further, the record indicates that this requirement would be costly and would delay competition. In short, we conclude that, in enacting section 251(c)(6), Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them. 375. We also conclude that requiring incumbent LECs to provide virtual collocation and other technically feasible methods of interconnection or access to unbundled elements is consistent with our desire to facilitate entry into the local telephone market by competitive carriers. In certain circumstances, competitive carriers may find, for example, that virtual collocation is less costly or more efficient than physical collocation. We believe that this may be particularly true for small carriers which lack the financial resources to physically collocate equipment in a large number of incumbent LEC premises. Moreover, since requesting carriers will bear the costs of other methods of interconnection or access, this approach will not impose an undue burden on the incumbent LECs.

376. Consistent with this view, other methods of technically feasible interconnection or access to incumbent LEC networks, such as meet point arrangements, in addition to virtual and physical collocation, must be available to new entrants upon request. See Teleport comments at 26–30; see also Washington Utilities and Transportation Commission, Filing No. WA File No. 14–5500 (Teleport Decision) at 25 (Washington Utilities and Transportation Commission Intervenor’s Brief); Intervenor’s Brief (Metro Access Transmission Services, Inc., Public Utility Commission of Oregon, Inc., and MCI Metro Access Transmission Services, Inc., Public Utility Commission of Oregon Order, Order No. 96–021, (Oregon Commission Jan. 12, 1996), at 86–88; Rules for Telecommunications Interconnection and Unbundling, Arizona Corporation Commission Order, Decision No. 59483, (Arizona Commission Jan. 11, 1996), Proposed Rule R14–2–1303 (Attachment E thereto). Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. The Michigan Commission recently required Ameritech to provide meet point interconnection. Michigan Public Service Commission, Case No. U–10860 (Michigan June 5, 1996) at 18 n.4. Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the “point” of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on “the local exchange carrier’s network” (e.g., main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection. In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant’s network and will be undertaken by the new entrant network provider in the new entrant’s network to another. We conclude that in a section 251(c)(3)
access situation, the new entrant should pay all of the economic costs of a meet point arrangement. Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.

Finally, in accordance with our interpretation of the term "technically feasible," we conclude that, if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Moreover, because the obligation of incumbent LECs to provide interconnection or access to unbundled elements by any technically feasible means arises from sections 251(c)(2) and 251(c)(3), we conclude that incumbent LECs bear the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point.

B. Collocation
1. Collocation Standards
a. Adoption of National Standards
(1) Background

378. In the NPRM we tentatively concluded that we should adopt national rules for virtual and physical collocation. This tentative conclusion was based on the belief that national standards would help to speed the development of competition. We also sought comment on specific national standards that we might adopt, and on whether any specific state approaches would serve as an appropriate model.

(2) Discussion

379. We conclude that we should adopt explicit national rules to implement the collocation requirements of the 1996 Act. We find that specific rules defining minimum requirements for nondiscriminatory collocation arrangements will remove barriers to entry by potential competitors and speed the development of competition. Our experience in the Expanded Interconnection proceeding indicates that incumbent LECs have an economic incentive to interpret regulatory ambiguities to delay entry by new competitors. Our review of the LECs' initial physical and virtual collocation tariffs raised significant concerns regarding the implementation of our Expanded Interconnection requirements and resulted in the designation of numerous issues for investigation. The Commission has not yet reached decisions on most of these issues, though it has found that certain rates for virtual collocation were unlawful. We and the states should therefore adopt, to the extent possible, specific and detailed collocation rules. We find, however, that states should have flexibility to apply additional collocation requirements that are otherwise consistent with the 1996 Act and our implementing regulations.

b. Adoption of Expanded Interconnection Terms and Conditions for Physical and Virtual Collocation Under Section 251

(1) Background

380. In our Expanded Interconnection proceeding, we required LECs to offer expanded interconnection to all interested parties, which allowed competitors and end users to terminate their own special access and switched transport access transmission facilities at LEC central offices. Expanded Interconnection with Local Telephone Company Facilities, First Report and Order, 57 FR 54323 (November 18, 1992) (Special Access Order), vacated in part and remanded, Bell Atlantic, 24 F.3d 1441 (1994); First Reconsideration, 57 FR 62481 (December 31, 1992); vacated in part and remanded, Bell Atlantic, 24 F.3d 1441 (1994); Second Reconsideration, 58 FR 48752 (September 17, 1993); Second Report and Order, 58 FR 48756 (September 17, 1993) (Switched Transport Order), vacated in part and remanded, Bell Atlantic Telephone Cos., v. FCC, 24 F.3d 1441; Remand Order, 9 FCC Rcd 5154 (1994) (Virtual Collocation Order), remanded for consideration of 1996 Act, Pacific Bell, et al. v. FCC, 81 F.3d 1147 (1996) (collectively referred to as Expanded Interconnection). Interstate access is a service traditionally provided by local telephone companies and enables IXCs and other customers to originate and terminate interstate telephone traffic. Special access is a form of interstate access that uses dedicated transmission lines between two points, without switching the traffic on those lines. Switched transport is another form of interstate access comprising the transmission of traffic between interexchange carriers' (or other customers') points of presence and local telephone companies' end offices, where the traffic is switched and routed to end users. We required Tier 1 LECs to offer physical collocation, with the interconnecting party paying the LEC for central office floor space. (Tier 1 LECs are local exchange carriers having $100 million or more in "total company annual regulated revenues."

Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990). We required that LECs provide space to interested parties on a first-come first-served basis, and that they provide virtual collocation when space for physical collocation is exhausted. Under virtual collocation, interconnectors are allowed to designate central office transmission equipment dedicated to their use, as well as to monitor and control their circuits terminating in the LEC central office. Interconnectors, however, do not pay for the incumbent's floor space under virtual collocation arrangements and have no right to enter the LEC central office. Under our virtual collocation requirements, LECs must install, maintain, and repair interconnector-designated equipment under the same intervals and with the same or better failure rates for the performance of similar functions for comparable LEC equipment.

381. In the Expanded Interconnection proceeding, we required the LECs to file tariffs to implement our virtual and physical collocation requirements. Our initial review of the LECs' tariffs raised significant concerns regarding the LECs' provision of physical and virtual collocation. Consequently, the Bureau partially suspended the rates proposed by many of the LECs and allowed these rates to take effect subject to investigation and an accounting order.

382. In 1994, the U.S. Court of Appeals for the District of Columbia Circuit found that the FCC lacked the authority under section 201 of the 1934 Communications Act to require physical collocation and remanded all other issues to the Commission. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1996). As discussed below, we find that the 1996 Act does not supplant or otherwise alter our Expanded Interconnection rules for interstate interconnection services provided pursuant to section 201 of the Communications Act. In the 1996 Act, Congress specifically directed
incumbent LECs to provide physical collocation for interconnection and access to unbundled network elements, absent technical or space constraints, pursuant to section 251(c)(6) of the Communications Act.

383. We sought comment in the NPRM on whether, for purposes of implementing physical and virtual collocation under section 251, we should readopt the standards set out in our Expanded Interconnection proceeding and, if so, how to adapt those standards to reflect the new statutory requirements and other policy considerations of the 1996 Act.

(2) Discussion

384. We conclude that we should adopt the existing Expanded Interconnection requirements, with some modifications, as the rules applicable for collocation under section 251. Those rules were established on the basis of an extensive record in the Expanded Interconnection proceeding, and are largely consistent with the requirements of section 251(c)(6). Adoption of those requirements for purposes of collocation under section 251, moreover, has substantial support in the record of this proceeding. Thus, the standards established for physical and virtual collocation in our Expanded Interconnection proceeding will generally apply to collocation under section 251. The most significant requirements of Expanded Interconnection are specifically set out in rules we adopt here. We address pricing and rate structure issues separately, in section VII below.

385. We find, however, that certain modifications to our Expanded Interconnection requirements are necessary to account for specific provisions of section 251(c)(6) and service arrangements that differ from those contemplated in our Expanded Interconnection orders. For example, the Expanded Interconnection requirements apply to Tier 1 LECs that are not NECA pool members, and section 251 applies to “incumbent LECs,” though there is an exemption for certain rural carriers. Expanded Interconnection also allows end-users to interconnect their equipment, while section 251 requires that interconnection and access to unbundled network elements be provided to “any requesting telecommunications carrier.” Accordingly, we set forth below several modifications to the terms and conditions for collocation as they are described in our Expanded Interconnection orders for application in implementing section 251. We believe that, in light of the expedited statutory time frame for this rulemaking and limited record addressing the specific terms and conditions for collocation under section 251 in this proceeding, it would be impractical and imprudent to develop a large number of new substantive collocation requirements in this order. We may consider the need for additional or different requirements in a subsequent proceeding, if we determine that such action is warranted.

386. The most significant difference between the Expanded Interconnection rules and the collocation rules we adopt to implement the 1996 Act concerns the collocation tariffing requirement. As discussed below, the 1996 Act does not require that collocation be federally tariffed. We thus do not adopt, under section 251, the Expanded Interconnection tariffing requirements originally adopted under section 201 for physical and virtual collocation. The existing tariffing requirements of Expanded Interconnection for interstate special access and switched transport will continue to apply for use by customers that wish to subscribe to those interstate services.

387. We reject SBC’s contention that we may not adopt any terms and conditions in this proceeding that differ from those in the Expanded Interconnection proceeding. SBC argues that Congress intended, in section 251(c)(6), to use the term “physical collocation” as a term of art, and thereby to adopt wholesale the terms and conditions for physical collocation that the Commission adopted in the Expanded Interconnection proceeding. A variety of terms and conditions for physical collocation are possible and section 251(c)(6) makes no reference to the Commission’s decisions on these issues in the Expanded Interconnection proceeding. If Congress had intended to readopt those rules wholesale without permitting the Commission any flexibility in the matter, we believe that Congress would have been more explicit rather than merely using the phrase “physical collocation.” Thus, we believe that we can and should modify our preexisting standards, as set forth below, for purposes of implementing the provisions of section 251(c)(6). In the following sections (c.-i.) we address comments filed by interested parties concerning application of our existing Expanded Interconnection requirements for purposes of collocation under section 251. (In a number of instances, we decline to adopt proposals for modifications to our Expanded Interconnection requirements.)

388. Finally, our experience reviewing the tariffs that incumbent LECs filed to implement our requirements for physical and virtual collocation suggests that rates, terms, and conditions under which incumbent LECs propose to provide these arrangements pursuant to section 251(c)(6) bear close scrutiny. We strongly urge state commissions to be vigilant in their review of such arrangements. Some areas of our investigations have found problematic in the past include channel assignment, letters of agency, charges for repeaters, and placement of point-of-termination bays. We will review this issue and revise our requirements as necessary.

c. The Meaning of the Term “Premises”

(1) Background

389. In the Expanded Interconnection proceeding, we required collocation at end offices, serving wire centers, and tandem switches, as well as at remote distribution nodes and any other points that the LEC treats as a “rating point.” A rating point is a point used in calculating the length of interoffice special access links. Section 251(c)(6) requires physical collocation “at the premises of the local exchange carrier.” In the NPRM, we tentatively concluded that the term “premises” includes, in addition to LEC central offices and tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We sought comment on whether structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures, should be deemed to be LEC “premises.”

(2) Discussion

390. The 1996 Act does not address the definition of premises, nor is the term discussed in the legislative history. Therefore, we look to the purposes of the 1996 Act and general uses of the term “premises” in other contexts in order to define this term for purposes of section 251(c)(6). The term “premises” is defined in varying ways, according to the context in which it is used. In light of the 1996 Act’s procompetitive purposes, we find that a broad definition of the term “premises” is appropriate in order to permit new entrants to collocate at a broad range of points under the incumbent LEC’s control. A broad definition will allow collocation at points other than those specified for collocation under the existing Expanded Interconnection requirements. We find that this result is
appropriate because the purposes of physical and virtual collocation under section 251 are broader than those established in the Expanded Interconnection proceeding. We therefore interpret the term “premises” broadly to include LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We also treat as incumbent LEC premises any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures.

391. As discussed below, we conclude that section 251(c)(6) requires collocation only where technically feasible. In light of this conclusion, we find that adoption of a definition of “premises” that depends on whether Interconnection or access to unbundled network elements at a particular point is “technically feasible” as suggested by Ameritech and Pacific Telesis, would be superfluous. We also conclude that it is not appropriate to adopt a definition of “premises,” as suggested by several parties, that is dependent on whether it is “practical” to collocate equipment at a particular point. We note however, that neither physical nor virtual collocation is required at points where not technically feasible. We therefore decline to adopt specific requirements regarding collocation at particular points in the LEC network, as suggested by GVNW and others. Because collocation is only required where technically feasible, the approach we have adopted will enable competitors to take advantage of opportunities to collocate equipment without imposing undue burdens on incumbent LECs, whether large or small.

392. We also address the impact on small incumbent LECs. For example, the Rural Tel. Coalition asks that Interconnection and collocation points be established in a flexible manner. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we do not adopt rigid requirements for locations where collocation must be provided. Incumbent LECs are not required to physically collocate equipment in locations where not practical for technical reasons or because of space limitations, and virtual collocation is required only where technically feasible. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

d. Collocation Equipment
(1) Background

393. In the Expanded Interconnection proceeding, we allowed collocation for central office equipment needed to terminate basic transmission facilities between LEC central offices and third-party premises. Acceptable equipment included optical terminating equipment and multiplexers. We did not require the LECs to permit collocation of enhanced services equipment or customer premises equipment because such equipment was not necessary to foster competition in the provision of basic transmission services. We also did not require LECs to allow the collocation of switches. Section 251(c)(6) requires incumbent LECs to allow collocation of “equipment necessary for interconnection or access to unbundled elements.”* * * * * We sought comment in the NPRM on what types of equipment competitors should be permitted to collocate on LEC premises.

(2) Discussion

394. We believe that section 251(c)(6) generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements. Although the term “necessary,” read most strictly, could be interpreted to mean “indispensable,” we conclude that for the purposes of section 251(c)(6) “necessary” does not mean “indispensable” but rather “used” or “useful.” This interpretation is most likely to promote fair competition consistent with the purposes of the Act. (We note that this view is consistent with the findings of the Colorado Commission, Colorado Public Utilities Commission, Proposed Rules Regarding Implementation of §§ 40-15-101 et seq., Requirements Relating to Interconnection and Unbundling, Docket No. 95R-556T, (Colorado Commission, March 29, 1996) at 19-20. Thus, we read section 251(c)(6) to refer to equipment used for the purpose of interconnection or access to unbundled network elements. Cf. National Railroad Passenger Corporation v. Boston and Maine Corp., 503 U.S. 407, 417 (1992) (upholding the ICC’s interpretation of the word “required” as “useful or appropriate,” rather than “indispensable”); McCulloch v. Maryland, 4 Wheat. 316, 413 (1819) (Chief Justice Marshall read the word “necessary” to mean “convenient, or useful,” rejecting a stricter reading of the term). Even if the collocator could use other equipment to perform a similar function, the specified equipment may still be “necessary” for interconnection or access to unbundled network elements under section 251(c)(6). We can easily imagine circumstances, for instance, in which alternative equipment would perform the same function, but with less efficiency or at greater cost. A strict reading of the term “necessary” in these circumstances could allow LECs to avoid collocating the equipment of the interconnectors’ choosing, thus undermining the procompetitive purposes of the 1996 Act. 395. Consistent with this interpretation, we conclude that transmission equipment, such as optical terminating equipment and multiplexers, may be collocated on LEC premises. We also conclude that LECs should continue to permit collocation of any type of equipment currently being collocated to terminate basic transmission facilities under the Expanded Interconnection requirements. In addition, whenever a telecommunications carrier seeks to collocate equipment for purposes within the scope of section 251(c)(6), the incumbent LEC shall prove to the State commission that such equipment is not “necessary,” as we have defined that term, for interconnection or access to unbundled network elements. State commissions may designate specific additional types of equipment that may be collocated pursuant to section 251(c)(6).

396. We do not find, however, that section 251(c)(6) requires collocation of equipment used to provide enhanced services, contrary to the arguments of the Association of Telemessaging Services International. We also decline to require incumbent LECs to allow collocation of any equipment without restriction. Section 251(c)(6) requires collocation only of equipment “necessary for interconnection or access to unbundled elements.” Section 251(c)(2) requires incumbent LECs to provide “interconnection” for the “transmission and routing of telephone exchange service and exchange access,” and section 251(c)(3) requires incumbent LECs to provide access to unbundled network elements “for the provision of a telecommunications service.” Section 251(c)(6) therefore requires incumbent LECs to provide physical or virtual collocation only for equipment “necessary” or used for those purposes. We find that section 251(c)(6) does not require collocation of equipment necessary to provide enhanced services. We declined to require collocation of enhanced services equipment in our Computer III and ONA proceedings. See Third Computer
In response to WinStar’s suggestion that we require collocation of microwave transmission facilities, we note that collocation of microwave transmission equipment was required where reasonably feasible by the Special Access Order. We also require the collocation of microwave equipment under section 251, although we modify the Expanded Interconnection standard we adopt under section 251 for when such collocation is required slightly to conform to the standard for the provision of physical collocation in section 251(c)(6). We therefore require that incumbent LECs allow competitors to use physical collocation for microwave transmission facilities except where this is not practical for technical reasons or because of space limitations, in which case virtual collocation is required where technically feasible.

e. Allocation of Space

(1) Background

398. In the Expanded Interconnection proceeding, we required LECs to allocate space for physical collocation on a first-come, first-served basis. We also required LECs to take into account interconnector demand for collocation space when reconfiguring or building new central offices, and found that imposing reasonable restrictions on collocation space was appropriate.

(2) Discussion

399. We believe that incumbent LECs have the incentive and capability to impede competitive entry by minimizing the amount of space that is available for collocation by competitors. Accordingly, we adopt our Expanded Interconnection space allocation rules for purposes of section 251, except as indicated herein. LECs will be required to make space available to requesting carriers on a first-come, first-served basis. We also conclude that allocators seeking to expand their collocated space should be allowed to use contiguous space where available. We further conclude that LECs should not be required to lease or construct additional space to provide physical collocation to interconnectors when existing space has been exhausted. We find such a requirement unnecessary because section 251(c)(6) allows incumbent LECs to provide virtual collocation where physical collocation is not practical for technical reasons or because of space limitations. Consistent with the requirements and findings of the Expanded Interconnection proceeding, we conclude that incumbent LECs should be required to take collocation demand into account when renovating existing facilities and constructing or leasing new facilities, just as they consider demand for other services when undertaking such projects. We find that this requirement is necessary in order to ensure that sufficient collocation space will be available in the future. We decline, however, to adopt a general rule requiring LECs to file reports on the status and planned increase in use of space. State commissions will determine whether sufficient space is available for physical collocation, and we conclude that they have authority under the 1996 Act to require incumbent LECs to file such reports. We expect individual state commissions to determine whether the filing of such reports is warranted.

400. We also agree with Pacific Teleis that restrictions on warehousing of space by interconnectors are appropriate. Because collocation space on incumbent LEC premises may be limited, inefficient use of space by one competitive entrant could deprive another entrant of the opportunity to collocate facilities or expand existing space. In the Expanded Interconnection proceeding, we allowed “reasonable” restrictions on warehousing of space, and will adopt this provision for purposes of section 251. As discussed below, we also adopt measures to ensure that incumbent LECs themselves do not unreasonably “warehouse” space, although we do permit them to reserve a limited amount of space for specific future uses. Incumbent LECs, however, are not permitted to set maximum space limitations without demonstrating that space constraints make such restrictions necessary, as such maximum limits could constrain a collocator’s ability to provide service efficiently.

401. We also address the impact on small incumbent LECs. For example, GVNW argues that we should require collocation in rural areas only where there is space available. We have considered the impact of our rules in this section on small incumbent LECs and do not require physical collocation at any point where there is insufficient space available. We decline, however, to adopt rules regarding space availability that apply differently to small, rural carriers because the rules we here adopt are sufficiently flexible. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

f. Leasing Transport Facilities

(1) Background

402. Our Expanded Interconnection rules require LECs to provide collocation for the purpose of allowing collocators to terminate their own transmission facilities for special access or switched transport service. We did not require that collocation be made available for other purposes, for example, when the interconnecting party wished only to connect incumbent LEC transmission facilities to collocated equipment. We sought comment in the NPRM on whether we should modify...
the standards of the Expanded Interconnection proceeding in light of the new statutory requirements and disputes that have arisen in the investigations regarding the incumbent LECs' physical and virtual collocation tariffs.

(2) Discussion

403. Although in Expanded Interconnection the Commission required that interested parties interconnect collocated equipment with their own transmission facilities, we conclude that it would be inconsistent with the provisions of the 1996 Act to adopt that requirement under section 251. Rather, we conclude that a competitive entrant should not be required to bring transmission facilities to LEC premises in which it seeks to collocate facilities. Entrants should instead be permitted to collocate and connect equipment to unbundled network transmission elements obtained from the incumbent LEC. The purpose of the Expanded Interconnection requirement was to foster competition in the market for interstate switched and special access transmission facilities. The purposes of section 251 are broader. Section 251(c)(3) requires that competitive entrants be given access to unbundled elements and that they be permitted to combine such elements. Prohibiting competitors from connecting unbundled network elements to their collocated equipment would appear contrary to the provisions of section 251(c)(3).

404. Finally, we find that Bell Atlantic's opposition to this requirement is without merit. Bell Atlantic argues that collocators should be required to provide their own transmission facilities because otherwise new entrants could compete without providing any of their own facilities. Section 251(c)(3) specifically states that unbundled elements are to be provided in a manner that allows requesting carriers to combine elements in order to provide telecommunications service. As stated above, requiring collocators to supply their own transmission facilities would amount to a prohibition on connecting unbundled transmission facilities to other unbundled elements connected to equipment in the collocation space. Although such interconnection arrangements were not required by our Expanded Interconnection requirements, we conclude that they are required by section 251 when collocated equipment is used to achieve interconnection or access to unbundled network elements.

405. In the most common collocation configuration under existing requirements, the designated physical collocation space of several competitive entrants is located close together within the LEC premises. Since carriers connect to the collocation space via high-capacity lines, different competitive entrants seeking to interconnect with each other may find connecting between their respective collocation spaces on the LEC premises the most efficient means of interconnecting with each other. We sought comment in the NPRM on whether we should adopt any requirements in addition to those adopted in the Expanded Interconnection proceeding in order to fulfill the mandate of the 1996 Act.

(2) Discussion

406. We believe that it serves the public interest and is consistent with the policy goals of section 251 to require that incumbents permit two or more collocators to interconnect their networks at the incumbent's premises. Parties opposed to this proposal have offered no legitimate objection to such interconnection. Allowing incumbent LECs to prohibit collocating carriers from interconnecting their collocated equipment would require them to interconnect collocated facilities by routing transmission facilities outside of the LECs' premises. We find that such a policy would needlessly burden collocating carriers. To the extent equipment is collocated for the purposes expressly permitted under section 251(c)(6), the statute does not bar us from requiring that incumbent LECs allow connection of such equipment to other collocating carriers located nearby. We find that requiring LECs to allow such interconnection of collocated equipment will foster competition by promoting efficient operation. It is also unlikely to have a significant effect on space availability. We find authority for such a requirement in section 251(c)(6), which requires that collocation be provided on "terms and conditions that are just, reasonable, and nondiscriminatory" and in section 4(i), which permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." We therefore will require that incumbent LECs allow collocating telecommunications carriers to connect collocated equipment to such equipment of other carriers within the same LEC premises so long as the collocated equipment is used for interconnection with the incumbent LEC or access to the LEC's unbundled network elements.

407. We clarify that we here require incumbent LECs to provide the connection between the equipment in the collocated spaces of two or more collocating telecommunications carriers unless they permit the collocating parties to provide this connection for themselves. We do not require incumbent LECs to allow placement of connecting transmission facilities otherwise by combination of the incumbent LEC premises anywhere outside of the actual physical collocation space.

h. Security Arrangements

(1) Background

408. Under our Expanded Interconnection requirements, incumbent LECs typically require that physically collocated equipment be placed inside a collocation cage within the incumbent LEC facility. Such cages are intended to separate physically the competitors' facilities from those of the incumbent and to prevent access by unauthorized personnel to any parties' equipment. Such cages frequently add considerably to the cost of establishing physical collocation at a particular LEC premises and could constitute a barrier to entry in certain circumstances.

(2) Discussion

409. Based on the comments in this proceeding and our previous experience with physical collocation in the Expanded Interconnection docket, we will continue to permit LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities. The physical security arrangements around the collocation space protect both the LEC's and competitor's equipment from interference by unauthorized parties. We reject the suggestion of ALTS and MCI that security measures be provided only at the request of the entrant since LECs have legitimate security concerns about having competitors' personnel on their premises as well. We conclude that the physical separation provided by the collocation cage adequately addresses these concerns. At the same time, we recognize that the construction costs of physical security arrangements could serve as a significant barrier to entry, particularly for smaller competitors. We also conclude that LECs have both an incentive and the capability to impose higher construction costs than the new
entrant might need to incur. We therefore conclude that collocating parties should have the right to subcontract the construction of the physical collocation arrangements with contractors approved by the incumbent LEC. Incumbent LECs shall not unreasonably withhold such approval of contractors. Approval by incumbent LECs of such contractors should be based on the same criteria as such LECs use for approving contractors for their own purposes. We decline, however, to require that competitive entrants' personnel be subject to minimum training and proficiency requirements as suggested by GVNW. We find that such concerns are better resolved through negotiation and arbitration.

1. Allowing Virtual Collocation in Lieu of Physical

(1) Background

410. Section 251(c)(6) requires that incumbent LECs provide physical collocation unless the carrier “demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations * * *.” In the NPRM, we sought comment on whether the Commission should establish guidelines for states to apply when determining whether physical collocation is not practical for “technical reasons or because of space limitations.”

(2) Discussion

411. Section 251(c)(6) clearly contemplates the provision of virtual collocation when physical collocation is not practical for technical reasons or because of space limitations. Section 251(c)(6) requires the incumbent LEC to demonstrate to the state commission’s satisfaction that there are space limitations on the LEC premises or that technical considerations make collocation impractical. Because the space limitations and technical practicality issues will vary considerably depending on the location at which competitor equipment is to be collocated, we find that these issues are best handled on a case-by-case basis, as they were under our Expanded Interconnection requirements. In light of our experience in the Expanded Interconnection proceeding, we require that incumbent LECs provide the state commission with detailed floor plans or diagrams of any premises where the incumbent alleges that there are space constraints. Submission of floor plans will enable state commissions to evaluate whether a refusal to allow physical collocation on the grounds of space constraints is justified. We also find that the approach detailed by AT&T in its July 12 Ex Parte submission to be useful and believe that state commissions may find it a valuable guide. AT&T describes a detailed proposed showing that would be required of an incumbent LEC that claims physical collocation is not practical because of space exhaustion. The proposed showing would require the specific identification of the space on incumbent LEC premises that is used for various purposes, as well as specific plans for rearrangement/expansion and identification of steps taken to avoid exhaustion.

412. Although section 251(c)(6) provides that incumbent LECs are not required to provide physical collocation where impractical for technical reasons or because of space limitations, our experience in the Expanded Interconnection proceeding has not demonstrated that technical reasons, apart from those related to space availability, are a significant impediment to physical collocation. We therefore decline to adopt any rules for determining when physical collocation should be deemed impractical for technical reasons.

413. Incumbent LECs are allowed to retain a limited amount of floor space for defined future uses. Allowing competitive entrants to claim space that incumbent LECs had specifically planned to use could prevent incumbent LECs from serving their customers effectively. Incumbent LECs may not, however, reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to hold collocation space for their own future use.

414. We decline to adopt AT&T’s suggestion that incumbent LECs should be required to lease additional space or provide trunking at no cost where they have insufficient space for physical collocation. In light of the availability of substitute virtual collocation arrangements, we find that requiring the type of “substitute” for physical collocation as advocated by AT&T is unnecessary. We similarly reject Time Warner’s suggestion that incumbent LECs supply a “substitute” for physical collocation at cost, except to the extent we require virtual collocation. On the other hand, we will require incumbent LECs with limited space availability to take into account the demands of interconnectors when planning renovations and leasing or constructing new premises, as we have in the Expanded Interconnection proceeding.

415. Incumbent LECs are not required to provide collocation at locations where it is not technically feasible to provide virtual collocation. Although space constraints are a concern normally associated with physical collocation, given our broad reading of the term “premises,” we find that space constraints could preclude virtual collocation at certain LEC premises as well. State commissions will decide whether virtual collocation is technically feasible at a given point. We do, however, require that incumbent LECs relinquish any space held for future use before denying virtual collocation due to a lack of space unless the incumbent can prove to a state commission that virtual collocation at that point is not technically feasible. Moreover, when virtual collocation is not feasible, we require that incumbent LECs provide other forms of interconnection and access to unbundled network elements to the extent technically feasible.

416. Finally, we decline to require that incumbent LECs provide virtual collocation that is equal in all functional aspects to physical collocation. Our Expanded Interconnection rules required a variety of standards for the virtual collocation and have been largely successful. In addition, Congress was aware of the differences between virtual and physical collocation when it adopted section 251(c)(6), and this section does not specify any requirements for virtual collocation. As discussed above, we adopt the Expanded Interconnection requirements for virtual collocation under section 251. We find, however, that a standard simply requiring equality in all functional aspects could be difficult to administer and could lead to substantial disputes. We also decline to adopt the suggestion that we require LECs to offer virtual collocation under the “$1 sale and repurchase option.” This configuration is described as involving “the acquisition by the interconnectors of the equipment to be dedicated for interconnectors’ use on the LEC premises and the sale of that equipment to the LECs for a nominal $1 sum while maintaining a repurchase option.” We do not find evidence that such a specific requirement is necessary at this time. We reserve the right to revisit these issues in the future, however, if we perceive that smaller entities would be disadvantaged by our existing standards.

2. Legal Issues

a. Relationship Between Expanded Interconnection Tariffs and Section 251

(1) Background

417. The enactment of sections 251 and 252 raises the question of whether,
and to what extent, the interconnection, access to unbundled network element, and collocation requirements set forth in those sections, and the delegation of specific rate-setting authority to the states under section 252(d)(1), as a matter of law supplant our section 201 Expanded Interconnection requirements. We tentatively concluded in the NPRM that our existing Expanded Interconnection policies for interstate special access and switched transport should continue to apply.

(2) Discussion

418. Our Expanded Interconnection rules require the largest incumbent LECs to file tariffs with the Commission to offer collocation to parties that wish to terminate interstate special access and switched transport transmission facilities. Section 252 of the 1996 Act, on the other hand, provides for interconnection arrangements rather than tariffs, for review and approval of such agreements by state commissions rather than the FCC, and for public filing of such agreements. Section 252 procedures, however, apply only to “request[s] for interconnection, services, or network elements pursuant to section 251.” Such procedures do not, by their terms, apply to requests for service under section 201. Moreover, section 251(i) expressly provides that “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201,” which provided the statutory basis for our Expanded Interconnection rules. Thus, we find that the 1996 Act, as a matter of law, does not displace our Expanded Interconnection requirements, and, in fact, grants discretion to the FCC to preserve our existing rules and tariffing requirements to the extent they are consistent with the Communications Act.

419. We further conclude that it would make little sense to find that sections 251 and 252 supersede our Expanded Interconnection rules, because the two sets of requirements are not coextensive. For example, our Expanded Interconnection rules encompass collocation for interstate purposes for all parties, including non-carrier end users, that seek to terminate transmission facilities at LEC central offices. In comparison, section 251 requires collocation only for “any requesting telecommunication carrier.” Certain competing carriers—and non-carrier customers not covered by section 251—may prefer to take interstate expanded interconnection service under general tariff rules. We find that it would be unnecessarily disruptive to eliminate that possibility at this time. We also conclude that permitting requesting carriers to seek interconnection pursuant to our Expanded Interconnection rules as well as section 251 is consistent with the goals of the 1996 Act to permit competitive entry through a variety of entry strategies. Thus, a requesting carrier would have the choice of negotiating an interconnection agreement pursuant to sections 251 and 252 or of taking tariffed interstate service under our Expanded Interconnection rules.

420. Finally, we expect that, over time, sections 251 and 252 and our implementing rules may replace our Expanded Interconnection rules as the primary regulations governing interconnection for carriers. We note that section 251 is broader than our Expanded Interconnection requirements in certain respects. For example, section 251 requires incumbent LECs to offer collocation for purposes of accessing unbundled network elements, whereas our Expanded Interconnection rules require collocation only for the provision of interstate special access and switched transport. In addition, section 251(c)(6) requires incumbent LECs to offer physical collocation subject to certain exceptions, whereas our existing Expanded Interconnection rules only require carriers to offer virtual collocation, although they may choose to offer physical collocation under Title II regulation in lieu of virtual collocation. In the future, we may review the need for a separate set of Expanded Interconnection requirements and revise our requirements if necessary. We believe that this approach is consistent with Congress’ determination that the need for federal regulations will likely decrease as the provisions of the 1996 Act take effect and competition develops in the local exchange and exchange access markets.

b. Takings Issues

(1) Background

421. In Bell Atlantic v. FCC, the U.S. Court of Appeals for the DC Circuit found that the Commission lacked authority under the Communications Act to impose physical collocation on the LECs. The court found that this requirement implicated the Fifth Amendment takings clause. See Bell Atlantic v. FCC, 24 F.3d 1441 (DC Cir. 1994). On remand, the Commission required LECs to provide physical collocation. In Pacific Bell v. FCC, 81 F.3d 1147 (DC Cir. 1996), several LECs challenged the Commission’s virtual collocation rules on essentially identical grounds, claiming that the virtual collocation rules also constituted an unauthorized taking. The court did not reach the merits of these claims. Instead, addressing the scope of section 251 immediately following enactment and before the FCC had yet exercised its interpretive authority with respect to the provision, the court stated that regulations enacted to implement the 1996 Act would render moot questions regarding the future effect of the virtual collocation order under review. The court did not vacate the order, but remanded to the Commission the issues presented in that case.

(2) Discussion

422. We conclude that the ruling in Bell Atlantic does not preclude the rules we are adopting in this proceeding. The court in Bell Atlantic did not hold that an agency may never “take” property; the court acknowledged that, as a constitutional matter, takings are unlawful only if they are not accompanied by “just compensation.” Instead, the court simply said that the Communications Act of 1934 should not be construed to permit the FCC to take LEC property without express authorization. Because the court concluded that mandatory physical collocation would likely constitute a taking, and that section 201 of the Act did not expressly authorize physical collocation, the court held that the Commission was without authority under section 201 to impose physical collocation requirements on LECs. The Commission maintains the position, however, that mandatory physical collocation should not properly be seen to create a takings issue. See Remand Order, 9 FCC Rcd at 5169.

423. The question of statutory authority to impose (physical or virtual) collocation obligations on incumbent LECs largely evaporates in the context of the 1996 Act. New section 251(c)(6) expressly requires incumbent LECs to provide physical collocation, absent space or technical limitations. Where such limitations exist, the statute expressly requires virtual collocation. Thus, under the court’s analysis in Bell Atlantic, there is no warrant for a narrowing construction of section 251 that would deny us the authority to require either form of collocation. Moreover, for the reasons stated in the Virtual Collocation Order, we continue to believe that virtual collocation, as we have defined it, is not a taking, and that our authority to order such collocation (under either section 251 or section 201) is not subject to the strict construction canons announced in Bell Atlantic.

424. Given that we now have express statutory authority to order physical and
virtual collocation pursuant to section 251, any remaining takings-related issue necessarily is limited to the question of just compensation. As discussed in Section VII.B.2.a.(3)(c), below, we find that the ratemaking methodology we are adopting to implement the collocation obligations under section 251(c) is consistent with congressional intent and fully satisfies the just compensation standard. There is, therefore, no merit to the LECs’ Fifth Amendment-based claims.

VII. Pricing of Interconnection and Unbundled Elements

A. Overview

425. The prices of interconnection and unbundled elements, along with prices of resale and transport and termination charges, are critical to implementing Congress’ pro-competition, de-regulatory national policy framework to establish among the states a common, pro-competition understanding of the pricing standards for interconnection and unbundled elements, resale, and transport and termination. While such a common interpretation might eventually emerge through judicial review of state arbitration decisions, we believe that such a process could delay competition for years and require carriers to incur substantial legal costs. We therefore conclude that, to expedite the development of fair and efficient competition, we must set forth rules now establishing this common, pro-competition understanding of the 1996 Act’s pricing standards. Accordingly, the rules we adopt today set forth the methodological principles for states to use in setting prices. This section addresses interconnection and unbundled elements, and subsequent sections address resale and transport and termination, respectively.

426. While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices. In one instance, the default proxy we establish is a price range. Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply. In setting a rate pursuant to the cost-based pricing methodology, and especially when setting a rate above a default proxy ceiling or outside the default proxy range, the state must give full and fair effect to the economic costing methodology we set forth in this Order and must create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

427. In the following sections, we first set forth generally, based on the current record, a cost-based pricing methodology based on forward-looking economic costs, which we conclude is the approach for setting prices that best furthers the goals of the 1996 Act. In dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market and existing competitors may decide to leave. Prices for unbundled elements under section 251 must reflect the way they are incurred. We adopt certain rules that states must follow in setting rates in arbitrations. These rules are designed to ensure the efficient cost-based rates required by the 1996 Act.

428. With respect to prices developed under the forward-looking, cost-based pricing methodology, we conclude that incumbent LECs’ rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. We adopt certain rules that states must follow in setting prices in arbitrations, states must set prices for interconnection and unbundled network elements based on the forward-looking, long-run, incremental cost methodology we describe below. Using this methodology, states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element. They may set prices to permit recovery of a reasonable share of forward-looking joint and common costs of network elements. In the aftermath of the arbitrations and relying on the state experience, we will continue to review this costing methodology, and issue additional guidance as necessary.

429. With respect to prices developed under the forward-looking, cost-based pricing methodology, we conclude that incumbent LECs’ rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. We adopt certain rules that states must follow in setting rates in arbitrations. These rules are designed to ensure the efficient cost-based rates required by the 1996 Act.

430. In the next section of the Order, we establish default proxies that states may elect to use prior to utilizing an economic study and developing prices using the cost-based pricing methodology. We recognize that certain states may find it difficult to apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes. We therefore set forth default proxies that will be relatively easy to apply on an interim basis to interconnection arrangements. We discuss with respect to particular unbundled elements the reasonable rate structure for those elements and the particular default proxies we are establishing for use pending our adoption of a generic forward-looking cost model. Finally, we discuss the following additional matters: generic forward-looking costing models that we intend to examine further by the first quarter of 1997 in order to determine
whether any of those models, with modifications, could serve as better default proxies; the future adjustment of rates; the relationship of unbundled element prices to retail prices; and the meaning of the statutory prohibition against discrimination in sections 251 and 252.

431. Those states that have already established methodologies for setting interconnection and unbundled rates must review those methodologies against the rules we are adopting in this Order. To the extent a state's methodology is consistent with the approach we set forth herein, the state may apply that methodology in any section 252 arbitration. However, if a state's methodology is not consistent with the rules we adopt today, the state must modify its approach. We invite any state uncertain about whether its approach complies with this Order to seek a declaratory ruling from the Commission.

B. Cost-Based Pricing Methodology

432. As discussed more fully in Section II.D. above, although the states have the crucial role of setting specific rates in arbitrations, the Commission must establish a set of national pricing principles in order to implement Congress's national policy framework. For the reasons set forth in the preceding section and as more fully explained below, we are adopting a cost-based methodology for states to follow in setting interconnection and unbundled element rates. In setting forth the cost-based pricing methodology for interconnection and access to unbundled elements, there are three basic sets of questions that must be addressed. First, does the 1996 Act require that the same standard apply to the pricing of interconnection provided pursuant to section 251(c)(2), and unbundled elements provided pursuant to section 251(c)(3)? Second, what is the appropriate methodology for establishing the price levels for interconnection and for each unbundled element, how should costs be defined, and is the price based on economic costs, embodied costs, or other costs? Third, what are the appropriate rate structures to be used to set prices designed to recover costs, including a reasonable profit? We address each of these questions in the following sections.

1. Application of the Statutory Pricing Standard

a. Background

433. In the NPRM, we proposed that any pricing principles we adopt should be the same for interconnection and unbundled network elements because sections 251(c)(2) and (c)(3) and 252(d)(1) use the same pricing standard. We invited parties to comment on this issue and to justify any proposed distinction in the priority for interconnection and unbundled network elements. We also stated our belief that the same pricing rules that apply to interconnection and unbundled network elements should also apply to collocation under section 251(c)(6) of the 1996 Act.

b. Discussion

434. Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt shall, therefore, apply to both.

435. We further conclude that, because section 251(c)(6) requires that incumbent LECs provide physical collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules. We also note that, because collocation is a method of obtaining interconnection and access to unbundled network elements, collocation is properly treated under the same pricing rules. This legal conclusion that there should be a single set of pricing rules for interconnection, unbundled network elements, and collocation provides greater consistency and guidance to the industry, regulators, and the courts. Moreover, it reduces the regulatory burdens on state commissions of developing and applying different pricing rules for collocation, interconnection, and unbundled network elements. We note that our adoption of this single set of pricing rules should minimize regulatory burdens, conflicts, and uncertainties associated with multiple, and possibly inconsistent rules, thus facilitating competition on a reasonable and efficient basis minimizing the economic impact of our rules for all parties, including small entities and small incumbent LECs.
of unbundled services and facilities. The Ohio Commission has adopted Long Run Service Incremental Cost ("LRSIC"), which is closely related to TSLRIC. The Missouri and Wyoming Commissions are among a number of state commissions that have not yet adopted a pricing methodology, but are considering LRIC or TSLRIC. Oklahoma law provides for submission of LRIC cost studies and studies identifying a contribution to common costs for interconnection of facilities and access to network elements to the Oklahoma Commission during an arbitration. A number of states have yet to choose a pricing methodology. For instance, the New York Commission sets prices on a case-by-case basis. Unbundled element prices also exist in several states pursuant to negotiated interconnection agreements that have either already been approved by state commissions or are under consideration.

438. Section 252(d)(1) requires, inter alia, that rates for interconnection and unbundled network elements be based on "cost (or return without reference to a rate-of-return or other rate-based proceeding)." We tentatively concluded in the NPRM that this language precludes states from setting rates by use of traditional cost-of-service regulation, with its detailed examination of historical carrier investment and expenses. Instead, we indicated our belief that the statute contemplates the use of other forms of cost-based price regulation, such as the setting of prices based on forward-looking economic cost methodologies (such as LRIC) that do not involve the use of an embedded rate base. We sought comment on whether section 252(d)(1) forecloses consideration of historical or embedded costs or merely prohibits state commissions from conducting a traditional rate-of-return proceeding to establish prices for interconnection and unbundled network elements. Embedded costs are the costs that the incumbent LECs carry on their accounting books that reflect historical purchase prices, regulatory depreciation rates, surcharges, and operating procedures. We invited parties to comment on whether incumbent LECs should be permitted to recover some portion of their historical or embedded costs over TSLRIC.

439. In the NPRM, we noted that certain incumbent LECs had advocated that interconnection and access to unbundled element prices be based on the "efficient component pricing rule" (ECPR). Under this approach, an incumbent LEC sells an essential input element, such as interconnection, to a competing network would set the price of that input element equal to "the input's direct per-unit incremental costs plus the opportunity cost to the input supplier of the sale of a unit of input." We tentatively concluded in the NPRM that ECPR or equivalent methodologies are inconsistent with the section 252(d)(1) requirement that rates be based on "cost," and we proposed to preclude the states from using this methodology.

440. Section 254 requires the Commission and the Joint Board established thereunder to ensure that "[a]ll providers of telecommunications service * * * make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. * * *" That section further provides that "[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service." The Conference Committee also explained that these provisions require any such universal service support payment to be, to the extent possible, explicit, rather than implicit, as many support mechanisms are today." In the NPRM, we sought comment on whether "it would be consistent with sections 251(d)(1) and 254 for states to include any universal service costs or subsidies in the rates they set for interconnection, collocation, and unbundled network elements." In particular, we discussed the "play or pay" system adopted by the State of New York in which interconnectors that agree to serve all customers in their self-defined service area pay additional contribution charges. We noted that the statutory schedule for the completion of the universal service reform proceeding (15 months from the enactment of the 1996 Act) is different from that for this proceeding (6 months from the date of enactment of the 1996 Act). We asked whether the ability of states to take universal service support into account after the joint and common costs. The 1996 Act encourages competition by removing barriers to entry and providing an opportunity for potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services. We believe that the prices that potential entrants pay for these elements should reflect forward-looking economic costs in order to encourage efficient levels of investment and entry.

442. In this section, we describe this forward-looking, cost-based pricing standard in detail. First, we define the terms we are using, explain how the methodology we are adopting differs from other costing approaches, and describe how it should be implemented. In particular, we explain that the price of a network element should include the forward-looking costs that can be attributed directly to the provision of services using that element, which includes a reasonable return on investment (i.e., "profit"), plus a reasonable share of the forward-looking joint and common costs. Second, we address potential cost measures that must not be included in a TELRIC analysis, such as embedded (or historical) costs, joint and common costs, or universal service subsidies. Finally, we refute arguments that this methodology would violate the incumbent LECs' rights under the Fifth Amendment.

(a) Total Element Long-Run Incremental Cost

443. Definitions of Terms. In light of the various possible definitions of a number of the critical economic terms used in this context, we begin by defining terms as we use them in this Order. Specifically, we provide definitions for the following terms: "incremental cost;" "economic cost;" "embedded or accounting cost;" "joint cost;" "common cost;" "long-run incremental cost;" "total service long-run incremental cost;" "total element long-run incremental cost." In addition to defining these terms, we explain the economic rationale behind the concepts.

444. Incremental costs are the additional costs (usually expressed as a cost per unit) that a firm will incur as a result of expanding the firm's output of a good or service by producing an additional quantity of the good or
service. Incremental costs are forward-looking in the sense that these costs are incurred as the output level changes by a given increment. The costs that are considered incremental will vary greatly depending on the size of the increment. For example, the incremental cost of carrying an additional call from a residence that is already connected to the network to its end office is virtually zero. The incremental cost of connecting a new residence to its end office, however, is the cost of the loop. Forward-looking incremental costs, plus a portion of the forward-looking joint and common costs, are sometimes referred to as “economic costs.”

Embedded or accounting costs are costs that firms incurred in the past for providing a good or service and are recorded as past operating expenses and depreciation. Due to changes in input prices and technologies, incremental costs may differ from embedded costs of that same increment. In competitive markets, the price of a good or service will tend towards its long-run incremental cost.

445. Certain types of costs arise from the production of multiple products or services. We use the term “joint costs” to refer to costs incurred when two or more outputs are produced in fixed proportion by the same production process (i.e., when one product is produced, a second product is generated by the same production process at no additional cost). The term “common costs” refers to costs that are incurred in connection with the production of multiple services, and remains unchanged as the relative proportion of those products or services varies (e.g., the salaries of corporate managers). Such costs may be common to all services provided by the firm or common to only a subset of those services or elements. If a cost is common with respect to a subset of services or elements, for example, a firm avoids that cost only by not providing each and every service or element in the subset. For the purpose of our discussion, we refer to joint and common costs as simply common costs unless the distinction is relevant in a particular context.

446. The term “long-run,” in the context of “long run incremental cost,” refers to a period long enough so that all of a firm’s costs become variable or avoidable. The term “total service,” in the context of TSLRIC, indicates that the relevant increment is the entire quantity of the service that a firm produces, rather than just a marginal increment over and above an existing level of production. Depending on what services are the subject of a study, TSLRIC may be for a single service or a class of similar services. TSLRIC includes the incremental costs of dedicated facilities and operations that are used by only the service in question. TSLRIC also includes the incremental costs of shared facilities and operations that are used by that service as well as other services.

447. While we are adopting a version of the methodology commonly referred to as TSLRIC as the basis for pricing interconnection and unbundled elements, we are coining the term “total element long-run incremental cost” (TELRIC) to describe our version of this methodology. The incumbent LEC offerings to be priced using this methodology generally will be “network elements,” rather than “telecommunications services,” as defined by the 1996 Act. More fundamentally, we believe that TELRIC-based pricing of discrete network elements or facilities, such as local loops and switching, is likely to be much more economically rational than TSLRIC-based pricing of conventional services, such as interstate access service and local residential or business exchange service. As discussed in greater detail below, separate telecommunications services are typically provided over shared network facilities, the costs of which may be joint or common with respect to some services. The costs of local loops and their associated line cards in local switches, for example, are common with respect to Interstate access service and local exchange service, because once these facilities are provided to serve one service, they are able to provide the other at no additional cost. By contrast, the network elements, as we have defined them, largely correspond to distinct network facilities. Therefore, the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller using a TELRIC methodology rather than a TSLRIC approach that measures the costs of conventional services. Because it is difficult for regulators to determine an economically optimal allocation of joint and common costs, we believe that pricing elements, defined as facilities with associated features and functions, is more reliable from the standpoint of economic efficiency than pricing services that use shared network facilities.

448. Description of TELRIC-Based Pricing Methodology. Adopting a pricing methodology based on forward-looking economic costs best replicates, to the extent possible, the conditions of competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior. Congress recognized in the 1996 Act that access to the incumbent LECs’ bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LEC’s unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs’ economies of scale and scope, as well as the benefits of competition. Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels. We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.

449. We note that incumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices for interconnection and unbundled network elements.

450. Some parties express concern that the information required to compute prices based on forward-looking costs is inherently so hypothetical as to be of little or no practical value. Based on the record before us, we disagree. A number of states, which ultimately will have to review forward-looking cost studies in carrying out their duties under section 252, either have already implemented forward-looking, incremental costing methodologies to set prices for interconnection and unbundled network elements or support the use of such an approach. While these states have applied somewhat different definitions of, and approaches to setting prices developed on, an incremental cost methodology, the record demonstrates that such approaches are practical and implementable.
451. We conclude that, under a TELRIC methodology, incumbent LECs’ prices for interconnection and unbundled network elements shall recover the forward-looking costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs. Per-unit costs shall be derived from total costs using reasonably accurate “fill factors” (estimates of the proportion of a facility that will be “filled” with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the element by a reasonable projection of the actual total usage of the element. Directly attributable forward-looking costs include the incremental costs of facilities and operations that are dedicated to the element. Such costs typically include the investment costs and expenses related to primary plant used to provide that element. Directly attributable forward-looking costs also include the incremental costs of shared facilities and operations. Those costs shall be attributed to specific elements to the greatest extent possible.

452. Forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future. Thus, a question arises whether costs should be computed based on the least-cost, most efficient network configuration and technology currently available, or whether forward-looking cost should be computed based on incumbent LECs’ existing network infrastructures, taking into account changes in depreciation and inflation. The record indicates three general approaches to this issue. Under the first approach, the forward-looking economic cost for interconnection and unbundled elements would be based on the most efficient network architecture, sizing, technology, and operating decisions that are operationally feasible and currently available to the industry. Prices based on the least-cost, most efficient network design and technology replicate conditions in a highly competitive marketplace by not basing prices on existing network design and investments unless they represent the least-cost systems available for purchase. This approach, however, may discourage facilities-based competition by new entrants because new entrants can use the incumbent LEC’s existing network based on the cost of a hypothetical least-cost, most efficient network.

453. Under the second approach, the cost of interconnection and unbundled network elements would be based on existing network design and technology that are currently in operation. Because this approach is not based on a hypothetical network in the short run, incumbent LECs could recover costs based on their existing operations, and prices for interconnection and unbundled elements that reflect inefficient or obsolete network design and technology. This is essentially an embedded cost methodology.

454. Under the third approach, prices for interconnection and access to unbundled elements would be developed from a forward-looking economic cost methodology based on the most efficient technology deployed in the incumbent LEC’s current wire center locations. This approach mitigates incumbent LECs’ concerns that a forward-looking pricing methodology ignores existing network design, while basing prices on efficient, new technology that is compatible with the existing infrastructure. This benchmark of forward-looking cost and existing network design most closely represents the incremental costs that incumbent LECs will incur in making network elements available to new entrants. Moreover, this approach encourages facilities-based competition to the extent that new entrants, by designing more efficient network configurations, are able to provide the service at a lower cost than the incumbent LEC. We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers are the incumbent LEC’s current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements.

455. We agree with USTA, Bell Atlantic, and BellSouth that, as a theoretical matter, the combination of significant sunk investment, declining technology costs, and competitive entry may increase the depreciation costs and cost of capital of incumbent LECs. We do not agree, however, that TSLRIC does not or cannot account for risks that an incumbent LEC incurs because it has sunk investments in facilities. On the contrary, properly designed depreciation schedules should account for expected declines in the value of capital goods. Both AT&T and MCI appear to agree with this proposition. For example, AT&T states, “[i]n order to estimate TSLRIC, one must perform a discounted cash flow analysis of the future costs associated with the decision to invest. * * * * One-time costs associated with the acquisition of capital goods are amortized over the economic life of the assets using the user cost of capital * * * which requires accounting for both expected capital good price changes and economic depreciation.” Moreover, we are confident that parties to an arbitration with TELRIC studies can propose specific depreciation rate adjustments that reflect expected asset values over time.

456. As noted, we also agree that, as a matter of theory, an increase in risk due to entry into the market for local exchange service can increase a LEC’s cost of capital. We believe that this increased risk can be partially mitigated, however, by offering term discounts, since long-term contracts can minimize the risk of stranded investment. In addition, growth in overall market demand can increase the potential of the incumbent LEC to use some of its displaced facilities for other purposes. Overall, we think that these factors can and should be captured in any LRIC model and therefore we do not agree that this requires a departure from the general principle of forward-looking cost-based pricing for network elements. 457. We are not persuaded by USTA’s argument that forward looking methodologies fail to adjust the cost of capital to reflect the risks associated with irreversible investments and that they are “irreversibly priced downward by a factor of three.” First, USTA’s argument unrealistically assumes that competitive entry would be instantaneous. The more reasonable assumption of entry occurring over time will reduce the costs of capital. Second, we find it unlikely that investment in communications
equipment is entirely irreversible or that such equipment would become valueless once facilities-based competition begins. In a growing market, there most likely would be demand for at least some embedded telecommunications equipment, which would therefore retain its value. Third, contractual arrangements between the new entrant and the incumbent that specifically address USTA’s concerns and protect incumbent’s investments during transition can be established.

455. Finally, we are not persuaded that the use by firms of hurdle rates that exceed the market cost of capital is convincing evidence that sunk investments significantly increase a firm’s cost of capital. An alternative explanation for this phenomenon is that the process that firms use to choose among investment projects results in overestimates of their returns. Firms therefore use hurdle rates in excess of the market cost of capital to account for these overestimates.

456. Summary of TELRIC Methodology. The following summarizes our conclusions regarding setting prices of interconnection and access to unbundled network elements based on the TELRIC methodology for such elements. The increment that forms the basis for a TELRIC study shall be the entire quantity of the network element provided. As we have previously stated, all costs associated with providing the element shall be included in the incremental cost. Only forward-looking, incremental costs shall be included in a TELRIC study. Costs must be based on the incumbent LEC’s existing wire center locations and most efficient technology available.

460. Any function necessary to produce a network element must have an associated cost. The study must explain with specificity why and how specific functions are necessary to provide network elements and how the associated costs were developed. Only those costs that are incurred in the provision of the network elements in the long run shall be directly attributable to those elements. Costs must be attributed on a cost-causal basis. Costs are causally-related to the network element being provided if the costs are incurred as a direct result of providing the network element, or can be avoided, in the long run, when the company ceases to provide them. Thus, for example, the forward-looking costs of capital (debt and equity) needed to support investments required to produce a given element shall be included in the forward-looking direct cost of that element. Directly attributable costs shall include costs such as certain administrative expenses, which have traditionally been viewed as common costs, if these costs vary with the provision of network elements. Retailing costs, such as marketing or consumer billing costs associated with retail services, are not attributable to the production of network elements that are offered to interconnecting carriers and must not be included in the forward-looking direct cost of an element.

461. In a TELRIC methodology, the “long run” used shall be a period long enough that all costs are treated as variable and avoidable. This “long run” approach ensures that rates recover not only the operating costs that vary in the short run, but also fixed investment costs that, while not variable in the short term, are necessary inputs directly attributable to providing the element.

462. States may review a TELRIC economic cost study in the context of a particular arbitration proceeding, or they may conduct such studies in a rulemaking and apply the results in various and diverse circumstances involving incumbent LECs. In the latter case, states must replace any interim rates set in arbitration proceedings with the permanent rate resulting from the separate rulemaking. This permanent rate will take effect at or about the time of the conclusion of the separate rulemaking and will apply from that time forward.

463. Forward-Looking Common Costs. Certain common costs are incurred in the provision of network elements. As discussed above, some of these costs are common to only a subset of the elements or services provided by incumbent LECs. Such costs shall be allocated to that subset, and should then be allocated among the individual elements or services in that subset, to the greatest possible extent. For example, shared maintenance facilities and vehicles should be allocated only to the elements that benefit from those facilities and vehicles. Common costs also include costs incurred by the firm’s operations as a whole, that are common to all services and elements (e.g., salaries of executives involved in overseeing all activities of the business), although for the purpose of pricing interconnection and access to unbundled elements, which are intermediate products offered to competing carriers, the relevant common costs do not include billing, marketing, and other costs attributable to the provision of retail service. Given these common costs, setting the price of each discrete network element based on only the directly differing incremental costs directly attributable to the production of individual elements will not recover the total forward-looking costs of operating the wholesale network. Because forward-looking common costs are consistent with our forward-looking, economic cost paradigm, a reasonable measure of such costs shall be included in the prices for interconnection and access to network elements.

464. The incumbent LECs generally argue that common costs are quite significant, while several other parties maintain that these amounts are minimal. Because the unbundled network elements correspond, to a great extent, to discrete network facilities, and have different operating characteristics, we expect that common costs should be smaller than the common costs associated with the long-run incremental cost of a service. We expect that many facility costs that may be common with respect to the individual services provided by the facilities can be directly attributed to the facilities when offered as unbundled network elements. Moreover, defining network elements at a relatively high level of aggregation, as we have done, should also reduce the magnitude of the common costs. A properly conducted TELRIC methodology will attribute costs to specific elements to the greatest possible extent, which will reduce the common costs. Nevertheless, there will remain some common costs that must be allocated among network elements and interconnection services. For example, at the sub-element level of study (e.g., identifying the respective costs of 2-wire loops, ISDN loops, and so on), common costs may be a significant proportion of all the costs that must be recovered from sub-elements. Given the likely asymmetry of information regarding network costs, we conclude that, in the arbitration process, incumbent LECs shall have the burden to prove the specific nature and magnitude of these forward-looking common costs.

465. We conclude that forward-looking common costs shall be allocated among elements and services in a reasonable manner, consistent with the pro-competitive goals of the 1996 Act. One reasonable allocation method would be to allocate common costs using a fixed allocator, such as a percentage markup over the directly attributable forward-looking costs. We conclude that a second reasonable allocation method would allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, and use the remaining share to replicate promptly (i.e., bottleneck facilities). Allocation of common costs...
on this basis ensures that the prices of network elements that are least likely to be subject to competition are not artificially inflated by a large allocation of common costs. On the other hand, certain other allocation methods would not be reasonable. For example, we conclude that an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used. We conclude that such an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic. Such an allocation of these costs would undermine the pro-competitive objectives of the 1996 Act.

466. We believe that our treatment of forward-looking common costs will minimize regulatory burdens and economic impact for all parties involved in arbitration of agreements for interconnection and access to unbundled elements, and will advance the 1996 Act’s pro-competitive objectives for local exchange and exchange access markets. In our decisionmaking, we have considered the economic impact of our rules in this section on small incumbent LECs. For example, although opposed to the use of a forward-looking, economic cost methodology, small incumbent LECs favor the recovery of joint and common costs and stand-alone costs. For example, although opposed to the use of a forward-looking, economic cost methodology, small incumbent LECs favor the recovery of joint and common costs and stand-alone costs. For example, although opposed to the use of a forward-looking, economic cost methodology, small incumbent LECs favor the recovery of joint and common costs and stand-alone costs. For example, although opposed to the use of a forward-looking, economic cost methodology, small incumbent LECs favor the recovery of joint and common costs and stand-alone costs.

467. Based on the current record, we conclude that the currently authorized rate of return at the federal or state level is a reasonable starting point for TELRIC calculations, and incumbent LECs bear the burden of demonstrating with specificity that the business risks that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate. These elements generally are bottleneck, monopoly services that do not now face significant competition. We recognize that incumbent LECs are likely to face increased risks given the overall increase in competition in this industry, which generally might warrant an increased cost of capital, but note that, earlier this year, we instituted a preliminary inquiry as to whether the currently authorized federal 11.25 percent rate of return is too high given the current marketplace cost of equity and debt. On the basis of the current record, we decline to engage in a time-consuming examination to determine a new rate of return, which may well require a detailed proceeding. States may adjust the cost of capital if a party demonstrates to a state commission that either a higher or lower level of cost of capital is warranted, without that commission conducting a “rate-of-return” or other rate-making proceeding.”

We note that the risk-adjusted cost of capital need not be uniform for all
elements. We intend to re-examine the issue of the appropriate risk-adjusted cost of capital on an ongoing basis, particularly in light of the state commissions’ experiences in addressing this issue in specific situations.

472. We disagree with the conclusion that, when there are mostly sunk costs, forward-looking economic costs should not be the basis for pricing interconnection elements. The TELRIC of an element has three components, the operating expenses, the depreciation cost, and the appropriate risk-adjusted cost of capital. We conclude that an appropriate calculation of TELRIC will include a depreciation rate that reflects the true changes in economic value of an asset and a cost of capital that appropriately reflects the risks incurred by an investor. Thus, even in the presence of sunk costs, TELRIC-based prices are an appropriate pricing methodology.

(b) Cost Measures Not Included in Forward-Looking Cost Methodology

473. Embedded Costs. We read section 252(d)(1)(A)(i) to prohibit states from conducting traditional rate-of-return or other rate-based proceedings to determine rates for interconnection and access to unbundled network elements. We find that the parenthetical, "(determined without reference to a rate-of-return or other rate-based proceeding)," does not further define the type of costs that may be considered, but rather specifies a type of proceeding that may not be employed to determine the cost of interconnection and unbundled network elements. The legislative history demonstrates that Congress was eager to set in motion expeditiously the development of local competition and intended to avoid imposing the costs and administrative burdens associated with a traditional rate case. Prior to the joint conference, the Senate version of the 1996 Act contained the parenthetical language. In addition, the Senate version of the 1996 Act eliminated rate-of-return regulation, as did the House version. Conference removed the provisions eliminating rate-of-return regulation, but retained the parenthetical.

474. Section 252(d)(1)(A)(i) does not specify whether historical or embedded costs should be considered or whether only forward-looking costs should be considered in setting arbitrated rates. We are not persuaded by incumbent LEC arguments that prices for interconnection and unbundled network elements must or should include any difference between the embedded costs they have incurred to provide those elements and their current economic costs. Neither a methodology that establishes the prices for interconnection and access to network elements directly on the costs reflected in the regulated books of account, nor a price based on forward looking costs plus an additional amount reflecting embedded costs, would be consistent with the approach we are adopting. The substantial weight of economic commentary in the record suggests that an "embedded cost"-based pricing methodology would be pro-competitor—in this case the incumbent LEC—rather than pro-competition. We therefore decline to adopt embedded costs as the appropriate basis of setting prices for interconnection and access to unbundled elements. Rather, we reiterate that the prices for the interconnection and network elements critical to the development of a competitive local exchange should be based on the pro-competition, forward-looking, economic costs of those elements, which may be higher or lower than historical embedded costs. Such pricing policies will best ensure the efficient investment decisions and competitive entry contemplated by the 1996 Act, which should minimize the regulatory burdens and economic impact of our decisions on small entities.

475. Incumbent LECs contend generally that, in order to ensure they will recover their total investment costs and earn a profit, they must recover embedded costs. These costs, they argue, were incurred under federal and regulatory oversight and therefore should be recoverable. We are not convinced by the incumbent LECs’ principal arguments for recognizing embedded cost in setting section 251 pricing rules. Even if the incumbent LECs’ contention is correct, increasing the rates for interconnection and unbundled elements would interfere with the development of efficient competition, and is not the proper remedy for any past under-depreciation. Moreover, contrary to assertions by some incumbent LECs, regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that we or the states have provided in the past. We have considered the economic impact of precluding recovery of small incumbent LECs’ embedded costs. We do not believe that basing the prices of interconnection and unbundled elements on an incumbent LEC’s embedded costs would advance the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

476. We acknowledge that some incumbent LECs may have incurred certain embedded costs reasonably before the passage of the 1996 Act, based on different regulatory regimes. Some incumbent LECs may assert that they have made certain historical investments required by regulators that they have been denied a reasonable opportunity to recover in the past and that the incumbent LECs may no longer have a reasonable opportunity to recover in the new environment of the 1996 Act. The record before us, however, does not support the conclusion that significant residual embedded costs will necessarily result from the availability of network elements at economic costs. To the extent that any such residual consists of costs of meeting universal service obligations, the recovery of such costs can and should be considered in our ongoing universal service proceeding. Universal Service NPRM. To the extent a significant residual exists within the interstate jurisdiction that does not fall within the ambit of section 254, we intend that to address that issue in our upcoming proceeding on access reform.

477. Opportunity Cost—Efficient Component Pricing Rule. A number of incumbent LECs advocate using the “efficient component pricing rule” (ECPR) to set the prices that incumbent LECs charge new entrants for inputs required to produce the same retail services the incumbent produces. Under the ECPR, the price of an input should be equal to the incremental cost of the input plus the opportunity cost that the incumbent carrier incurs when the new entrant provides the services instead of the incumbent. The opportunity cost, which is computed as revenues less all incremental costs, represents both profit and contribution to common costs of the incumbent, given the existing retail prices of the services being sold.

478. We conclude that ECPR is an improper method for setting prices of interconnection and unbundled network elements because the existing retail prices that would be used to compute incremental opportunity costs under ECPR are not cost-based. Moreover, the ECPR does not provide any mechanism for moving prices towards competitive levels. It simply takes the embedded costs they have incurred to provide those elements and their current economic costs and applies them to the price for interconnection and access to network elements.

479. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.
retail prices are not based on costs. Incumbents generally argue that local residential retail prices are below costs while new entrants contend that they exceed competitive levels. In either case, application of ECPR would result in input prices that would be either higher or lower than those which would be generated in a competitive market and would not lead to efficient retail pricing. 479. In markets where retail prices exceed competitive levels, entry would take place if network element prices were set at efficient competitive levels. The ECPR, however, will serve to discourage competition in these very markets because it relies on the prevailing retail price in setting the price which new entrants pay the incumbent for inputs. While ECPR establishes conditions for efficient entry given existing retail prices, as its advocates contend, the ECPR provides no mechanism that will force retail prices to their competitive levels. We do not believe that Congress envisioned a pricing methodology for interconnection and network elements that would insulate incumbent LECs’ retail prices from competition. Instead, Congress specifically determined that input prices should be based on costs because this would foster competition in the retail market. Therefore, we reject the use of ECPR for establishing prices for interconnection and unbundled elements. 480. As discussed above, the record in this docket shows that end user prices are not cost-based. In Open Video Systems, in contrast, we did not find that there would be a problem with the determination of end user prices. Implementation of Section 302 of the Telecommunications Act of 1996—Open Video Systems, Second Report and Order, 61 FR 28698 (June 5, 1996). We concluded that “[u]se of [an ECPR] approach is appropriate in circumstances where the pricing is applicable [sic] to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider.” In addition, in Open Video Systems, we concluded that the ECPR is appropriate because it encourages entry for open video system operators and also enhances the availability of carriage for unaffiliated programmers. The ECPR generally protects the provider’s profits and provides opportunities for third parties to use the provider’s inputs. The ECPR does not provide a mechanism to drive retail prices to competitive levels, however. In Open Video Systems, we wanted to encourage entry by open video system providers and to encourage them to have incentives to open their systems to unaffiliated programmers. Here, our goal is to ensure that competition between providers, including third party providers using interconnection and unbundled elements, will drive prices toward competitive levels and thus use of the ECPR is inappropriate. 481. Universal Service Subsidies. We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Sections 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services. We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements, and access to network elements reflect the costs of providing those network elements, not the costs of supplying universal service. 482. Section 254(f) provides that a state may adopt equitable, nondiscriminatory, specific, and predictable mechanisms to advance universal service within that state. If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based. It is also inconsistent with the requirement of section 254(f) that telecommunications carriers contribute to state universal service on a nondiscriminatory basis, because telecommunications carriers requesting interconnection or access to unbundled network elements will be required to make contributions to universal service support through such surcharges. States may not, therefore, include universal service support funding in the rates for elements and services pursuant to sections 251 and 252, nor may they implement mechanisms that have the same effect. For example, states may not fund universal service support by imposing higher rates for interconnection, unbundled elements, or transport and termination on carriers that offer service to different types of customers or different geographic areas. To the extent that New York’s “pay or play” system funds universal service in this manner, it violates sections 251, 252, and 254 of the 1996 Act. Nothing in the 1996 Act or in this Order, however, precludes a state from adopting a universal service funding mechanism, whether interim or otherwise, if such funds are collected in accordance with section 254(f) on an “equitable and nondiscriminatory basis” through “specific, predictable, and sufficient mechanisms that do not rely on or burden Federal universal service support mechanisms.” 483. Our decision here does not exempt carriers purchasing elements or services under section 251 from contributing to (or possibly receiving) universal service support. Rather, the recovery of universal service support costs from telecommunications carriers, including carriers requesting unbundled network elements, will be governed by section 254 of the 1996 Act. Federal universal service support mechanisms will be determined by our decisions reached in CC Docket 96–45, based on the recommendations of the Federal/State Universal Service Joint Board, and states may adopt additional universal service support mechanisms consistent with section 254(f). 484. We are mindful that the requirements of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254. As discussed in the subsection immediately below, we permit incumbent LECs to continue to recover certain non-cost-based interstate access charge revenues for a limited period of time, largely because of concerns about possible deleterious impacts on universal service. We also authorize incumbent LECs, for a similar limited period of time, to continue to recover explicit intrastate universal service subsidy revenues based on intrastate access charges. This mechanism minimizes any possibility that implementation of sections 251 and 252 will unduly harm universal service during the interim period prior to completion of our universal service and access reform proceedings. Because we conclude this action should adequately provide for the continuation of a portion
of existing subsidy flows during a transition period until completion of our proceeding implementing section 254, we decline to permit any additional funding of universal service support through rates for interconnection, unbundled elements, and transport and termination during the interim period.

485. Interim Application of Access Charges to Purchasers of Unbundled Local Switching Element. In the introduction of this Order, we emphasize that implementation of section 251 of the 1996 Act is integrally related to both universal service reform as required under section 254, and to reform of the interstate access charge system. In order to achieve pro-competitive, deregulatory markets for all telecommunications services, we must create a new system of funding universal service that is specific, explicit, predictable, sufficient, and competitively neutral. We also must move access charges to more cost-based and economically efficient levels. We intend to fulfill both of these goals in the coming months, by completing our pending universal service proceeding to implement section 254 by our statutory deadline of May 1997, and by addressing access charge issues in an upcoming access reform proceeding. The 1996 Act, however, requires us to adopt rules implementing section 251 by August 1996. We are concerned that implementation of the requirements of section 251 now, without taking into account the effects of the new rules on our existing access charge and universal service regimes, may have significant, immediate, adverse effects that were neither intended nor foreseen by Congress.

486. Specifically, as we conclude above, the 1996 Act permits telecommunications carriers that purchase access to unbundled network elements from incumbent LECs to use those elements to provide telecommunications services, including the origination and termination of interstate calls. Without further action on our part, section 251 would allow entrants to use those unbundled network facilities to provide access services to customers they win from incumbent LECs, without having to pay access charges to the incumbent LECs. This result would be consistent with the long term outcome in a competitive market. In the short term, however, while other aspects of our regulatory regime are in the process of being reformed, such a change may have detrimental consequences.

The access charge system includes non-cost-based components and elements that at least in part may represent subsidies, such as the carrier common line charge (CCLC) and the transport interconnection charge (TIC). The CCLC recovers part of the allocated interstate costs for incumbent LECs to provide local loops to end users. In the universal service NPRM, we observed that the CCLC may result in higher-volume toll users paying rates that exceed cost, and some customers paying rates that are below cost. We sought comment on whether that subsidy should be continued, and on whether and how it should be restructured.

Universal Service NPRM. The nature of most of the revenues recovered through the TIC is unclear and subject to dispute, although a portion of the TIC is associated with certain costs related to particular transport facilities. Although the TIC was not created to subsidize local rates, some parties have argued in the Transport proceeding and elsewhere that some portion of the revenues now recovered through the TIC may be misallocated to a loop or intrastate costs that operate to support universal service. First Transport Order. 57 FR 54717 (November 20, 1992). In the forthcoming access reform proceeding, we intend to consider the appropriate disposition of the TIC, including the development of cost-based transport rates as directed by the United States Court of Appeals for the District of Columbia Circuit in Competitive Telecommunications Association v. FCC, 87 F.3d 522 (1996) (CompTel v. FCC).

488. Without a temporary mechanism such as the one we adopt below, the implementation of section 251 would permit competitive local service providers that also provide interstate long-distance service to avoid totally the CCLC and the TIC, which in part represent contributions toward universal service, by serving their local customers solely through the use of unbundled network elements rather than through resale. We believe that allowing such a result before we have reformed our universal service and access charge regimes would be undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than the unfettered operation of a competitive market. Because of our desire to err on the side of caution where universal service may be implicated, we conclude that some action is needed during the interim period before we complete our access reform and universal service proceedings.

489. We conclude that we should establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goal of the 1996 Act, including the implementation of a new, competitively-neutral system to fund universal service and a comprehensive review of our system of interstate access charges. Therefore, for a limited period of time, incumbent LECs may recover from interconnecting carriers the CCLC and a charge equal to 75 percent of the TIC for all interstate minutes traversing the incumbent LECs’ local switches for which the interconnecting carriers pay unbundled local switching element charges. Incumbent LECs may recover these charges only until the earliest of: (1) June 30, 1997; (2) the effective date of final decisions by the Commission in both the universal service and access reform proceedings; or (3) if the incumbent LEC is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer interregion interLATA service. The end date for BOCs that are authorized to offer interregion LATA service shall apply only to the recovery of access charges in those states in which the BOC is authorized to offer such service.

490. We tentatively concluded in the NPRM that purchasers of unbundled network elements should not be required to pay access charges. We reaffirm our conclusion above in our discussion of unbundled network elements that nothing on the face of sections 251(c)(3) and 252(d)(1) compels telecommunications carriers that use unbundled elements to pay these charges, nor limits these carriers’ ability to use unbundled elements to originate or terminate interstate calls, and that payment of rates based on TELRIC plus a reasonable allocation of common costs, pursuant to section 251(d)(1), represents full compensation to the incumbent LEC for use of the network elements that telecommunications carriers purchase. Because of the unique situation described in the preceding paragraphs, however, we conclude, contrary to our proposal in the NPRM, that during a time-limited period, interconnecting carriers should not be able to use unbundled elements to avoid access charges in all cases. As detailed below, this temporary mechanism will apply only to carriers that purchase the local switch as an unbundled network element, and use that element to originate or terminate interstate traffic. We are applying these transitional charges to the unbundled local switching element, rather than to any
other network elements, because such an approach is most closely analogous to the manner in which the CCLC and TIC are recovered in the interstate access regime. Currently, the CCLC and TIC apply to interstate switched access minutes that traverse incumbent LECs' local switches. Applying the CCLC and 75 percent of the TIC to the unbundled local switching element is consistent with our goal of minimizing disruptions while we reform our universal service system and consider changes to our access charge mechanisms. Moreover, the CCLC and the TIC are recovered on a per-minute basis, and the local switch is the primary point at which incumbent LECs are capable of recording interstate minutes for traffic associated with end user customers of requesting carriers.

491. We have crafted this short-term continuation of certain access charge revenue flows to minimize the possibility that incumbent LECs will be able to "double recover" through access charges the facility costs that new entrants have already paid to purchase unbundled elements. For that reason, we do not permit incumbent LECs to assess on purchasers of the unbundled switching element any interstate access charges other than the CCLC and 75 percent of the TIC. The other access charges are all designed to recover the cost of particular facilities involved in the provision of interstate access services, such as local switching, dedicated interoffice transport circuits, and tandem switching. Imposition of these facility-based access charges in addition to the cost-based charges for comparable network elements established under Section 252 could result in double recovery. The mechanism we establish will ensure that incentives created by non-cost-based elements of access charges do not result in harmful consequences prior to completion of access reform and our universal service proceeding. Imposition of additional access charges is therefore not necessary. We note that this mechanism serves to minimize the potentially disruptive effects of our decisions on incumbent LECs, including small incumbent LECs.

492. For the same reason, we permit incumbent LECs to recover only 75 percent of the TIC. Some portion of the TIC recovers revenues associated with specific transport facilities. To the extent that these costs can be identified clearly, they should not be imposed on new entrants through the TIC. Incumbent LECs will be fully compensated for any transport facilities that are not purchased from them through the unbundled element rates states establish under section 252(d)(1), which, as we have stated, must be based on economic cost rather than access charges. In our interim transport rate restructuring, we explicitly set the initial tandem switching rate at 20 percent of the interstate revenue requirement, with the remainder included in the TIC. Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, 57 FR 54717 (November 20, 1992). In addition, certain costs of upgrading incumbent LEC networks to support SS7 signaling were allocated to transport through then-existing separations procedures. In our interim transport rate restructuring, we did not create any facility-based charges to recover these costs, so the associated revenues presumably were incorporated into the TIC. There may also be other revenues associated with transport facilities that are recovered today through the TIC. While we are uncertain of the precise magnitude of these revenues, in our best judgment, based on the record in the Transport proceeding and other information before us, we find that it is likely that these revenues approach, but probably do not exceed 25 percent of the TIC for most incumbent LECs. Thus, we believe that 25 percent is a conservative amount to exclude from the TIC to ensure that incumbent LECs do not double recover revenues associated with transport facilities from new entrants. Moreover, the Court in CompTel v. FCC remanded our Transport decision, in part, because of the inclusion of tandem switching revenues in the TIC rather than in the rate element for tandem switching. We find that excluding 25 percent of the TIC represents a reasonable exercise of our discretion to prevent revenues associated with the tandem switching revenue requirement from being recovered from purchasers or unbundled local switching.

493. We strongly emphasize that these charges will apply to purchasers of the unbundled switching element only for a very limited period, to avoid the possible harms that might arise if we were to ignore the effects on access charges and universal service of implementation of section 251. BOCs shall not be permitted to recover these revenues once they are authorized to offer in-region interLATA service, because at that time the potential loss of access charge revenues faced by a BOC most likely will be able to be offset by new revenues from interLATA services. Moreover, although we do not prejudge the conditions necessary to grant BOC petitions under section 271 to offer in-region interLATA service, we do decide that BOCs should not be able to charge the CCLC and the TIC, which are not based on forward-looking economic costs, to competitors that use unbundled elements under section 251 once they are authorized to provide in-region interLATA service. Only BOCs are subject to special restrictions in the 1996 Act to ensure that their entry into the in-region interLATA market does not have an adverse impact on competition. We conclude that this additional trigger date after which BOCs may not continue to receive access charges from purchasers of unbundled local switching is consistent with this Congressional design.

494. We have selected June 30, 1997 as an ultimate end date for this transitional mechanism to coincide with the effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement that certain entrants pay the CCLC or a portion of the TIC on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry. Thus, the economic impact of our decision on competitive local service providers, including those that are small entities, should be minimized.

495. We believe that we have ample legal authority to implement this temporary transitional measure, and we find that this approach is consistent with the letter and spirit of the 1996 Act. We recognize that the CCLC and TIC have not been developed in accordance with the pricing standards of section 252(d)(1), and that to comply with the 1996 Act, the rates that states establish for interLATA services and unbundled network elements may not include non-cost-based amounts or subsidies. The 1934 and 1996 Acts do, however, give us legal authority to determine, for policy reasons, that users of LEC facilities should pay certain access charges for a period of time. The effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement that certain entrants pay the CCLC or a portion of the TIC on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry. Thus, the economic impact of our decision on competitive local service providers, including those that are small entities, should be minimized.

496. We believe that we have ample legal authority to implement this temporary transitional measure, and we find that this approach is consistent with the letter and spirit of the 1996 Act. We recognize that the CCLC and TIC have not been developed in accordance with the pricing standards of section 252(d)(1), and that to comply with the 1996 Act, the rates that states establish for interLATA services and unbundled network elements may not include non-cost-based amounts or subsidies. The 1934 and 1996 Acts do, however, give us legal authority to determine, for policy reasons, that users of LEC facilities should pay certain access charges for a period of time. The effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement that certain entrants pay the CCLC or a portion of the TIC on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry. Thus, the economic impact of our decision on competitive local service providers, including those that are small entities, should be minimized.
We intend to determine the appropriate disposition for these revenues. Until we have had the opportunity to do so, however, we permit incumbent LECs to recover a transitional charge equal to 75 percent of the TIC under the limited circumstances described herein. 497. The interim mechanism we establish here differs from the waiver relief we have previously granted to NYNEX and Ameritech to permit them to recover certain interstate access charge revenues through “bulk billing” of revenues to all interstate switched access customers. Those orders responded to waiver requests filed prior to the passage of the 1996 Act. Our responsibility in those proceedings was to determine whether special circumstances existed, and whether the specific relief requested better served the public interest than continued application of our general rules. By contrast, the action we take today addresses industry-wide issues that arise from the new regime put into place by section 251 of the 1996 Act, which allows states to adjust network element rates that recover the full unseparated cost of elements. Our response to the Ameritech and NYNEX waiver petitions does not, simply because those petitions also concerned access charge recovery, constrain our decision in this proceeding.

498. It would be unreasonable to provide such a transitional mechanism on the federal level, but to deny similar authority to the states. Therefore, states may continue existing explicit universal service support mechanisms based on intrastate access charges for an interim period of a similar brief, clearly-defined length. During that period, unless decided otherwise by the state, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. States may terminate these mechanisms at any time. We define mechanisms based on intrastate access charges as those mechanisms that require purchasers of intrastate access services from incumbent LECs to pay non-cost-based charges for those access services on the basis of their intrastate access minutes of use. 499. We do not intend, however, that such a transitional mechanism will eviscerate the requirements of sections 252 and 254, which, as we have stated, prohibit funding of universal service subsidies through rates for intrastate traffic generated by private investors. Such mechanisms such as New York’s “pay or play” system, which would impose intrastate access charges on non-access services rather than allowing incumbent LECs to recover non-cost-based revenues from purchasers of access services, may not be included in this interim system. Such a result is justified because state “pay or play” mechanisms do not at present constitute a significant revenue stream to incumbent LECs, and therefore elimination of this mechanism is unlikely, in the short term, to have significant detrimental effects on universal service support.

500. These state mechanisms must end on the earlier of: (1) June 30, 1997; or (2) if the incumbent LEC that receives the transitional access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. With one exception, the analysis provided above as to the rationale for the end dates for the transitional interstate access charge mechanism applies here as well. Because our access reform proceeding focuses on federal charges, and because the full extent of the section 254 universal service mechanism remains to be determined in that proceeding, intrastate access charge-based universal service support mechanisms should not now be required to terminate upon the completion of those proceedings.

501. As with our decision to permit incumbent LECs to continue to receive certain interstate access charge revenues from some purchasers of unbundled local switching for a limited period of time, we believe our decision to allow states to preserve certain intrastate universal service support mechanisms based on access charges is within our authority under section 251(d)(1) of the 1996 Act, and section 4(i) of the 1934 Act. Moreover, although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.

502. We conclude that our decision to permit LECs to continue to receive certain intrastate access charge revenues from some purchasers of unbundled local switching for a limited period of time is consistent with our authority under sections 251(d)(1) and 251(g) of the 1996 Act.

(c) Fifth Amendment Issues

We conclude that our decision to permit LECs to continue to receive certain intrastate access charge revenues from some purchasers of unbundled local switching for a limited period of time is consistent with our authority under sections 251(d)(1) and 251(g) of the 1996 Act.
with service, may assert their rights under the Takings Clause of the Fifth Amendment. Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). In applying the Takings Clause to rate setting for public utilities, the Court has stated that “[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.

503. The Supreme Court has held that the determination of whether a rate is confiscatory depends on whether that rate is just and reasonable, and not on what methodology is used. In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Federal Power Commission v. Memphis Light, Gas & Water Division, 411 U.S. 458 (1973); Jersey Central Power & Light v. FERC, 810 F.2d 1168 (D.C. Cir. 1987). In Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591 (1944), the Court upheld the Federal Power Commission’s order that required the company to make a large reduction in wholesale gas rates. The commission based its determination of a reasonable rate of return on a plant valuation determined by using a historical cost methodology that was only half as large as the company’s own valuation based on forward-looking reproduction costs. In its decision, the Court set forth the governing legal standard for determining whether a rate is constitutional:

Under the statutory standard of “just and reasonable” it is the result reached not the method employed that is controlling. It is not the thrust of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

504. The Court went on to explain that, in determining whether a rate is reasonable, the regulatory body must balance the interests of both the investor and consumer. “From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business * * *. [T]he return on the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”

505. Under sections 251(c) (2) and (3) of the 1996 Act, incumbent LECs must establish rates for interconnection and unbundled elements that are just and reasonable. Failing to do so means adopting the rules that govern those rates, under Hope Natural Gas we must consider whether the end result of incumbent LEC rates is just and reasonable. Incumbent LECs argue that establishing a rate structure that does not permit recovery of historical or embedded costs is confiscatory. We disagree. As stated above, the Court has consistently held since Hope Natural Gas that it is the end result, not the method used to achieve that result, that is the issue to be addressed. Indeed, the Court has found that the “fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.” Moreover, the Court has upheld as reasonable changes in ratemaking methodology when the change resulted in the exclusion of historical costs prudently incurred. Thus, the mere fact that an incumbent LEC may not be able to set rates that will allow it to recover a particular cost incurred in establishing its regulated network does not, in and of itself, result in confiscation.

506. Moreover, Hope Natural Gas requires only that the end result of our overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. In other words, incumbent LECs’ overall rates must be considered, including the revenues for other services under our jurisdiction.

507. In this proceeding, we are establishing pricing rules that should produce rates for monopoly elements and services that approximate what the incumbent LEC would be able to charge if there were a competitive market for such offerings. We believe that a forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investment, i.e., just and reasonable rates. The record does not compel a contrary conclusion. No incumbent LEC has provided persuasive evidence that prices based on a forward-looking economic cost methodology would have a significant impact on its “financial integrity.” We further note that at least one federal appellate court has held incremental cost-based pricing constitutional. Metropolitan Transp. Auth. v. Interstate Commerce Commission, 792 F.2d 287, 297 (2d Cir.), cert. denied, 479 U.S. 1017 (1986). 508. Incumbent LECs may seek relief from the Commission’s pricing methodology if they provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory rates. We also do not preclude the possibility that incumbent LECs will be afforded an opportunity to recover, to some extent, their embedded costs through a mechanism separate from rates for interconnection and unbundled network elements. As stated above, we intend to explore this issue in detail in our upcoming access reform proceeding.

509. GTE argues that the proper standard to review our ratemaking methodology is the just compensation standard generally reserved for takings of property. This is in effect a contention that the 1996 Act’s physical collocation and unbundled network facility requirements constitute physical occupation of their property that should be deemed a taking and that must be subject to “just compensation.” Assuming for the sake of argument that the physical collocation and unbundled facilities requirements do result in a taking, we nevertheless find that the ratemaking methodology we have adopted satisfies the just compensation standard. Just compensation is normally measured by the fair market value of the property subject to the taking. Just compensation is not, however, intended to permit recoveries of monopoly rents.

The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates that would be charged in a competitive market, Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, 53 FR 22356 (June 15, 1988), and, we believe, is entirely consistent with the just compensation standard. Indeed, a similar rate methodology based on incremental costs has been found to satisfy the just compensation requirement. For these reasons, we conclude that, even if the 1996 Act’s physical collocation and unbundled network facility requirements constitute a taking, a forward-looking economic cost methodology satisfies the Constitution’s just compensation standard.

3. Rate Structure Rules

a. General Rate Structure Rules

(1) Background

510. In addition to applying our economic pricing methodology to determine the rate level of a specific element or interconnection, the state must also determine the appropriate rate structure. We discuss in this section general principles for analyzing rate structure questions, such as in what circumstances charges should be flat-rates or usage sensitive and in what circumstances they should be recurring or non-recurring. These rate structure
rules will apply as well if a state sets rates based on default proxies discussed in Section VII.C.2 below, where we also discuss the appropriate rate structure for specific network elements. Network providers incur costs in providing two broad categories of facilities, dedicated and shared. Dedicated facilities are those that are used by a single party—either an end user or an interconnecting network. Shared facilities are those used by multiple parties. In the NPRM, we proposed that costs should be recovered in a manner that reflects the way they are incurred. We also sought comment on whether we should require states to provide for recovery of dedicated facility costs on a flat-rated basis, or at a minimum, require LECs to offer a flat-rate option.

(2) Discussion

511. We conclude, as a general rule, that incumbent LECs’ rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. This will conform to the 1996 Act’s requirement that rates be cost-based, ensure requesting carriers have the right incentives to construct and use public network facilities efficiently, and prevent incumbent LECs from inefficiently raising costs in order to deter entry. We note that this conclusion should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs. We also adopt some more specific rules that follow from this general rule.

512. First, we require that the charges for dedicated facilities be flat-rated, including, but not limited to, charges for unbundled loops, dedicated transport, interconnection, and collocation. These charges should be assessed for fixed periods, such as a month. We are requiring flat-rated charges for dedicated facilities. Usage-based charges for dedicated facilities would give purchasers of access to network elements an uneconomic incentive to reduce their traffic volumes. Moreover, purchasers of access to network elements with low volumes of traffic would pay below-cost prices, and therefore have an incentive to add lines that they did not need if they had to pay the full cost. As stated in the NPRM, a flat-rated charge is most efficient for dedicated facilities, because it ensures that a customer will pay the full cost of the facility, and no more. It ensures that an entrant will, for example, purchase the exclusive right to use additional loops only if the entrant believes that the benefits of the additional loops will exceed its costs. It also ensures that the entrant will not face an additional (and non-cost-based) usage charge.

513. Second, if we apply our general rule that costs should be recovered in a manner that reflects the way they are incurred, then recurring costs must be recovered through recurring charges, rather than through a nonrecurring charge. A recurring cost is one incurred periodically over time. A LEC may not recover recurring costs such as income taxes, maintenance expenses, and administrative expenses through a nonrecurring charge because these are costs that are incurred in connection with the asset over time. For example, we determine that maintenance expenses relating to the local loop must be recovered through the recurring loop charge, rather than through a nonrecurring charge imposed upon the entrant.

514. We find that recovering a recurring cost through a nonrecurring charge would be unjust and unreasonable because it is unlikely that incumbent LECs will be able to calculate properly the present value of recurring costs. To calculate properly the present value of recurring costs, an incumbent LEC would have to project accurately the duration, level, and frequency of the recurring costs and estimate properly its overall cost of capital. We find that, in practice, the present value of the recurring costs cannot be calculated with sufficient accuracy to warrant up-front recovery of these costs because incumbent LECs lack sufficient experience with the provision of interconnection and unbundled rate elements. Without sufficient experience, incumbent LECs are unable to project the length of time that an average entrant would interconnect with, or take an unbundled element from, the incumbent LEC, or how expenses associated with interconnection and unbundled rate elements would change over time. In contrast, a recurring charge for a recurring cost would ensure that a customer is only charged for the costs the entrant incurs while that entrant is taking interconnection service or unbundled rate elements from the incumbent LEC. Moreover, when costs are recovered over a reasonable period of time in lieu of a nonrecurring charge, this arrangement would decrease the size of the entrant’s initial capital outlay, thereby reducing financial barriers to entry. At the same time, any such reasonable arrangement would ensure that incumbent LECs are fully compensated for their nonrecurring costs.

515. We require, however, that state commissions take steps to ensure that incumbent LECs do not recover nonrecoverable costs and that nonrecoverable costs are imposed equitably among entrants. A state commission may, for example, decide to permit incumbent LECs to charge the initial entrants the full amount of costs incurred for shared facilities for physical collocation services, even if future entrants may benefit. A state commission may, however, require subsequent entrants, who take physical collocation services in the same central office and receive benefits as a result of costs for shared facilities, to pay the incumbent LEC for their proportionate share of those costs, less depreciation (if
an asset is involved). Under this approach, the state commission could require the incumbent LEC to provide the initial entrant pro rata refunds, reflecting the full amount of the charges collected from the subsequent entrants. Alternatively, a state commission may decide to permit incumbent LECs to charge initial entrants a proportionate fraction of the costs incurred, based on a reasonable estimate of the total demand by entrants for the particular interconnection service or unbundled rate elements.

519. In addition, state commissions must ensure that nonrecurring charges imposed by incumbent LECs are equitably allocated among entrants where such charges are imposed on one entrant for the use of an asset and another entrant uses the asset after the first entrant abandons the asset. For example, when an entrant pays a nonrecurring charge for construction of a physical collocation cage and the entrant discontinues occupying the cage before the end of the economic life of the cage, a state commission could require that the initial entrant receive a pro rata refund from the incumbent LEC for the undepreciated value of the cage in the event that a subsequent entrant takes physical collocation service and uses the asset. Under this approach, the state commission could require that the subsequent entrant pay the incumbent LEC a nonrecurring charge equal to the remaining unamortized value of the cage and the initial entrant will receive a credit from the incumbent LEC equal to the unamortized value of the cage at the time the subsequent entrant takes service and utilizes the cage.

520. BeltSouth's concern that rate structure rules could preclude mutually agreeable alternative structures is misplaced. The rate structure rules we adopt here apply only to rates imposed by the states in arbitration among the parties and to state review of BOC statements of generally available terms. Our rules do not restrict parties from agreeing to alternative rate structures. On the contrary, our intent, following the clear pro-negotiation spirit of the 1996 Act, is for parties to use the backdrop of state arbitrations conducted under our rules, to negotiate more efficient, mutually agreeable arrangements, subject, of course, to the antitrust laws and to the 1996 Act's requirements that voluntarily negotiated agreements not unreasonably discriminate against third parties.

b. Additional Rate Structure Rules for Shared Facilities

(1) Background

521. In the NPRM, we stated our belief that the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users that share the facility. The NPRM noted that, for shared facilities, it may be efficient to set prices using any of the following: a usage-sensitive charge; a usage-sensitive charge for peak-time usage and a lower charge for off-peak usage; or a flat charge for the peak capacity that an interconnector wishes to pay for and use as though that portion of the facility were dedicated to the interconnector.

(2) Discussion

522. The costs of shared facilities including, but not limited to, much of local switching, tandem switching, transmission facilities between the end office and the tandem switch, and signaling, should be recovered in a manner that efficiently apportions costs among users. Because the cost of capacity is determined by the volume of traffic that the facilities are able to handle during peak load periods, we believe, as a matter of economic theory, that if usage-sensitive rates are used, then somewhat higher rates should apply to peak period traffic, with lower rates for non-peak usage. The peak load price would be designed to recover at least the cost of the incremental network capacity added to carry peak period traffic. Pricing traffic during peak periods based on the cost of the incremental capacity needed to handle additional traffic would be economically efficient because additional traffic would be placed on the network if and only if the user or interconnecting network is willing to pay the cost of the incremental network capacity required to handle this additional traffic. Such pricing would ensure that a call made during the peak period generates enough revenue to cover the cost of the facilities expansion it requires, and would thus give carriers an incentive to expand and develop the network efficiently. In contrast, off-peak traffic imposes relatively little additional cost because it does not require any incremental capacity to be added to base plant, and consequently, the price for carrying off-peak traffic should be lower.

523. We recognize, however, that there are practical problems associated with using a peak-sensitive pricing system. For example, differences in a given provider's network may experience peak traffic volumes at different times (e.g., business districts may experience their peak period between 10:00 and 11:00 a.m., while suburban areas may have their peak periods between 7:00 and 8:00 p.m.). Moreover, peak periods may change over time. For instance, growth in Internet usage may create new peak periods in the late evening. Further, charging different prices for calls made during different parts of the day may cause some customers to shift their calling to the less expensive time periods, which could shift the peak or create new peaks. Thus, to design an efficient peak-sensitive pricing system requires detailed knowledge of both the structure of costs as well as demand.

524. We conclude that the practical problems associated with peak-sensitive pricing make it inappropriate for us to require states to impose such a rate structure for unbundled local switching or other shared facilities whose costs vary with capacity. Because we believe that such a structure may be the most economically efficient, however, we do not prohibit states from imposing peak-sensitive pricing. We also expect that parties may be able to negotiate agreements with peak/off-peak differences if the benefits of such distinctions are sufficiently high. We conclude that states may use either usage-sensitive rates or flat capacity-based rates for shared facilities, if a state finds that such rates reasonably reflect the costs imposed by the various users. States may consider for guidance rate structures developed in competitive markets for shared facilities. We note that our decisions in this section may benefit small entity entrants in local exchange and exchange access markets by minimizing the extent to which purchasers of interconnection and unbundled access pay rates that diverge from the costs of those facilities and services.

c. Geographic/Class-of-Service Averaging

(1) Background

525. In the NPRM, we asked about the appropriate level of aggregation for rates for interconnection and access to unbundled elements. We noted that geographic averaging is simple to administer and prevents unreasonable or unlawful rate differences but, where averaging covers high and low cost areas, it could distort competitors' decisions whether to lease unbundled elements or build their own facilities. We sought comment on the geographic averaging of interconnection and unbundled element rates by zone, LATA, or other area.
526. We also inquired about disaggregation by class of service. We questioned whether business and residential loops, or loops deployed using different technologies should be charged different rates, and how large a differential should be allowed.

(2) Discussion

527. Geographic Deaveraging. The 1996 Act mandates that rates for interconnection and unbundled elements be "based on the costs * * * of providing the interconnection of network elements." We agree with most parties that deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Thus, we conclude that rates for interconnection and unbundled elements must be geographically deaveraged.

528. The record reflects that at least two states have implemented geographically deaveraged rate zones. These state deaveraged systems have generally included a minimum of three zones. In the Expanded Interconnection proceeding, the Commission also permitted LECs to implement a three zone structure. Expanded Interconnection Order. 57 FR 54323 (November 18, 1992); Expanded Interconnection Second Report and Order and Third Notice of Proposed Rulemaking. 58 FR 48756 (September 17, 1993). We conclude that three zones are presumptively sufficient to reflect geographic cost differences in setting rates for interconnection and unbundled elements, and that states may, but need not, use these existing density-related rate zones. Where such systems are not in existence, states shall create a minimum of three cost-related rate zones to implement deaveraged rates for interconnection and unbundled elements. A state may establish more than three zones where cost differences in geographic regions are such that it finds that additional zones are needed to adequately reflect the costs of interconnection and access to unbundled elements.

529. Class-of-Service Deaveraging. The record leads us to the opposite conclusion for class-of-service deaveraging. Under the 1996 Act, wholesale rates for resold services will be based on retail rates less avoided costs. Rates for interconnection and access to unbundled elements, however, are to be based on costs. We conclude that the pricing standard for interconnection and unbundled elements prohibits deaveraging that is not cost-based. Interconnection and unbundled elements are intermediate services provided by incumbent LECs to other telecommunications carriers, and there is no evidence that the cost of providing these intermediate services varies with the class of service the telecommunications carrier is providing to its end-user customers. We conclude that states may not impose class-of-service deaveraging on rates for interconnection and unbundled elements. We disagree with the Ohio Consumers' Counsel's position that the 1996 Act's explicit permission of class-of-service deaveraging of resold services implies that class-of-service deaveraging should be permitted for interconnection and unbundled elements. Finally, we note that these decisions concerning deaveraging may be expected to lead to increased competition and a more efficient allocation of resources, which should benefit the entire industry, including small entities and small incumbent LECs.

C. Default Proxy Ceilings and Ranges

530. As previously discussed, we strongly encourage states to, as a general rule, set arbitrated rates for interconnection and access to unbundled network elements pursuant to the forward-looking, economic cost pricing methodology we adopt in this Order. Such rates would approximate levels charged in a competitive market, would be economically efficient, and would be based on the forward-looking, economic cost of providing interconnection and unbundled elements. We recognize, however, that, in some cases, it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration and thus here first address situations in which a state has not approved a cost study. States that do not complete their review of a forward-looking economic cost study within the statutory time periods but must render pricing decisions, will be able to establish interim arbitrated rates based on the proxies we provide in this Order. A proxy approach might provide a faster, administratively simpler, and less costly approach to establishing prices on an interim basis than a detailed forward-looking cost study.

531. The default proxies we establish will, in most cases, serve as presumptive ceilings. States may set prices below those ceilings if the record before them supports a lower price. States should provide a reasoned basis for selecting a particular default price. In one case, for local switching, the default proxy is a range within which a state may set prices below the default price. States that set prices based upon the default proxies must also require the parties to update the prices in the interconnection agreement on a going-forward basis, either after the state conducts or approves an economic study according to the cost-based pricing methodology or pursuant to any revision of the default proxy. We believe generic economic cost models, in principle, best comport with the preferred economic cost approach described previously, and we intend to examine further such models by the first quarter of 1997 to determine whether any of those models, with any appropriate modifications, could serve as better default proxies. Any updated price would take effect beginning at the time of the completed and approved study or the application of the revised default proxy.

532. Second, if a state has approved or conducted an economic cost study, prior to this Order, that complies with the methodology we adopt in this Order, the state may continue to apply the resulting rate even when not consistent with our default proxies. There must, however, be a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. Finally, while we provide for the use by states of default proxies, we recognize that certain states that are unable to utilize an economic cost study may wish to obtain the benefits of setting rates pursuant to such a study for its residents. The Commission will therefore entertain requests by states to review an economic cost study, to assist the state in conducting or reviewing such a study, or to conduct such a study.

1. Use of Proxies Generally

a. Background

533. In the NPRM, we discussed the possibility of setting certain outside limits for interconnection and unbundled element rates, in particular, by the use of proxies. We invited parties to comment on whether the use of certain proxies to set outer boundaries on the prices for interconnection and unbundled elements would be consistent with the pricing principles of the 1996 Act. Specifically, in the NPRM, we asked parties to comment on the benefits of various types of proxies: (1) generic cost studies, such as the Benchmark Cost Model and the Hatfield models; (2) some measure of nationally-averaged cost data; (3) rates in existing interconnection and unbundling arrangements between incumbent LECs and other providers of local service, such as neighboring incumbent LECs, CMRS providers, or other entrants in the
same service area; (4) a subset of the
current LEC’s existing interstate
access rates, charged for interconnection
with IXCs and other access customers,
or an intrastate equivalent; (5) use of
the interstate prices established in the ONA
proceeding for unbundled features and
functions of the local switch as ceilings
for the same unbundled elements under section 251; and (6) any other
administratively simple methods for
establishing a ceiling for
interconnection and unbundled network
element rates. As a counterpart
to ceilings, we also sought comment on
whether it would be necessary or
appropriate for us to establish floors for
interconnection and unbundled element
prices.

b. Discussion

536. We adopt, in the section below,
default proxies for particular network
elements. We believe that these default
proxies generally will result in
reasonable price ceilings or price ranges
and, for administrative and practical
reasons, will be beneficial to the states
in conducting initial rate arbitrations,
especially in the time period prior to
completion of a cost study. The proxies
we adopt are designed to approximate
prices that will enable competitors to
to enter the local exchange market swiftly
and efficiently and will constrain the
incumbent LECs’ ability to preclude
efficient entry by manipulating the
allocation of common costs among
services and elements. States that utilize
the default proxies we establish to set
prices in an arbitration should revise
those prices on a going-forward basis
when they are able to utilize the
preferred economic costing
methodology we describe in Section
VII.B.2.a. above, or if we subsequently
adopt new proxies.

537. We have considered the
economic impact of the adoption of
default proxy ceilings and ranges on
small entities, including new entrants
and small incumbent LECs. The
adoption of proxies for interim
arbitrated rates should minimize
regulatory burdens on the parties to
arbitration, including small entities
seeking to enter the local exchange
markets and small incumbent LECs, by
permitting states to implement the 1996
Act more quickly and facilitating
competition on a reasonable and
efficient basis by all firms in the
industry. We therefore believe that the
adoption of default proxy ranges and
ceilings advances the pro-competitive
goals of the 1996 Act. We also note that
certain small incumbent LECs are not
subject to our rules under section
251(f)(1) of the 1996 Act, unless

otherwise determined by a state
commission, and certain other small
incumbent LECs may seek relief from
their state commissions from our rules
under section 251(f)(2) of the 1996 Act.

538. The proxies that we establish
represent the price ceiling or price
ranges for the particular element on an
averaged basis. In Section VII.B.3.c.
avove, we required that rates be set on
a geographically-deaveraged basis.
Consequently, states utilizing the
proxies shall set rates such that the
average rate for the particular element in
an area does not exceed the
applicable proxy ceiling or lie outside
the proxy range.

539. We reject the use of rates in
interconnection agreements that predate
the 1996 Act as a proxy-based ceiling for
interconnection and unbundled element
rates. These existing interconnection
agreements were not reached in a
competitive market environment.

Further, such agreements may reflect
the divergent bargaining power of the
to the agreement, various public
policy initiatives to advance rural
telephone service, or non-monetary
pro quos often found in voluntarily
negotiated business arrangements that
may be difficult to quantify. There is
little basis for us to conclude that rates
in these interconnection agreements
reflect the forward-looking, incremental
cost of interconnection and unbundled
network elements. Prices in agreements
reached since the 1996 Act are more
likely than prior agreements to provide
useful information about forward-
looking costs, which together with other
information may be useful in
establishing proxies.

540. In the NPRM, we also raised the
issue of using some measure of
nationally-averaged cost data as a proxy.
No such study has been submitted into
the record in this proceeding.

2. Proxies for Specific Elements

a. Overview

541. Although we encourage states to
use an economic cost methodology to
set rates for interconnection, unbundled
network elements, and collocation,
we will permit states unable to analyze an
economic costing study within the
statutory time constraints to use default
proxies in setting and reviewing rates.
We set forth below the default proxies for
specific network elements. These
proxies are interim only. They will
apply only until a state sets rates in
arbitrations on the basis of an economic
cost study, or until we promulgate new
proxies based on economic cost models.
We also set forth below the rate
structure rules that apply to each of
network elements. These rate structure
requirements are applicable regardless of
whether a state uses an economic cost
study or the proxy approach to set rate
levels.

b. Discussion

542. Most loop costs are associated
with a single customer. MTS and WATS
Market Structure, Third Report and
Order. 48 FR 10319 (March 11, 1983).
Outside plant between a customer’s
premises and ports on incumbent LEC
switches is typically either physically
separate for each individual customer,
or has costs that can easily be
apportioned among users. We therefore
conclude that costs associated with
unbundled loops should be recovered on
a flat-rates basis. Usage-based rates
for an unbundled loop would most
likely translate into usage-based rates
for new entrants’ retail local customers.
A retail usage-based rate would distort
efficient use. Customers that had to pay a usage charge would
have an incentive not to use the network
in situations where the benefit of using
the network exceeds the true cost
of using the network. Usage-based loop
prices would put an entrant at an
artificial cost disadvantage when
competing for high-volume customers.
We note that MFS has filed a separate
petition asking the Commission to
preempt certain provisions of the Texas
statute, which it contends requires
incumbent LECs to sell unbundled local
loops on a usage-sensitive basis. We will
rule specifically on the Texas statute
when we consider the MFS Texas
Petition.

543. In general, we believe that states
should use a TELRIC methodology to
establish geographically deaveraged,
flat-rate charges for access to unbundled
loops. As discussed above, however, we
recognize that, in some cases, it may not
be possible for carriers to prepare, or for
state commissions to review, economic
cost studies within the statutory time
frame for arbitration proceedings.
Because reviewing and approving such
cost studies takes time and because
many states have not yet begun, or have
only recently begun, to develop and
examine such studies, it is critical for
the near-term development of local
competition to have proxies that
provide an approximation of forward-
looking economic costs and can be used
by states almost immediately. These
proxies would be used by a state
commission until it is able either to
cost study or to evaluate and adopt the
results of a study or studies.
submitted in the record. In an NPRM to be issued shortly, we will investigate more fully various long-run incremental cost models in the record with an eye to developing a model that can be used to generate proxies for the forward looking economic costs of network elements. Until such time as we can develop such a model, we have developed the following default proxy ceilings that state commissions that have not completed forward looking economic cost studies may use in the interim as an approximation to the forward looking cost of the local loop. 544. State commissions may use this proxy to derive a maximum (or ceiling) loop rate for each incumbent LEC operating within their state, and may establish actual unbundled loop rates at any level less than or equal to this maximum rate in specific arbitrations or other proceedings. Of course, we are encouraging states to have economic studies completed wherever feasible. Moreover, states will have to replace this proxy ceiling with the results of their own forward looking economic cost study or the results produced by a generic economic cost model that the Commission has approved.

545. We are adopting a proxy ceiling based on two cost models and rates for unbundled loops allowed by six states that had available to them the results of forward-looking economic cost studies at the time they considered either interim or permanent rates for the unbundled loop element. These states are Colorado, Connecticut, Florida, Illinois, Michigan, and Oregon. Each of these states has used a standard that appears to be reasonably close to the forward-looking economic cost methodology that we require to be used, although possibly not consistent in every detail with our TELRIC methodology. Generally, these states appear to have included an allocation of forward-looking common costs in their unbundled loop prices. The individual state studies resulted in the following average rates for unbundled local loops:

- Colorado: $18
- Connecticut: $12.95
- Florida: $17.28
- Illinois: $10.93
- Michigan: $10.03
- Oregon: $12.45

546. The Colorado Commission set an interim rate of $18 per month for unbundled loops terminated at the main distribution frame of the LEC switch. The Connecticut Commission ruled that SNET must provide the following interim unbundled loop prices varying by four zones: metro $10.18; urban $11.33; suburban $15.33; and rural $14.97. In the absence of further information about customer density or average loop length by zone, we used a simple average equal to $12.95. The Florida Commission set an interim rate for 2-wire loops at $17.00 per month for BellSouth, $15.00 for United/Centel, and $20.00 for GTE. Using weights equal to the number of loops served by each company in 1994 as reported in the Monitoring Report, we computed a weighted average price equal to $17.28. Pursuant to its Customers First Order, the Illinois Commerce Commission approved tariffs establishing business rates equal to $7.08, $10.92, and $14.45, and residential rates equal to $4.39, $8.67, and $12.14 in three density zones. Based on data from Table 2.5, page 20 of the Common Carrier Statistics, 1995 Preliminary, we found a 36 percent–64 percent business residential split. Using Illinois Commission data for number of households in each density zone (996,750 in zone A; 2,788,759 in zone B; 4,594,567 in zone C), we computed an average loop cost of $10.93. The Michigan Commission approved transitional rates of $8.00 per loop for business and $11 per loop for residence. Based on Common Carrier Statistics, 1995 Preliminary data, we computed a 32 percent–68 percent business-residential split in Michigan, which leads to an average rate of $10.03. The Oregon Commission set the rate for a “basic 2-wire loop set” at $11.95 plus $0.50 for a network access channel connection, for a total price of $12.45. For the Oregon Commission for 1995 Preliminary data, we found a weighted average price equal to $17.28. The Illinois Commission approved transitional rates of $8.67, and $12.14 in three density zones.

547. In order to set a proxy ceiling for unbundled loop elements we make use of the two cost models for which nationwide data are available and upon which parties have had the opportunity to comment in this proceeding. These models are the Benchmark Cost Model (BCM) and the Hatfield 2.2. Based on our current information, we believe that both these models are based on detailed engineering and demographic assumptions that vary among states, and that the outputs of these models represent sufficiently reasonable predictions of relative cost differences among states to be used as set forth below to set a proxy ceiling on unbundled loop prices for each state. We do not believe, however, that these model outputs by themselves necessarily represent accurate estimates of the absolute magnitude of loop costs. As we discuss below, further analysis is necessary in order to evaluate fully the procedures and input assumptions that the models use in order to derive cost estimates. Furthermore, in the case of BCM, model outputs include costs in addition to the cost of the local loop. In order to correct for these considerations, we have developed a hybrid cost proxy in the following manner. First, we have applied a scaling factor to the cost estimates of each model. This scaling is based on the actual rates computed for unbundled loop elements in the six states referred to above. Specifically we have multiplied the cost estimate produced by each model in each state by a factor equal to the unweighted average of rates adopted by state commissions in the six states, divided by the unweighted average of the model cost estimates for the same six states. Our hybrid cost proxy is computed as the simple average of the scaled cost estimates for the two models in each of the 48 contiguous states and the District of Columbia. Neither BCM nor Hatfield 2.2 provide cost estimates for Alaska and only the BCM provides an estimate for Hawaii. Our default loop cost proxies for Hawaii and Puerto Rico are based on the default loop cost proxies of the states that most closely approximate them in population density per square mile. We are not setting default loop cost proxies in this Order for Alaska or for any of the remaining non-contiguous areas subject to the 1996 Act requirement that incumbent LECs offer unbundled loop elements. We are not establishing default loop cost proxies for these areas because we are unsure that comparisons of the population densities of the continental states and of Alaska and other non-contiguous areas subject to the 1996 Act fully capture differences in loop costs. Regulatory authorities in those areas may seek assistance from this Commission should default loop cost proxies be needed before they have completed their investigations of the forward-looking costs of providing unbundled loop elements. Our intention is to establish a ceiling for unbundled loop rates, we believe that it is necessary to take account of the variation in the data that we have used for scaling. While the six states that we considered appear to have based their rates on forward-looking economic cost pricing principles, the actual rates that they approved appear to reflect other factors as well. Furthermore, because only a small number of states have conducted such studies, some upward adjustment is warranted as a safety margin to ensure that the ceiling captures the variation in forward-looking economic costs and prices on a state-by-state basis. We have therefore chosen to adjust the hybrid cost estimates upward by five percent for each state. A table listing the proxy ceilings on a statewide average basis is contained in Appendix D.
A number of parties have opposed the use of either the Hatfield model or BCM. Some critics, for example, have argued that the models may lead to inaccurate cost estimates since these estimates assume that a network is built “from scratch.” Others have criticized specific procedures that have been used in the models to estimate both operating expenses and capital costs. As discussed below in Section VII.C.3., we believe that these criticisms may have merit. In a future rulemaking proceeding, we intend to examine in greater detail various forward looking economic cost models. For the purposes of setting an interim proxy, however, we note that the criticisms have been directed largely toward the absolute level of cost estimates produced by the models, rather than the relative cost estimates across states. Since our hybrid proxy ceiling explicitly scales the model cost estimates based on existing state decisions and uses the model results simply to compute relative prices, we believe that these criticisms do not apply in the present context.

We also note that a third model, the BCM 2, could have been used in the construction of our interim cost proxy by simply taking the scaled cost estimates from three cost models instead of two. We have chosen not to follow this approach since parties have not had an opportunity to comment on the possible deficiencies of the BCM 2. For comparison purposes, however, we have computed the corresponding ceiling costs.

We have found that the scaled costs using the three model proxy are very similar to the estimated costs that were derived using the two models.

As discussed above, we believe that cost-based rates should be implemented on a geographically deaveraged basis. We allow states to determine the number of density zones within the state, provided that they designate at least three zones, but require that in all cases the weighted average of unbundled loop prices, with weights equal to the number of loops in each zone, should be less than the proxy ceiling set for the statewide average loop cost set forth in Appendix D.

As noted above, we have not yet had sufficient time to evaluate fully any of the cost models that have been submitted in the record, and our hybrid proxy is therefore intended to be used only on an interim basis. We believe that the methodology is consistent with forward-looking cost studies, but we also recognize that there may be situations where forward looking loop costs will differ from computed costs, and accordingly, we have increased the state average loop costs by five percent and established the proxy as a ceiling. We emphasize that use of the hybrid proxy model can be superseded at any time by a full forward looking economic cost study that follows the guidelines set forth in this Order. In addition, we are currently in the process of evaluating the more detailed cost models that have been submitted in the record, and will issue a further notice on the use of these models in the near future.

2) Local Switching

(a) Discussion

We conclude that a combination of a flat-rated charge for line ports, which are dedicated to a single new entrant, and either a flat-rate or per-minute usage-based switch matrix for trunk ports, which constitute shared facilities, best reflects the way costs for unbundled local switching are incurred and is therefore reasonable. We find that there is an insufficient basis in the record to conclude that we should require two flat rates for unbundled local switching charges as proposed by Sprint.

On the record in this proceeding and in the LEC-MRST Interconnection proceeding, we conclude that a range between 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use for unbundled local switching is a reasonable default proxy. In setting this default price range, we consider the range of evidence in the record, and believe that the most credible studies fall at the lower end of this range. However, so as to minimize disruption for any state that has set a rate only marginally outside this range, we will grandfather any state that has set a rate at 0.5 cents ($0.005) per minute of use or less pending completion of an economic cost study pursuant to the methodology set forth in this Order.

The forward-looking cost studies contained in the record estimate that the average cost of end-office switching ranges from 0.18 cents ($0.0018) per minute of use to 0.35 cents ($0.0035) per minute of use. Maryland and Florida have adopted rates based on forward-looking economic cost studies that fall within the default price range we are adopting. NYNEX’s estimate of 0.129 cents ($0.00129) per minute of use, in the Massachusetts proceeding, is an estimate of the marginal cost of end-office switching. As discussed above, we generally expect studies estimating marginal costs to generate estimates that are less than estimates derived from TELRIC-based studies. We, therefore, conclude that 0.2 cents ($0.002) per minute of use is a reasonable lower end of the price range for end-office switching.

USTA’s estimate of 1.3 cents ($0.013) appears to be an outlier that is significantly higher than the other estimates. We find that USTA’s estimate does not represent an appropriate cost model for termination of traffic. USTA’s estimate is based on the high end of a set of econometric estimates of LEC-reported cost data rather than an independent cost estimate, and USTA gives no explanation of why we should regard this as the best estimate. In addition, USTA’s figure is derived, at least in part, from studies that attempt to measure the incremental cost of end-to-end use of the network for local calls, not the cost of local switching. Pacific Bell’s study of the average LRIC of a call terminating under “Feature Group B” apparently includes terminations at tandem switches in addition to end-office terminations.

Michigan and Illinois have adopted rates for transport and termination of traffic that are higher than the default price range we adopt for end-office switching. Michigan, which established mutual compensation rates of 1.5 cents ($0.015) per minute of use, did not review a forward-looking cost study. Illinois’s 0.5 cents ($0.005) per minute rate for termination through the end office is just outside the range we are establishing. First, as previously stated, we are grandfathering rates of 0.5 cents ($0.005) per minute or lower. Further, we do not believe Illinois’s rate overrides the weight of evidence in the record, which supports the range we are establishing.

States that do not calculate the rate for the unbundled local switching element pursuant to a forward-looking economic cost study may, in the interim, set the rate so that the sum of the flat-rated charge for line ports and the product of the projected minutes of use per port and the usage-sensitivity charges for switching and trunk ports, all divided by the projected minutes of use, does not exceed 0.4 cents ($0.004) per minute of use and is not lower than 0.2 cents ($0.002) per minute of use. A state may impose a rate for unbundled local switching that is outside this range if it finds that a forward-looking economic cost study shows a higher or lower rate is justified. States that use our proxy and impose flat-rated charges for unbundled local switching should set rates so that the price falls within the range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use if converted through use of a geographically disaggregated average.
usage factor. A default price range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use should allow carriers the opportunity to recover fully their additional cost of terminating a call, including, according to Maryland’s study, a reasonable allocation of common costs. We observe that the most credible studies in the record before us fall at the lower end of this range and we encourage states to consider such evidence in their analysis.

558. With respect to the argument that vertical features should be priced pursuant to the resale price standards, we concluded earlier that vertical features are part of the unbundled local switching element, because they are provided through the operation of hardware and software comprising the “facility” that is the switch. Accordingly, the pricing standard in 252(d)(1) applies to vertical features as part of the functionality of the switch. As previously discussed, allowing new entrants to purchase switching and vertical features as part of the local switching network element is an integral part of a separate option Congress has provided for new entrants to compete against incumbent LECs.

559. The 1996 Act establishes different pricing standards for these two options available to new entrants—resale of services pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3). Where the new entrant purchases vertical features as part of its purchase of an unbundled local switching element, the price of that element, including associated vertical features, should be determined according to section 252(d)(1). The availability of vertical services as part of a wholesale service offering is distinct from their availability as part of the local switching network element. In these circumstances, allowing the new entrant to combine unbundled elements with wholesale services is an option that is not necessary to permit the new entrant to enter the local market.

560. As to Bell Atlantic’s takings argument, we concluded above that the pricing of unbundled elements according to the just and reasonable standard in section 251(c)(2) and (c)(3), and applied in section 252(d)(1), is not an unconstitutional taking. That analysis, which looks at the overall rates established by our regulations, applies with equal force to the pricing of unbundled local switching, inclusive of associated vertical features. A forward-looking economic cost methodology enables LECs to recover a fair return on their investments and Bell Atlantic has provided no specific evidence to the contrary. We conclude that our pricing methodology for unbundled local switching, inclusive of associated vertical features, provides just compensation to incumbent LECs.

561. The primary categories of network elements identified in this Order, other than loops and switching, are transport, signaling, and collocation. Our rule that dedicated facilities shall be priced on a flat-rated basis applies to dedicated transmission links because these facilities are dedicated to the use of a specific customer.

562. For dedicated transmission links, rates must use existing rates for interstate dedicated switched transport as a default proxy ceiling. We believe these rates are currently at or close to economic cost levels. Such rates were set based on interstate special access rates, which we found based on the record in the Transport proceeding were relatively close to costs. First Transport Order. 57 FR 54717 (November 20, 1992); Transport Rate Structure and Pricing, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking. 60 FR 2068 (January 6, 1995). These interstate access rates originally were based on incumbent LEC accounting costs, rather than a forward-looking economic cost model. Since 1991, however, incumbent LEC interstate access rates have been subject to price cap regulation, and have therefore been disengaged from embedded costs. Interstate access rates for dedicated transport vary by region, type of circuit, mileage, and other factors. For example, BellSouth’s entrance facility charge, for transport from an IXC’s point of presence to a BellSouth serving wire center, is $134 monthly per DS1 circuit ($5.58 per derived voice grade circuit) and $2,100 monthly per DS3 circuit ($3.13 per derived voice grade circuit). Dedicated transport for 10 miles of interoffice transmission between a serving wire center and an end office is $325 monthly per DS1 circuit ($13.54 per derived voice grade circuit) and $2,950 monthly per DS3 circuit ($4.39 per derived voice grade circuit). Installation, multiplexing, and other transport-related charges may also apply.

563. Typically, transmission facilities between tandem switches and end offices are shared facilities. Pursuant to our rule structure guidelines, states may establish usage-sensitive or flat-rate charges to recover those costs. For shared transmission facilities between tandem switches and end offices, states may use as a default proxy ceiling the rate derived from the incumbent LEC’s interstate direct trunked transport rates in the same manner that we derive presumptive price caps for tandem switched transport under our interstate price cap rules, using the same weighting and loading factors. Specifically, when the transport rate restructure was implemented, the initial levels of tandem-switched transmission rates were presumed reasonable if they were based on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links, calculated using a loading factor of 9000 minutes per month per voice-grade circuit. 47 CFR § 69.111. We conclude above that interstate direct trunked transport rates provide a reasonable default proxy ceiling for unbundled dedicated transport rates. First Transport Order. Interstate access rates for tandem-switched transport vary by region and mileage. The average charge by RBOCs in Density Zone 1 for transport termination and one mile of switched common transport facility between a tandem switching office and end office equals 0.033 cents ($0.000331) per minute. For a five-mile facility, the average charge is 0.048 cents ($0.000479) per minute; for a ten-mile facility, 0.066 cents ($0.000664) per minute. When we restructured the incumbent LECs’ interstate transport rates to be more closely aligned with cost, we derived presumptive tandem-switched transmission rates from direct-trunked transport rates. This proxy ceiling for shared transmission facilities between tandem switches and end offices, therefore, should be similarly derived.

564. The United States Court of Appeals for the District of Columbia Circuit recently remanded our interim transport rules. The court concluded that the Commission had not provided sufficient justification for its method of establishing the rate level of the interstate switched access rate element for tandem switching. We do not believe, however, that the CompTel v. FCC decision is inconsistent with the rules we establish here because the decision did not address or criticize the Commission’s determination of the rates for dedicated transport or tandem-switched transport links. Because our proxies do not involve the interstate access rate for tandem switching, they are not inconsistent with the court’s analysis.

565. Tandem switching also employs shared facilities. States may, therefore,
establish usage-sensitive charges to recover tandem-switching costs. For those states that cannot complete a forward-looking economic cost study within the arbitration period or cannot devote the necessary resources to such a review, we establish a default rate ceiling of 0.15 cents ($0.0015) per minute of use. The additional cost of termination at a tandem in comparison to termination at an end office consists of the cost of tandem switching and the cost of tandem-switched transport transmission. Illinois and Maryland have adopted rates for the transport and termination of traffic from the tandem switch that are, respectively, 0.25 cents ($0.0025) per minute of use and 0.2 cents ($0.002) per minute of use, higher than rates for termination at end office switches. In both instances, our default rate ceiling for tandem switching constitutes at least 60 percent of the implicit tandem switching and transport to the end office switch. We, therefore, find the default rate ceiling we adopt for tandem switching to be consistent with both Illinois’s and Maryland’s adopted rates for transport and switching of traffic from the tandem office. States that use our proxy and impose flat-rated charges for tandem switching should set rates so that the price does not exceed 0.15 cents ($0.0015) per minute of use if converted through use of a geographically disaggregated usage factor.

566. Rates for signaling and database services should be usage-sensitive, based either on the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, which should be charged on a flat-rated basis. Usage charges of this type appear to reflect most accurately the underlying costs of these services. Interstate access rates for most of these elements have been justified using the price caps new service test, which roughly approximates the results of a forward-looking economic cost study. Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, CC Docket Nos. 89-79 and 87-313, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 56 FR 33879 (July 24, 1991), modified on recon. 57 FR 37720 (August 20, 1992). In addition, the costs of these services were forward-looking, in that the services were completely new and hence, by definition, used the best-available technology. Thus, we established as a default proxy ceiling for these elements corresponding interstate charges for these elements. Interstate database services consist of Line Information Database (LIDB) and 800 Database. Deployment of SS7 (out-of-band signaling) has enabled LECs to offer these services. The average charge for RBOCs for LIDB in Density Zone 1 equals 3.34 cents ($0.034) per database query. For elements that have not been subject to the new services test, states may establish proxy ceilings by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs. Because we expect that the joint and common costs associated with the forward-looking cost of network elements are substantially less than those associated with traditional service-based costs, allowing a reasonable allocation is sufficient to protect against possible anticompetitive pricing. Absent any proxy, this approach will provide the most reasonable approximation of forward-looking economic cost.

567. We have established rate structure rules for collocation elements in connection with our Expanded Interconnection proceeding. Expanded Interconnection with Local Telephone Company Facilities, 59 FR 38922 (August 1, 1994). Many collocation elements established under section 251(c)(6) are likely to represent the same facilities, and should have the same cost characteristics, as existing interstate expanded interconnection services, and therefore we require states to use the same rate structure rules for those collocation elements that were established in the Expanded Interconnection proceeding. As a proxy ceiling, states may use the rates the LEC has in effect for those elements or expand those rates to represent the same facilities. Expanded interconnection services are subject to the new services test, which, as discussed above, uses a forward-looking methodology. Although LECs have filed expanded interconnection tariffs, we have not yet completed our investigation into those tariffs. Any price for unbundled collocation elements set based on LEC expanded interconnection tariffs would therefore be subject to any modification of those tariffs that results from our pending investigation, and any state-imposed prices based on those tariffs will need to be adjusted accordingly.

568. We find it unnecessary to specify rate structures for other unbundled elements. The states shall make those determinations by applying our general rate structure principles described above. In the unlikely event that acceptable forward-looking cost study, states may establish default proxy ceilings for other unbundled elements by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs.

3. Forward-Looking Cost Model Proxies

a. Background

569. In the NPRM, we sought comment on the use of certain generic cost studies. Commenters discussed several such models. These models include: (1) the Hatfield 2; (2) the Hatfield 2.2; (3) the BCM; (4) the BCM 2; and (5) the CPM.

b. Discussion

570. We believe that the generic forward-looking costing models, in principle, appear best to comport with the preferred economic cost approach discussed previously. Several such models were placed in the record, including Hatfield 2, Hatfield 2.2, BCM, BCM 2, and the CPM. The BCM is designed to produce “benchmark” costs for the provision of basic telephone service within specific geographic regions defined by the Bureau of the Census as Census Block Groups. The Hatfield 2 model combines output from the BCM with independently-developed investment data to produce annual cost estimates for eleven basic network functions. The CPM is similar in structure to the BCM and Hatfield 2 models, although it uses different algorithms.

571. These models appear to offer a method of estimating the cost of network elements on a forward-looking basis that is practical to implement and that allows state commissions the ability to examine the assumptions and parameters that go into the cost estimates. Although these models were submitted too late in this proceeding for the Commission and parties to evaluate them fully, our initial examination leads us to believe that the remaining practical and empirical issues can be resolved in the near future. In light of the advantages of such a generic approach, we will further examine these generic economic cost models by the first quarter of 1997 to determine whether we should use one of them to replace the default proxies we adopt in this proceeding. In that event, states would have the option of setting rates in arbitrations on the basis of an economic cost study or by using a generic forward-looking cost model approved at that time.

572. Finally, we note that Commission staff developed a model of the telecommunications industry that they designed to simulate industry demand and supply characteristics. In
order to encourage an open-ended discussion of the utility of the staff model, the Common Carrier Bureau sought comment on a working draft of the model that was released. Almost all parties commenting on the staff model urged the Commission not to rely upon the staff model as record evidence in this proceeding. We are not relying on the staff model to develop the requirements imposed by this Order.

D. Other Issues

1. Future Adjustments to Interconnection and Unbundled Element Rate Levels

a. Background

573. In the NPRM, we sought comment on whether some cost index or price cap system would be appropriate to ensure that rates reflect expected changes in costs over time.

b. Discussion

574. As noted earlier, we will continue to review our pricing methodology, and will make revisions as appropriate. Accordingly, there is no present need to establish a Commission price cap or cost index system to adjust interconnection and unbundled element rate levels.

2. Imputation

a. Background

575. We sought comment in the NPRM on whether we should require an “imputation rule” in establishing rates for unbundled network elements. An imputation rule would require that the sum of prices charged for a basket of unbundled network elements not exceed the retail price for a service offered using the same basket of elements. We further solicited comment on any other rules that could be adopted regarding pricing of unbundled network elements that would help to promote the pro-competitive goals of the 1996 Act.

b. Discussion

576. Although we recognize, as several commenters observe, that an imputation rule could help detect and prevent price squeezes, we decline to impose an imputation requirement. Adoption of an imputation rule could force states to engage in a major rate rebalancing effort at this time, because it would impose substantial additional burdens on states at a time when they will need to devote significant resources to implementing the 1996 Act.

577. In addition to our practical concerns regarding implementation of an imputation rule, we find that an imputation rule may not be necessary to achieve the pro-competitive goals of the 1996 Act. As some commenters, including several state commissions, suggest, competing providers may be able to provide basic service, at less than the cost of facilities and associated management, just as incumbent LECs do currently, by selling customers higher profit vertical or intrastate toll services, or through receipt of access revenues and subsidies. Further, the Ohio Consumers’ Counsel suggest that below-cost rates may not be sufficiently prevalent to justify a national imputation rule. The Joint Consumer Advocates and the Ohio Consumers’ Counsel question whether local service is, in fact, underpriced.

578. We give special weight to the comments of several state commissions that currently employ imputation rules. These state commissions endorse imputation as a tool to prevent price squeezes, but urge us only to provide states with the flexibility to adopt imputation rules. We agree with those state commission commenters that argue that nothing in the 1996 Act prohibits individual states from adopting imputation rules. While an imputation rule may be appropriate toward that end, we will leave the implementation of such rules to individual states for the time being.

3. Discrimination

a. Background

579. In the NPRM, we noted the different usages of the term “discrimination” in the 1996 Act and the 1934 Act. Sections 251 and 252 require that interconnection and unbundled element rates be “nondiscriminatory.” Similarly, section 251(c)(4) requires that, in making resale available, carriers not impose “discriminatory conditions or limitations on resale.” Finally, section 252(e) provides that states may reject a negotiated agreement or a portion of the agreement if it “discriminates” against a carrier not a party to the agreement and section 252(i) requires incumbent LECs to “make available any interconnection, service, or network element provided under an agreement * * * to which it is a party to any requesting telecommunications carrier upon the same terms and conditions.” In contrast, section 202(a) of the 1934 Act provides that “(i)t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges * * * for * * * like communication service.”

580. We sought comment on the meaning of the term “nondiscriminatory” in the 1996 Act compared with the phrase “unreasonable discrimination” in the 1934 Act.” We asked specifically whether Congress intended to prohibit all price discrimination, including measures such as density zone pricing or volume and term discounts, by choosing the word “nondiscriminatory.” We further asked whether sections 251 and 252 could be interpreted to prohibit only unjust or unreasonable discrimination. Finally, we sought comment on whether the 1996 Act prohibited carriers from charging different rates to parties that are not similarly situated.

b. Discussion

581. We conclude that the term “nondiscriminatory” in the 1996 Act is not synonymous with “unjust and unreasonable discrimination” in section 202(a), but rather is a more stringent standard. Finding otherwise would fail to give meaning to Congress’s decision to use different language. We agree, however, with those parties that argue that cost-based differences in rates are permissible under sections 251 and 252.

582. Section 252(d)(1), for example, requires carriers to base interconnection and network element charges on costs. Where costs differ, rate differences that accurately reflect those differences are not discriminatory. This is consistent with the economic definition of price discrimination, which is “the practice of selling the same product at two or more prices where the price differences do not reflect cost differences * * * An important feature of the economic definition of price discrimination is that it occurs not only when prices are different in the presence of similar costs but also when the prices are the same and the costs of supplying customers are different.” As one economist has recognized, differential pricing is “one of the most prevalent forms of marketing practices” of competitive enterprises. Strict application of the term “nondiscriminatory” as urged by those commenters who argue that prices must be uniform would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired. Thus, we find that price differences, such as volume and term discounts, when based upon legitimate variations in costs are permissible under the 1996 Act, if justified.

583. On the other hand, price differences based not on cost differences but on such considerations as competitive relationships, the
technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs, the requirements of the Act, or applicable rules, would be discriminatory and not permissible under the new standard. Such examples include the imposition of different rates, terms and conditions based on the fact that the competing provider does or does not compete with the incumbent LEC, or offers service via wireless rather than wireline facilities. We find that it would be unlawfully discriminatory, in violation of sections 251 and 252, if an incumbent LEC were to charge one class of interconnecting carriers, such as CMRS providers, higher rates for interconnection than it charges other carriers, unless the different rates could be justified by differences in the costs incurred by the incumbent LEC.

584. State regulations permitting non-cost based discriminatory treatment are prohibited by the 1996 Act. This conclusion is consistent with both the letter and the spirit of the 1996 Act and our determination that the pricing for interconnection, unbundled elements, and transport and termination of traffic should not vary based on the identity or classification of the interconnector.

VIII. Resale

585. Section 251(c)(4) imposes a duty on incumbent LECs to offer certain services for resale at wholesale rates. Specifically, section 251(c)(4) requires an incumbent LEC: (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

586. The requirement that incumbent LECs offer services at wholesale rates is described in section 252(d)(3), which sets forth the pricing standard that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions:

(A) The State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Section VIII.A. of this Order discusses the scope of section 251(c)(4). Section VIII.B. addresses the determination of "wholesale rates." Section VIII.C. considers the issue of conditions or limitations on resale under this section. Section VIII.D. discusses the resale obligations under section 251(b)(1), and Section VIII.E. considers the application of access charges in the resale environment.

A. Scope of Section 251(c)(4)

1. Background

587. In the NPRM, we sought comment generally on the scope of section 251(c)(4).

2. Discussion

588. Section 251(c)(4)(A) imposes on all incumbent LECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." We conclude that an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a "telecommunications service;' and (2) is provided at retail to subscribers who are not "telecommunications carriers." We thus find no statutory basis for limiting the resale duty to basic telephone services, as some suggest.

589. We need not prescribe a minimum list of services that are subject to the resale requirement. State commissions, incumbent LECs, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers. State commissions, however, may have the power to require incumbent LECs to offer specific intrastate services.

590. Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users. It is true that incumbent LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services, and that end users do occasionally purchase some access services, including special access, Feature Group A, and certain Feature Group D elements for large private networks. Despite this fact, we conclude that the language and intent of section 251 clearly demonstrates that exchange access services should not be considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4). We note that virtually all commenters in this proceeding agree, or assume without stating, that exchange access services are not subject to the resale requirements of section 251(c)(4).

591. We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users. Part 69 of our rules defines these charges as "carrier's carrier charges," and the specific part 69 rules that describe each interstate switched access element refer to charges assessed on "interexchange carriers" rather than end users. The mere fact that fundamentally non-retail services are offered pursuant to tariffs that do not restrict their availability, and that a small number of end users do purchase some of these services, does not alter the essential nature of the services. Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any "retail" costs when offering these services at "wholesale" to those same IXCs. Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate.

592. We conclude that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers," not with end users or other entities. We further discuss the definition of
“telecommunications carrier” in Section IX. of the Order.

593. With regard to independent public payphone providers, however, we agree with the American Public Communication Council’s argument that such carriers are not “telecommunications carriers” under section 3(44). We therefore also agree with the American Public Communications Council’s contention that the services independent public payphone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide “at retail to subscribers who are not telecommunications carriers” and that such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public payphone providers are not “telecommunications carriers,” however, we conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is consistent with our finding that wholesale offerings must be purchased for the purpose of resale by “telecommunications carriers.”

594. We conclude that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, i.e., bundled service offerings. Section 251(c)(4) states that the incumbent LEC must offer for resale “any telecommunications service” provided at retail to subscribers who are not telecommunications carriers. The resale provision of the 1996 Act does not contain any language exempting services if those services can be duplicated or approximated by combining other services. On the other hand, section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services. The 1996 Act merely requires that any retail services offered to customers be made available for resale.

B. Wholesale Pricing

1. Background

595. As discussed above, section 251(c)(4) requires incumbent LECs to offer at “wholesale rates” any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Section 252(d)(3) establishes the standard that states must use in determining wholesale rates in arbitrations or in reviewing wholesale rates under BOC statements of generally available terms and conditions. Specifically, section 252(d)(3) provides that wholesale rates shall be set “on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”

596. In the NPRM, we generally sought comment on the meaning of the term “wholesale rates” in section 251(c)(4). We asked if we could and should establish principles for the states to apply in order to determine wholesale prices in an expeditious and consistent manner. We also sought comment on whether we should issue rules for states to apply in determining avoided costs. We stated that we could, for example, determine that states are permitted under the 1996 Act to direct incumbent LECs to quantify their costs for any marketing, billing, collection, and similar activities that are associated with offering retail, but not wholesale, services. We also sought comment on whether avoided costs should include a share of common costs and general overhead or “markup” assigned to such costs. LECs would then reduce retail rates by this amount, offset by any portion of expenses that they incur in the provision of wholesale rates. We noted that this approach appeared to be consistent with the 1996 Act, but would create certain administrative difficulties because all of the information regarding costs is under the control of the incumbent LECs. We also asked for comment on several alternative approaches. For example, we asked whether we could establish a uniform set of presumptions regarding avoided costs that states could adopt and that would apply in the absence of a quantification of such costs by incumbent LECs. Additionally, we asked whether states should identify specific accounts or portions of accounts in the Commission’s Uniform System of Accounts (“USOA”) that the states should include as avoided costs. We also requested comment on whether we should establish rules that allocate avoided costs across services. We asked whether incumbent LECs should be allowed, or required, to vary the percentage wholesale discounts across different services based on the degree the avoided costs relate to those services. Finally, we asked whether we should adopt a uniform percentage discount off of the retail rate of each service.

2. Discussion

597. Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks. In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates. For the same reasons discussed in Section II.D of the Order, we believe that we have legal authority under the 1996 Act to articulate principles that will apply to the arbitration or review of wholesale rates. We also believe that articulating such principles will promote expeditious and efficient entry into the local exchange market. Clear resale rules will create incentives for parties to reach agreement on resale arrangements in voluntary negotiations. Clear rules will also aid states in conducting arbitrations that will be administratively workable and will produce results that satisfy the intent of the 1996 Act. The rules we adopt and the determinations we make in this area are crafted to achieve these purposes. We also note that clear resale rules should minimize regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.

598. The statutory pricing standard for wholesale rates requires state commissions to (1) identify what marketing, billing, collection, and other costs will be avoided by incumbent LECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Our rules provide two methods for making these determinations. The first, and preferred, method requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by this Commission. They may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate.
599. We adopt a minimum set of criteria for avoided cost studies used to determine wholesale discount rates. The record before us demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of section 252(d)(3). The criteria we adopt are designed to ensure that states apply consistent interpretations of the 1996 Act in setting wholesale rates based on avoided cost studies which should facilitate swift entry by national and regional resellers, which may include small entities. At the same time, our criteria are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services. Thus, for example, our rules for identifying avoided costs by USOA expense account are cast as rebuttable presumptions, and we do not adopt as presumptively correct any avoided cost model.

600. Based on the comments filed in this proceeding and on our analysis of state decisions setting wholesale discounts, we adopt a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels. A default wholesale discount rate shall be used if: (1) an avoided cost study that satisfies the criteria we set forth below does not exist; (2) a state commission has not completed its review of such an avoided cost study; or (3) a rate established by a state commission before release of this Order is based on a study that does not comply with the criteria described in the following section. A state commission must establish wholesale rates based on avoided cost studies within a reasonable time from when the default rate was selected. This approach will enable state commissions to complete arbitration proceedings within the statutory time frames even if it is infeasible to conduct full-scale avoided cost studies that comply with the criteria described below for each incumbent LEC.

a. Criteria for Cost Studies

601. There has been considerable debate on the record in this proceeding and before the state commissions on whether section 252(d)(3) embodies an “avoided” cost standard or an “avoidable” cost standard. We find that “the portion [of the retail rate] * * * attributable to costs that will be avoided” includes all of the costs that the LEC incurs in retaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Thus, we reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered “avoided” for purposes of section 252(d)(3). We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale. We note that Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted the 1996 Act in this manner.

602. We find that, under this “reasonably avoidable” standard discussed above, an avoided cost study must include indirect, or shared, costs as well as direct costs. We agree with MCI, AT&T, and the California, Illinois, Ohio, Colorado, and Georgia commissions that some indirect or shared costs are avoidable if and only if (1) the LEC can reasonably be expected to decrease its operations resulting from a reduction in retail activity.

603. A portion of contribution, profits, or mark-up may also be considered “attributable to costs that will be avoided” when services are sold wholesale. MCI’s model makes this attribution by means of a calculation that applies the same mark-up to wholesale services as to retail services. The Illinois Commission used a similar effect by removing a pro rata portion of contribution from the retail rate for each service. In AT&T’s model, the portion of return on investment (profits) that was attributable to assets used in avoided retail activities was treated as an avoided cost. We find that these approaches are consistent with the 1996 Act.

604. An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3). The language of section 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds. We therefore reject NCTA’s argument that discount rates should be ten percent or less in order to avoid discouraging facilities-based competition, as well as AT&T’s suggestion that wholesale discount rates should be set at levels that ensure the viability of the reseller’s business. We also reject, for example, MCI’s assertion that no external relations or research and development costs should be allowed in wholesale rates because the activities represented by those costs are contrary to the interests of the LEC competitors that purchase wholesale services. Our analysis also precludes a state commission from adopting a wholesale discount rate that is inconsistent with the manner in which it would use a study methodology that is consistent with the method. For example, the Illinois Commission calculated its wholesale rate using an avoided cost formula and long run incremental cost studies. Embedded cost studies, such as the studies used by the Georgia Commission, may also be used to identify avoided costs. Ideally, a state would use a study methodology that is consistent with the manner in which it sets retail rates.

605. The 1996 Act requires that wholesale rates be based on existing retail rates, and thus clearly precludes use of a “bottom up” TSLRIC study to establish wholesale rates that are not related to the rates for the underlying retail services. We thus reject the suggestions of those parties that ask us to require use of TSLRIC to set wholesale rates. The 1996 Act does not, however, preclude use of TSLRIC cost studies to identify the portion of a retail rate that is attributable to avoided retail costs. TSLRIC studies would be entirely appropriate in states where the retail rates were established using a TSLRIC method. For example, the Illinois Commission calculated its wholesale rate using an avoided cost formula and long run incremental cost studies. Embedded cost studies, such as the studies used by the Georgia Commission, may also be used to identify avoided costs. Ideally, a state would use a study methodology that is consistent with the manner in which it sets retail rates.

606. We neither prohibit nor require use of a single, uniform discount rate for all of an incumbent LEC’s services. We recognize that a uniform rate is simple to apply, and avoids the need to allocate avoided costs among services. Therefore, our default wholesale discount rate is to be applied uniformly. On the other hand, we also agree with parties who observe that avoided costs...
may, in fact, vary among services. Accordingly, we allow a state to approve nonuniform wholesale discount rates, as long as those rates are set on the basis of an avoided cost study that includes a demonstration of the percentage of avoided costs that is attributable to each service or group of services.

607. All costs recorded in accounts 6611 (product management), 6612 (sales), 6613 (product advertising) and 6623 (customer services) are presumed to be avoidable. The costs in these accounts are the direct costs of serving customers. All costs recorded in accounts 6621 (call completion services) and 6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties. These presumptions regarding accounts 6611–6613 and 6621–6623 may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that these costs in these accounts are not included in the retail prices of the resold services.

608. General support expenses (accounts 6121–6124), corporate operations expenses (accounts 6711, 6712, 6721–6728), and telecommunications uncollectibles (account 5301) are presumed to be avoided in proportion to the avoided direct expenses identified in the previous paragraph. Expenses recorded in these accounts are tied to the overall level of operations in which an incumbent LEC engages. Because the advent of wholesale operations will reduce the overall level of operations—for example, staffing should decrease because customer inquiries and billing and collection activity will decrease—overhead and support expenses are in part avoided. We select the revenue offset account of 5301 rather than accounts 5300 or 5790 because account 5301 most directly represents overhead attributed to the services being resold.

609. Plant-specific and plant non-specific expenses (other than general support expenses) are presumptively not avoidable.

610. In the case of carriers designated as Class B under section 32.11 of our rules that use certain summary accounts in lieu of accounts designated in this subsection of the Order, our avoided cost study criteria shall apply to the relevant summary account in its entirety.

b. Default Range of Wholesale Discount Rates

611. Parties to this proceeding present evidence or arguments supporting wholesale discount rates ranging from 4.76 percent to 55 percent.

<table>
<thead>
<tr>
<th>Discount Rate</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sprint/United Telephone study:</td>
<td></td>
</tr>
<tr>
<td>Simple Access service</td>
<td>4.76</td>
</tr>
<tr>
<td>Other services</td>
<td>7.19</td>
</tr>
<tr>
<td>NCTA</td>
<td>10.0</td>
</tr>
<tr>
<td>Comcast</td>
<td>10.0</td>
</tr>
<tr>
<td>Massachusetts Attorney General.</td>
<td>25.0</td>
</tr>
<tr>
<td>ACTA</td>
<td>25.0</td>
</tr>
<tr>
<td>MCI Model</td>
<td>25.6–33.2</td>
</tr>
<tr>
<td>Telecommunications Resellers Ass'n</td>
<td>30.0–50.0</td>
</tr>
<tr>
<td>AT&amp;T Model</td>
<td>23.05–55.52</td>
</tr>
</tbody>
</table>

612. States applying wholesale pricing standards similar to the standards in section 252(d)(3) have set the following wholesale discounts:

<table>
<thead>
<tr>
<th>State</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>California:</td>
<td></td>
</tr>
<tr>
<td>PacTel:</td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>17.0</td>
</tr>
<tr>
<td>Residential</td>
<td>12.0</td>
</tr>
<tr>
<td>GTE:</td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>12.0</td>
</tr>
<tr>
<td>Residential</td>
<td>7.0</td>
</tr>
<tr>
<td>Colorado:</td>
<td></td>
</tr>
<tr>
<td>Residential</td>
<td>18.0</td>
</tr>
<tr>
<td>Business</td>
<td>18.0</td>
</tr>
<tr>
<td>Toll Services</td>
<td>16.0</td>
</tr>
<tr>
<td>Central Office</td>
<td>30.0</td>
</tr>
<tr>
<td>All other services</td>
<td>50.0</td>
</tr>
<tr>
<td>Georgia:</td>
<td></td>
</tr>
<tr>
<td>Residential</td>
<td>18.0</td>
</tr>
<tr>
<td>Business</td>
<td>17.3</td>
</tr>
<tr>
<td>Illinois:</td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>20.3</td>
</tr>
<tr>
<td>NYNEX:</td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>17.0</td>
</tr>
<tr>
<td>Residential</td>
<td>11.0</td>
</tr>
<tr>
<td>Rochester Telephone</td>
<td>13.5</td>
</tr>
</tbody>
</table>

613. We find unpersuasive various arguments presented by parties at the lower and higher ends of the range of possible discounts. The Sprint/United Telephone study produces unreasonably low measures of avoided costs because the study considers only avoided direct expenses in five accounts. As explained above, we interpret the statutory language providing for a wholesale price that excludes the "portion of a retail rate attributable to any marketing, billing, collection, and other costs that will be avoided" to include indirect as well as direct costs. The proposals of NCTA and Comcast for a maximum discount of 10 percent are premised on the view that any greater discount would unduly discourage facilities-based competition. Section 252(d)(3), however, requires wholesale prices to be set based on avoided costs, not on any policy preference for facilities-based competition. For the same statutory reason, we reject as inconsistent with section 252(d)(3) the policy arguments of the Telecommunications Resellers Association and AT&T that we should establish national wholesale discounts at levels that will ensure that resale of local exchange services is a viable business.

614. We find AT&T's model unsuitable for purposes of establishing in this proceeding a range for default wholesale discount rates. The AT&T model does in many respects satisfy the general criteria we establish above for avoided cost studies. The model, however, incorporates numerous assumptions, cost allocation factors, and studies, and because AT&T submitted its model with its reply comments, and other parties have not analyzed the model in detail. We find that we would need to develop a more complete record on the AT&T model before deciding whether to endorse it. We do not, however, preclude a state commission from considering in a wholesale rate proceeding evidence developed using this model.

615. We find that we can use MCI's model, with some modifications, along with the results of certain state proceedings, to establish a range of rates that would produce an acceptable default wholesale discount rate that reasonably approximates the amount of avoided costs that should be subtracted from the retail rate. A default rate is to be used only in three instances: (1) in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist; (2) where a state has not completed its review of such an avoided cost study; (3) where a state has not established its rate based on a study that does not comply with the criteria described in the previous section. We emphasize that the default rate is to be used as an interim measure only, and should be replaced with an avoided cost study within a reasonable time. The MCI model is a reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data. We find, however, that we should modify certain features of the model.

616. First, MCI treats account 6722 (external relations) and account 6727 (research and development) as avoidable costs. MCI argues that purchasers of wholesale services are competing with LECs and, therefore, should not be forced to fund regulatory
activities reflected in account 6722. MCI claims that research and development are not of practical use for the services that resellers will purchase. As explained above, this type of disallowance is not contemplated by the avoided cost standard of section 252(d)(3). We therefore adjust the model to treat these costs in the same manner as other overhead expense accounts.

617. Second, MCI treats a number of accounts as “other avoided costs” on the grounds that the expenses in those accounts are not relevant to the provision of telecommunications services that an incumbent LEC currently provides. Based on this rationale, MCI excludes account 6613 (aircraft expense), account 6341 (large PBX expense), account 6511 (property held for future telecommunications use expense), account 6531 (public telephone terminal equipment expense), account 6512 (provisioning expense), and account 6562 (depreciation expense for property held for future telecommunications use), and account 6564 (depreciation expense for intangible). Public telephone terminal equipment expense and large PBX expense are not “avoided” precisely because they are unrelated to the retail services being discounted. We would not expect these expenses to be included in retail service rates for resale services; but if these expenses were included in retail rates, they would not be avoided when the services are purchased by resellers. The rest of MCI’s “other” accounts contain costs that support all of the telecommunications services offered by the company. MCI has not shown that any of these costs are either reduced or eliminated when services are sold at wholesale. We, therefore, adjust the MCI model so as not to treat these accounts as avoidable costs.

618. Third, MCI treats accounts 6611 (product management), 6612 (sales), 6613 (product advertising), and 6623 (customer services) as costs that are entirely avoided with respect to services purchased at wholesale. We agree that a large portion of the expenses in these accounts is avoided when service is sold at wholesale. We also agree, however, with parties that argue that some expenses in these accounts will continue to be incurred with respect to wholesale products and customers, and that some new expenses may be incurred in addressing the needs of resellers as customers. No party in this proceeding suggests this specific adjustment to the MCI model that would account for these costs of the wholesale operation.

619. Fourth, MCI uses a complex formula to calculate the portions of overhead and general support expense that are attributable to avoided costs. We find that this formula is constructed in a way that tends to inflate the results of the calculation. We, therefore, substitute a more straightforward approach in which we apply to each indirect expense category the ratio of avoided direct expense to total expenses. We also identify a slightly different list of accounts representing indirect costs than that proposed by MCI.

620. With the modifications described above, and using actual 1995 data, MCI’s model produces the following results for the RBOCs and GTE:

<table>
<thead>
<tr>
<th>Company</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>U S West</td>
<td>18.80</td>
</tr>
<tr>
<td>GTE</td>
<td>18.81</td>
</tr>
<tr>
<td>BellSouth</td>
<td>19.20</td>
</tr>
<tr>
<td>Bell Atlantic</td>
<td>19.99</td>
</tr>
<tr>
<td>SBC</td>
<td>20.11</td>
</tr>
<tr>
<td>NYNEX</td>
<td>21.31</td>
</tr>
<tr>
<td>Pacific</td>
<td>23.87</td>
</tr>
<tr>
<td>Ameritech</td>
<td>25.98</td>
</tr>
</tbody>
</table>

621. We also take into account the experience of those state commissions, Illinois and Georgia, that have undertaken or approved detailed avoided cost studies under the pricing standard of section 252(d)(3) of the 1996 Act. Applying the statutory standard to the examination of significant cost studies, those commissions derived average wholesale discounts of 18.74 percent and 20.07 percent. We find that these decisions present evidence of an appropriate wholesale discount that should be given more weight than state commission decisions that have set their discounts under other pricing standards or only on an interim basis.

622. Accordingly, based on the record before us, we establish a range of default discounts of 17–25 percent that is to be used in the absence of an avoided cost study that meets the criteria set forth above. A state commission that has not set wholesale prices based on avoided cost studies that meet the criteria set forth above as of the release date of this Order shall use a default wholesale discount rate between 17 and 25 percent. A state should articulate the basis for selecting a particular discount rate. If this default discount rate is used, the state commission must establish wholesale rates based on avoided cost studies within a reasonable time. The avoided cost study must comply with the criteria for avoided cost studies described above. A state commission may submit an avoided cost study to this Commission for a determination of whether it complies with these criteria. If a party (either a reseller or an incumbent LEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with this Commission, asking us to determine whether the state has failed to comply with this rule. We will, in making such determinations, consider the particular circumstances in the state involved. If a state commission has adopted as of the release date of this Order an interim wholesale pricing decision that relies on an avoided cost study that meets the criteria set forth above, the state commission may continue to require an incumbent LEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, so long as the state commission’s interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study that meets the criteria set forth above.

623. We select the 17 to 25 percent range of default discounts based on our evaluation of the record. The adjusted results of the MCI model taken together with the results of those state proceedings discussed above that indicated they applied the statutory standard produces, a range between 18.74 and 25.98 percent. A majority of these wholesale discount rates fall between 18.74 and 21.11 percent. Other state commissions, such as California and New York, that have employed avoided cost studies have produced wholesale discount rates somewhat below the low end of this range. Furthermore, it has been argued that smaller incumbent LECs’ avoided costs are likely to be less than those of the larger incumbent LECs, whose data was used by MCI. Therefore, to allow for...
these considerations, we select 17 percent as the lower end of the range. We select 25 percent as the top of the range because it approximates the top of the range of results produced by the modified MCI model. This range gives state commissions flexibility in addressing circumstances of incumbent LECs serving their states and permits resale to proceed until such time as the state commission can review a fully-compliant avoided cost study.

624. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Bay Springs, et al., argues that national wholesale pricing rules will insufficiently consider operational differences between small and large incumbent LECs. We take this into consideration in setting the default discount rate and in requiring state commissions to perform carrier-specific avoided cost studies within a reasonable period of time that will reflect carrier-to-carrier differences. We believe, however, that the pro-competitive goals of the 1996 Act require us to establish a default discount rate for state commissions to use in the absence of avoided cost studies that comply with the criteria we set forth above. The presumptions we establish in conducting avoided cost studies regarding the avoidability of certain expenses may be rebutted by evidence that certain costs are not avoided, which should minimize any economic impact of our decisions on small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

C. Conditions and Limitations

625. Section 251(c)(4) requires incumbent LECs to make their services available for resale without unreasonable or discriminatory conditions or limitations. This portion of this Order addresses various issues relating to conditions or limitations on resale. It first discusses restrictions, generally, in Section VIII.C.1. Next, it turns to promotional and discounted offerings and the conditions that may attach to such offerings in Section VIII.C.2., and then to refusals to resell residential and below-cost services in Section VIII.C.3. Limitations on the categories of customers to whom a resale of incumbent LEC services are discussed in VIII.C.4. Resale restrictions in the form of withdrawal of service are discussed in VIII.C.5.

Finally, Section VIII.C.6. discusses resale restrictions relating to provisioning.

1. Restrictions, Generally, and Burden of Proof

a. Background

626. In the NPRM, we asked whether incumbent LECs should have the burden of proving that restrictions on resale are reasonable and nondiscriminatory. We stated our belief that, given the pro-competitive goals of the 1996 Act and the view that restrictions and conditions were likely to be evidence of an exercise of market power, the range of permissible restrictions should be quite narrow.

b. Discussion

627. We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the pro-competitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4). This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable. We discuss several specific restrictions below including certain restrictions for which we conclude the presumption of unreasonable shall not apply. We also discuss certain restrictions that we will presume are reasonable.

2. Promotions and Discounts

a. Background

628. In the NPRM, we asked whether an incumbent LEC's obligation to make their services available for resale at wholesale rates applies to discounted and promotional offerings and, if so, how. We also asked, if the wholesale pricing obligation applies to promotions and discounts, whether the reseller's entrant's customer must take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers.

b. Discussion

629. Section 251(c)(4) provides that incumbent LECs must offer resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby exacerbating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts. Limited time offerings of service are still subject to resale pursuant to Section VIII.A.

630. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate:" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve pro-competitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their pro-competitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional
prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

631. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, e.g., no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offers to evasive the wholesale obligation, for example by consecutively offering a series of 90-day promotions.

632. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

633. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there is a reasonable period of time before the expiration of promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

634. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers. Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 41 FR 30657 (July 26, 1976). We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background

635. Responding to our general questions regarding the scope of limitations that may be placed on competitors’ resale of incumbent LEC services, parties addressed in their comments whether below-cost and residential services are subject to section 251(c)(4).

b. Discussion

636. Subject to the cross-class restrictions discussed below, we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to "any telecommunications service" and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition. Thus, differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale.

637. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, MECAs argue that services incumbent LECs offer at below-cost rates should not be subject to resale under section 251(c)(4). We do not adopt MECAs’s proposal. As explained above, we conclude that the 1996 Act provides that below-cost services are subject to the section 251(c)(4) resale obligation and that differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale. Therefore, resale of below-cost services at wholesale rates should not adversely impact small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Cross-Class Selling

a. Background

638. In the NPRM, we sought comment on the meaning of section 251(c)(4)(B) which provides that “[a] State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.” We suggested that competing resellers may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.
category of subscribers and then resell such service to other customers. We tentatively concluded, for example, that it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program. We noted that we have generally not allowed carriers to prevent other carriers from purchasing high-volume, low-price offerings to resell to a broad pool of lower volume customers. Similarly, we inquired into the propriety of practices such as limiting the resale of flat-rated service.

b. Discussion

639. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings. State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions’ ability to impose such restrictions on resale.

640. Shared tenant services are made possible through the resale and trunking of flat-rated services to multiple customers. We do not believe that these or other efficient uses of technology should be discouraged through restrictions on the resale of flat-rated offerings to multiple end users, even if incumbent LECs have not always priced such offerings assuming these usage patterns. We therefore conclude that such restrictions are presumptively unreasonable.

641. We also conclude that all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

5. Incumbent LEC Withdrawal of Services

a. Background

642. In the NPRM, we sought comment on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the retail service on a retail basis, or whether the incumbent should first be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also asked if access to unbundled elements addresses the concern that incumbent LECs could withdraw retail services.

b. Discussion

643. We are concerned that the incumbent LECs’ ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. Many state commissions have rules regarding the withdrawal of retail services and have experience regulating such matters. States can assess, for example, the universal service implications of an incumbent LEC’s proposal to withdraw a retail service. Therefore, we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services. We find it important, however, to ensure that grandfathered customers—subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services—not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller. The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

6. Provisioning

644. We conclude that service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act’s prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes such differences imperceptible to end users because such differences may still provide incumbent LECs with advantages in the marketplace. Additionally, we conclude that incumbent LEC services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC’s subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. This equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations and incumbent LEC requirements relating to such limitations, such as potential down payments. We note that common carrier obligations, established by federal and state law and our rules, continue to apply to incumbent LECs in their relations with resellers. With regard to customer changeover charges, we conclude that states should determine reasonable and nondiscriminatory rates for such charges.

645. Brand identification is likely to play a major role in markets where resellers compete with incumbent LECs for the provision of local and toll service. This brand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller’s primary competitor. We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests. We recognize that an incumbent LEC may incur costs in complying with a request for unbranding or rebranding. Because we
do not have a record on which to determine the level of fees or wholesale pricing offsets that may reasonably be assessed to recover these costs, we leave such determinations to the state commissions.

D. Resale Obligations of LECs Under Section 251(b)(1)

646. Section 251(b)(1) imposes a duty on all LECs to offer certain services for resale. Specifically, section 251(b)(1) requires LECs not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."

1. Background

647. In the NPRM, we sought comment generally on the relationship of section 251(b)(1) to section 251(c)(4). We also sought comment on whether all LECs are prohibited from imposing unreasonable restrictions on resale of their services, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers. We also sought comment on what types of resale restrictions should be permitted under section 251(b)(1) and stated our belief that few, if any, conditions or limitations should be permitted for the same reasons that resale restrictions are sharply limited under section 251(c)(4). We also asked what standards should be adopted for determining whether resale restrictions should be permitted, and whether presumptions should be established.

2. Discussion

648. There are two differences between the resale obligations in section 251(b)(1) and in section 251(c)(4): the scope of services that must be resold and the pricing of such resale offerings. Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Thus, the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4). We need not prescribe a minimum list of services that are subject to the 251(b)(1) resale requirement for the same reasons that we specified for not prescribing such a list in Section VIII.A. of this Order. We note that section 251(b)(1) clearly omits a wholesale pricing requirement. We therefore conclude that the 1996 Act does not impose wholesale pricing requirements on nonincumbent LECs. Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs and were therefore not made subject to the wholesale pricing obligation in the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary. 649. Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251(b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4). We conclude that any restriction of a type that has been found reasonable for incumbent LECs should be deemed reasonable for all other LECs as well.

E. Application of Access Charges

1. Background

650. In the NPRM, we suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues. In other words, IXCs must still pay access charges to incumbent LECs for originating and terminating interstate traffic of an end user served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4). We granted Rochester Telephone waivers to permit Rochester Telephone to bill the SLC for access charges. We also permitted Rochester Telephone to bill resellers the PIC change charge, which is assessed by incumbent LECs to recover the SLC charge on telecommunications carriers that purchase local exchange service for resale and by unbundling subscriber lines from other network functions. Rochester Telephone created a situation where it would no longer have a direct relationship with end users, IXCs, or both, and that such a situation was not contemplated when the Commission created the rules governing the recovery of access charges.

2. Discussion

651. We conclude that the 1996 Act requires that incumbent LECs continue to receive access charge revenues when local services are resold under section 251(c)(4). IXCs must still pay access charges to incumbent LECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4).
of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a “telecommunications service [an incumbent LEC] provides at retail to subscribers.” Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

IX. Duties Imposed on “Telecommunications Carriers” by Section 251(a)

A. Background

656. Section 251(a) imposes two fundamental duties on all telecommunications carriers: (1) “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;” and (2) “not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256.” 47 U.S.C. § 251(a). Section 255 addresses access by persons with disabilities and establishes that manufacturers and providers of telecommunications will design equipment and provide service that is accessible to, and usable by, individuals with disabilities. Section 256 provides for coordination for interconnectivity “to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services.” 47 U.S.C. §§ 255, 256. In this proceeding we determine which carriers are “telecommunications carriers” as defined in section 3(44) of the Act. The term telecommunications carrier means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(44).

In the NPRM, we tentatively concluded that, pursuant to the statute’s definition of “telecommunications carrier” and “telecommunications service,” to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of “telecommunications carrier.” We sought comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.

657. We also tentatively concluded that we should determine whether the provision of mobile satellite services is Commercial Mobile Radio Services (CMRS) or Private Mobile Radio Service (PMRS) based on the factors set forth in the CMRS Second Report and Order. NPRM para 247. The Commission makes this determination by looking at an array of public interest considerations (e.g., the types of services being offered and the number of licensees being authorized). See, e.g., Amendment of Parts 2, 22 and 25 of the Commission’s Rules to Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Second Report and Order, 52 FR 4017 (February 9, 1987); Amendment to the Commission’s Rules to Establish Other Rules and Policies Pertaining to a Radiodetermination Satellite Service, GEN Docket No. 84-689, Second Report and Order, 51 FR 18444 (May 20, 1986). We sought comment on the meaning of offering service “directly or indirectly” to the public in the context of section 251(a)(1) and on whether section 251(a) allows non-incumbent LECs discretion to interconnect directly or indirectly with a requesting carrier. We also sought comment on what other actions we should take to ensure that carriers do not install network features, functions, or capabilities that are inconsistent with the guidelines and standards established pursuant to sections 255 and 256.

B. Discussion

658. A “telecommunications carrier” is defined as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).” 47 U.S.C. § 153(44). The term “aggregator” is defined as “any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.” 47 U.S.C. § 226(a)(2). A telecommunications carrier shall be treated as a common carrier under the Act “only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” A “telecommunications service” is defined as the “offering of telecommunications for a fee directly to the public, to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of “telecommunications carrier.” We find that this definition is consistent with the 1996 Act, and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. Also, enhanced service providers, to the extent that they are providing telecommunications services, are entitled to the rights under section 251(a).

659. We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that all CMRS providers are telecommunications carriers and are thus obliged to comply with section 251(a). The term “CMRS” is defined as “any mobile service * * * that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.” 47 U.S.C. § 332(d)(1). CMRS includes, among other things, private paging, personal communications services, business radio services, and
Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes provision of a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent.

661. We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements. In addition, we conclude that enhanced service providers that do not provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.

662. Consistent with our tentative conclusion in the NPRM, we will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or PMRS based on the factors set forth in the CMRS Second Report and Order. Commenters have not raised objections to the Commission's tentative conclusion on this issue.

663. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient, technical and economic choices. The interconnection requirements under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunications carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (e.g., two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a).
Commission comments at 82–83. Specific accessibility requirements such as those proposed by the Illinois Commission will need to be developed in proceedings to implement section 255, and therefore, we will not set forth any required "features, functions, or capabilities" in this proceeding. Similarly, the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement Section 256. We intend to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

X. Commercial Mobile Radio Service Interconnection

665. In the NPRM, we sought comment on whether interconnection arrangements between incumbent LECs and CMRS providers fell within the scope of sections 251 and 252. Application of sections 251 and 252 to LEC±CMRS interconnection arrangements involves two distinct issues. One is whether the terms and conditions of the physical interconnection between incumbent LECs and CMRS providers are governed under section 251(c)(2), and the corresponding pricing standards set forth in section 252(d)(1). The second, and perhaps more critical issue from the CMRS providers' perspective, is whether CMRS providers are entitled to reciprocal compensation for transport and termination under section 251(b)(5), and the corresponding pricing standards set forth in section 252(d)(2).

666. We tentatively concluded in the NPRM that CMRS providers are not obliged to provide to requesting telecommunications carriers either reciprocal compensation for transport and termination of telecommunications under section 251(b)(5), or interconnection under the provisions of section 251(c)(2), but that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing "telephone exchange service and exchange access." We sought comment on this tentative conclusion. We also asked for comment on the separate but related question of whether LEC±CMRS transport and termination arrangements fall within the scope of section 251(b)(5). In addition, we sought comment on the relationship between section 251 and section 332(c), 47 U.S.C. 332(c). This section sets forth the regulatory treatment for mobile services, including the common carrier treatment of CMRS providers (except for such provisions of Title II as the Commission may specify), the right of CMRS providers to request (and the Commission to order) physical interconnection with other common carriers and the preemption of state regulation of the entry of or the rates charged by any CMRS providers. We acknowledged that issues relating to LEC±CMRS interconnection pursuant to section 332(c) were part of an ongoing proceeding initiated before the passage of the 1996 Act, (Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, CC Docket No. 95-185, 61 FR 3644 (February 1, 1996) (LEC±CMRS Interconnection NPRM)), and retained the prerogative of incorporating by reference the comments filed in that docket to the extent necessary. We hereby do so.

A. CMRS Providers and Obligations of Local Exchange Carriers Under Section 251(b) and Incumbent Local Exchange Carriers Under Section 251(c)

1. Background

667. Section 251(b) imposes duties only on LECs, and section 251(c) imposes duties only on incumbent LECs. Section 3(26) of the Act defines "local exchange carrier" to mean "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." In the NPRM, we sought comment on whether, and to what extent, CMRS providers should be classified as "local exchange carriers" and therefore subject to the duties and obligations imposed by section 251(b).

2. Discussion

668. We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs. Section 3(26) of the Act, quoted above, makes clear that CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted. We disagree with COMAV and National Wireless Resellers Association that CMRS providers are de facto LECs (and even incumbent LECs if they are affiliated with a LEC) simply because they provide telephone exchange and exchange access services. Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs. We further note that, because the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion, states are preempted from requiring CMRS providers to classify themselves as "local exchange carriers" or be subject to rate and entry regulation as a precondition to participation in interconnection negotiations and arbitrations under sections 251 and 252.

669. NARUC argues that CMRS providers should be classified as LECs if they provide fixed service. We are currently seeking comment in our CMRS Flexibility Proceeding, (Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996)), on the regulatory treatment to be afforded CMRS providers when they provide fixed services. Thus, we believe that it would be premature to answer that question here, based only on the record in this proceeding. We also decline to adopt the Illinois Commission's suggestion that we find that a CMRS provider is a LEC if the CMRS provider seeks to compete directly with a wireline LEC. Even if we were to accept the Illinois Commission's underlying assumption, the record in this proceeding contains no evidence that wireless local loops have begun to replace wireline loops for the provision of local exchange service. Thus, until such time that we decide otherwise, CMRS providers will not be classified as LECs, and are not subject to the obligations of section 251(b). We further note that, even if we were to classify some CMRS providers as LECs, other types of CMRS providers, such as paging providers, might not be so classified because they do not offer local exchange service or exchange access.

670. We further note that, because CMRS providers do not fall within the definition of a LEC under section 251(h)(1), they are not subject to the duties and obligations imposed on incumbent LECs under section 251(c). An incumbent LEC is defined in section 251(h)(1), and includes only those LECs that were, on the date of enactment of the 1996 Act, deemed to be members of NECA, pursuant to 47 CFR § 69.601(b), or the successor or assign of a NECA member. Similarly, we do not find that...
CMRS providers satisfy the criteria set forth in section 251(h)(2), which grants the Commission the discretion to, by rule, provide for the treatment of a LEC as an incumbent LEC if certain conditions are met.

B. Reciprocal Compensation Arrangements Under Section 251(b)(5)

Some parties contend that LEC-CMRS transport and termination arrangements do not fall within the scope of 251(b)(5), which requires LECs to establish reciprocal compensation arrangements for transport and termination. Other commenters argue that because CMRS providers fall within the definitions of “telecommunications carriers,” they fall within the scope of section 251(b)(5).

Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of “telecommunications.” Under section 3(43), “[t]he term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other’s networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B, below.

C. Interconnection Under Section 251(c)(2)

1. Background

Section 251(c)(2)(A) provides that an incumbent LEC must provide interconnection with its local exchange network to “any requesting telecommunications carrier * * * for the transmission and routing of telephone exchange service and exchange access.” In the NPRM, we tentatively concluded that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing telephone exchange service and exchange access. We sought comment on this tentative conclusion.

2. Discussion

As discussed in the preceding section, CMRS providers meet the statutory definition of “telecommunications carriers.” We also agree with several commenters that many CMRS providers (specifically cellular, broadband PCS and covered SMR) also provide telephone exchange service and exchange access as defined by the 1996 Act. Incumbent LECs must accordingly make interconnection available to these CMRS providers in conformity with the terms of sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable and nondiscriminatory.

The 1996 Act defines “telephone exchange service” as “service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area * * * and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. 153(47) (emphasis added). This is a broader definition of “telephone exchange service” than had previously existed; Congress changed the definition in the 1996 Act to include services “comparable” to telephone exchange. At a minimum, we find that cellular, broadband PCS, and covered SMR providers fall within the second part of the definition because they provide “comparable service” to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers are comparable because, as a general matter, and as some commenters note, these CMRS carriers provide local, two-way switched voice service as a principal part of their business. Indeed, the Commission has described cellular service as exchange telephone service. (See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1278 (1986), and cellular carriers as “generally engaged in the provision of local exchange telecommunications in conjunction with local telephone companies * * *.”)

In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1278 (1986) (Competition Opinion); see also id. at 1284 (cellular carriers are primarily engaged in the provision of local, intrastate exchange telephone service); Equal Access and Interconnection Access and Panning Pertaining to Commercial Radio Services, CC Docket No. 94–54, Notice of Proposed Rulemaking and Notice of Inquiry, 59 FR 35664 (July 13, 1994). In addition, although CMRS providers are not currently classified as LECs, the fact that most CMRS providers are capable, both technically and pursuant to the terms of their licenses, of providing fixed services, as LECs do, buttresses our conclusion that these CMRS providers offer services that are “comparable” to telephone exchange service and supports the notion that these services may become a true economic substitute for wireline local exchange service in the future. See Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96–6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96–283 (released August 1, 1996) (amending rules to allow providers of narrowband and broadband PCS, cellular, CMRS SMR, CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services).

6. We also believe that other definitions in the Act support the conclusion that cellular, broadband PCS, and covered SMR licenses provide telephone exchange service. The fact that the 1996 Act’s definition of a LEC excludes CMRS until the Commission finds that such service should be included in the definition, “suggests that Congress found that some CMRS providers were providing telephone exchange service or exchange access, but sought to afford the Commission the discretion to decide whether CMRS providers should be treated as LECs under the new Act. Similarly, section 253(f) permits the states to impose certain obligations on “telecommunications carrier[s] that seek[] to provide telephone exchange service” offerral areas. The provision further provides that “[t]his subsection shall not apply * * * to a provider of commercial mobile services.” It would have been unnecessary for the statute to include this exception if some CMRS were not telephone exchange service. Similarly, section 271(c)(1)(A), which sets forth conditions for determining the presence of a facilities-based competitor for purposes of BOC applications to provide in-region, InterLATA services, provides that part 22 [cellular] services “shall not be considered to be telephone exchange services,” for purposes of that section. Again, if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service, it would not have
been necessary to exclude cellular providers from this provision.

677. The arguments that CMRS traffic flows may differ from wireline traffic, that CMRS providers' termination costs may differ from LECs, that CMRS service areas do not coincide with wireline local exchange areas, or that CMRS providers are not LECs, do not alter our conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. These considerations are not relevant to the statutory definition of telephone exchange service in section 3(47). Incumbent LECs are required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under the plain language of section 251(c)(2).

D. Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates

1. Background

678. In the NPRM, we sought comment on the relationship between section 251 and section 332(c). As noted above, we hereby incorporate by reference the comments filed in CC Docket No. 95–185 to the extent relevant to our analysis. In the NPRM, we noted that we had previously sought comment on the relationship of these two statutory provisions in the LEC–CMRS Interconnection proceeding. In the LEC–CMRS proceeding, we tentatively concluded that the Commission has sufficient authority to promulgate specific federal requirements for interstate and intrastate LEC–CMRS interconnection arrangements, including the adoption of a specific interim bill and keep arrangement. However, we reached that tentative conclusion before the enactment of the 1996 Act.

2. Discussion

679. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC–CMRS interconnection rates. Other parties assert that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC–CMRS interconnection rates. Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other.

680. Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC–CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 is a basis for jurisdiction over LEC–CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

681. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will expedite the parties’ negotiations and drive voluntary CMRS–LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

682. Although we are applying sections 251 and 252 to LEC–CMRS interconnection at this time, we reserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers. In passing section 332 in 1992, Congress stated that it intended to foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.” H.R. Report No. 103–11, 103d Cong., 1st Sess. 260 (1993). We also recognize that, based on the combined record in CC Docket No. 95–185 and CC Docket No. 96–68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection. Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC–CMRS interconnection rates.

683. Our decision to proceed under section 251 as a basis for regulating LEC–CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state. CAL. PUBLIC UTILITIES CODE Sections 1001, 1005 (West 1995); ALASKA STAT. Section 42.05221 (1995); CONN. GEN. STAT. Section 16-247g (1995); HAW. REV. STAT. Section 269–7.5 (1995); NEB. REV. STAT. Section 86–805 (1995); N.M. STAT. ANN. Section 63–9B–4 (Michie 1996). Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law. See In the Matter of Motion for a Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulation as Applies to Cellular Carriers, File No. WTB/POL 95-2, Motion for a Declaratory Ruling, Alaska-3 Cellular d/b/a CellularOne, p.5, para. 11 (filed Sept. 22, 1995); Decision, Investigation Into Wireless Mutual Compensation Plans, State of Connecticut, Department of Public Utility control, at 15 (Connecticut Commission Sept. 22, 1995). Hawai’i and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file tariffs with the state commission. HAW. REV. STAT. Section 6–80–29 (1996); R.S. Sections for Competition in the Local Telecommunications Market, General
Order, Louisiana Public Service Commission, §§ 301, 401 (Louisiana Commission March 15, 1996). We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.

X. Obligations Imposed on LECs by Section 251(b)

A. Reciprocal Compensation for Transport and Termination of Telecommunications

1. Statutory Language

684. Section 251(b)(5) provides that all LECs, including incumbent LECs, have the duty to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” Section 252(d)(2) states that, for the purpose of compliance by an incumbent LEC with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the “mutual and reciprocal recovery of costs * * * may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements).” 2. Definition of Transport and Termination of Telecommunications

a. Background

685. In the NPRM, we sought comment on whether “transport and termination of telecommunications” under section 251(b)(5) is limited to certain types of traffic. We noted that the statutory provision appears to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing provider in the same local service area as well as traffic passing between LECs and CMRS providers. We sought comment on whether section 251(b)(5) also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another. We also observed in the NPRM that section 252(d)(2) is entitled “Charges for Transport and Termination of Traffic,” and it could be interpreted to permit separate charges for these two components of reciprocal compensation. We sought comment on this issue.

b. Discussion

(1) Distinction Between “Transport and Termination” and Access

686. We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

687. We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. We disagree with Frontier’s contention that section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers—typically, the originating LEC, the IXC, and the terminating LEC—collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. In addition, both the caller and the party receiving the call pay a flat-rate access charge—the end-user common line charge—to the respective incumbent LEC to whose network each of these parties is connected. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by section 252(d)(2)(A)(i), which establishes the pricing standards for section 251(b)(5). Section 251(d)(2)(A)(i) provides for “recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

688. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered “local areas” for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions’ historical practice of defining local service areas for wireline LECs. Traffic originating or terminating
outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different. This approach is consistent with a recently negotiated interconnection agreement between Ameritech and ICG that restricted reciprocal compensation arrangements to the local traffic area as defined by the state commission. Continental Cablevision, in an ex parte letter, states that many incumbent LECs offer optional expanded local area calling plans, in which customers may pay an additional flat rate charge for calls within a wider area than that deemed as local, but that terminating intrastate access charges typically apply to calls that originate from competing carriers in the same wider area. Continental Cablevision argues that local transport and termination rates should apply to these calls. We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions. In addition, we expect the states to decide whether section 251(b)(5) reciprocal compensation provisions apply to the exchange of traffic between incumbent LECs that serve adjacent service areas.

689. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). See Rand McNally, Inc., 1992 Commercial Atlas & Marketing Guide 38-39 (1992). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions to assess CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges. 690. We conclude that section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description. Contrary to the arguments of NYNEX and Pacific Telesis, neither the plain language of the Act nor its legislative history limits this subsection to the transport and termination of telecommunications traffic between new entrants and incumbent LECs. In addition, applying section 251(b)(5) obligations to neighboring incumbent LECs in the same local exchange area is consistent with our decision that all interconnection agreements, including agreements between neighboring LECs, must be submitted to state commissions for approval pursuant to section 252(e). 691. Under section 252, neighboring states may establish different rate levels for transport and termination of traffic. In cases in which traffic in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This provides an administratively convenient rule, and termination of the call typically occurs in the same state where the terminating carrier's end office switch is located and where the cost of terminating the call is incurred. (2) Distinction Between "Transport" and "Termination" 692. We conclude that transport and termination should be treated as two distinct functions. We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier). Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by other carriers on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method. 693. We define "termination," for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. A carrier or provider typically has no other mechanism for delivering traffic to a called party served by another carrier except by having that called party's carrier terminate the call. In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section. As such, we conclude that we need to treat transport and termination as separate functions—each with its own cost. With respect to CPE's compensation obligations or whether transport and termination of traffic will allow incumbent LECs to "game" the system through network design decisions, we conclude in the interconnection section above that interconnecting carriers may interconnect at any technically feasible point. We find that this sufficiently limits LECs' ability to disadvantage interconnecting parties through their network design decisions. (3) CMRS-Related Issues 694. Section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligations run, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers. 695. We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that
section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

698. As noted above, CMRS providers' access charges is defined by § 69.5(b) of our rules. * * *

Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay a carrier's carrier [i.e., access charges is defined by § 69.5(b) of our rules.” See Regulatory Treatment of Services Second Report and Order, 59 FR 18493 (April 2, 1994). Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers to avoid any possible disruption of existing reciprocal compensation arrangements.

699. In the NPRM, we sought comment on how to interpret section 252(d)(2) of the Act. Specifically, we asked if we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic. We also asked whether such a generic pricing methodology or ceiling should be established using the same principles we adopt for interconnection and unbundled elements. Additionally, we sought comment on the use of an interim and transitional pricing mechanism that would address concerns about unequal bargaining power in negotiations.

b. Discussion

(1) Statutory Standard

700. We conclude that the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions. Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on “a reasonable approximation of the additional costs of terminating such calls.” Moreover, there is some substitutability between the fees for the use of unbundled network elements for transporting traffic and its use of transport services under section 252(d)(2). Depending on the arrangement agreements, carriers may transport traffic to the competing carriers' end offices or hand traffic off to competing carriers at meet points for termination.
on the competing carriers’ networks. Transport of traffic for termination on a competing carrier’s network is, therefore, largely indistinguishable from transport for termination of calls on a carrier’s own network. Thus, we conclude that transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled elements or transport of traffic that originated on a competing carrier’s network. We, therefore, find that the “additional cost” standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements.

(2) Pricing Rule

701. States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements. Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a “bill and keep” arrangement, as discussed below.

(3) Cost-Based Pricing Methodology

702. Consistent with our conclusions about the pricing of interconnection and unbundled network elements, we conclude that states that elect to set rates through a cost study must use the forward-looking economic cost-based methodology, which is described in greater detail above, in establishing rates for reciprocal transport and termination when arbitrating interconnection arrangements. We find that section 252(d)(2)(B)(ii), which indicates that section 252(d)(2) shall not be construed to “authorize the Commission or any State to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls,” does not preclude states or this Commission from reviewing forward-looking economic cost studies. First, we believe that Congress intended the term “rate regulation proceeding” in section 252(d)(2)(B)(ii) to mean the same thing as “a rate-of-return or other rate-based proceeding” in section 252(d)(1)(A)(i).

In the section on the pricing of interconnection and unbundled elements above, we conclude that the statutory prohibition of the use of such proceedings is intended to foreclose the use of traditional rate case proceedings using rate-of-return regulation. Moreover, forward-looking economic cost studies typically involve “a reasonable approximation of the additional cost,” rather than determining such costs “with particularity,” such as by measuring labor costs with detailed time and motion studies.

703. We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the “additional cost” to the LEC of terminating a call that originates on a competing carrier’s network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. The duty to terminate calls that originate on the network of a competitor does not directly affect the number of calls routed to a particular end user and any costs that result from inadequate loop capacity are, therefore, not considered “additional costs.” We conclude that such non-traffic-sensitive costs should not be considered “additional costs” when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an “additional cost” to be recovered through termination charges.

704. Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that “additional costs” may not include a reasonable allocation of forward-looking common costs. We recognize that the allocation of costs, as noted by Time Warner, call termination is an essential element in completing calls because competitors are required to use the incumbent LEC’s existing networks to terminate calls to incumbent LEC customers. The 1996 Act envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation. In order to terminate traffic ubiquitously to other companies’ local customers, all LECs are given the right to use termination services from those companies rather than construct facilities to everyone. While, on the originating end, carriers have different options to reach their revenue-paying customers—including their own network facilities, purchasing access to unbundled elements of the incumbent LEC, or resale—they have no realistic alternatives for terminating traffic destined for competing carriers’ subscribers other than to use those carriers’ networks. Thus, all carriers—incumbent LECs as well as competing carriers—have a greater incentive and opportunity to charge prices in excess of economically efficient levels on the terminating end. To ensure that rates for reciprocal compensation make possible efficient competitive entry, we conclude that termination rates should include an allocation of forward-looking common costs that is no greater proportionately than that allocated to unbundled local loops, which, as discussed above, should be relatively low. Additionally, we conclude that rates for the transport and termination of traffic shall not include an element that allows incumbent LECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers’ service, because such an element would be inconsistent with the statutory requirement that rates for transport and termination be based on additional costs. In the section on addressing prices for unbundled elements we conclude that the ECPR, which would allow incumbent LECs to recover such lost contributions, or collection of universal service costs through interconnection rates, leads to significant distortions in markets when existing retail prices are not cost-based.

705. We also address the impact on small incumbent LECs. For example, the Western Alliance argues that it is especially important for small LECs to recover lost contributions and common costs through termination charges. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we conclude that termination rates for all LECs that include an allocation of forward-looking common costs, but find that the inclusion of an element for the
recovery of lost contribution may lead to significant distortions in local exchange markets. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions on our rules under section 251(f)(2) of the 1996 Act.

(4) Default Proxies

706. As with unbundled network elements, we recognize that it may not be feasible for some state commissions conducting or reviewing economic studies to establish transport and termination rates using our TELRIC-based pricing methodology within the time required for the arbitration process, particularly given some states’ resource limitations. Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end office switch. This default price range is based on the same proxies that apply to local switching as an unbundled network element. In establishing end office termination rates, states may adopt a default termination price that is within our default price range or at either of the end points of the range. States should articulate the basis for selecting a particular price within this range. Thus, in arbitration proceedings, states must set the price for end office termination of traffic by: (1) using a forward-looking, economic-cost study that complies with the forward-looking, economic-cost methodology set forth above; or (2) adopting a price less than or equal to 0.4 cents ($0.004) per minute, and greater than or equal to 0.2 cents ($0.002) per minute, pending the completion of such a forward-looking, economic cost study. We observe that the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis. The adoption of a range of rates to serve as a default price range for interconnection agreements being arbitrated by the states provides carriers with a clearer understanding of the terms and conditions that will govern them if they fail to reach an agreement and helps to reduce the transaction costs of arbitration and litigation. We also find that states that have already adopted end-office termination rates based on an approach other than a full forward-looking cost study, either through arbitration or rulemaking proceedings, do not set such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5 cents ($0.005) per minute. As discussed below, a state may also order a “bill and keep” arrangement subject to certain limitations. Additionally, our adoption of a default price range temporarily relieves small and mid-sized carriers from the burden of conducting forward-looking economic cost studies.

707. Similarly, in establishing transport rates under sections 251(b)(5) and 252(d)(2), state commissions should be guided by the price proxies that we are establishing for unbundled transport elements discussed above. States should explain the basis for selecting a particular default price subject to the applicable ceiling. Specifically, when interconnecting carriers hand off traffic at an incumbent LEC’s tandem switch (or equivalent facilities of a carrier other than an incumbent LEC), the rates for the tandem switching and transmission from the tandem switch to end offices—a portion of the “transport” component of transport and termination rates—should be subject to the proxies that apply to the analogous unbundled network elements. Thus, for the time being, when states set rates for tandem switching under section 252(d)(2), they may set a default price at or below the default price ceiling that applies to the tandem switching and transmission as an alternative to reviewing a forward-looking economic cost study using our TELRIC methodology. Similarly, when states set rates for transmission facilities between tandem switches and end offices, they may establish rates equal to the default price adopting for such transmission, as discussed above in the section on unbundled elements.

708. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport. For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the “providing carrier”) and another local carrier with which it interconnects (the “interconnecting carrier”). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides multiple trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier’s network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the share of traffic during peak periods.

709. Nearly all commenters agree that flat rates, rather than usage-sensitive rates, should apply to the purchase of dedicated facilities. As discussed in the NPRM, economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis. We, therefore, require all interconnecting parties to be offered the option of purchasing dedicated facilities, for the transport of traffic, on a flat-rated basis. As discussed by Lincoln Telephone, the connection between an incumbent LEC’s end or tandem office and an interconnecting LEC’s network is likely to be a dedicated facility. We recognize that the facility itself can be provided in a number of different ways—by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where cost of the usagesensitive services going to arbitration and in reviewing BOC statements of terms and conditions, the
carrier actually providing the facility should presumptively be entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier. We recognize that negotiated agreements may incorporate flat-rated charges when it is efficient to do so and find that the presence of the arbitration default rule is likely to lead parties to negotiate efficient rate structures.

710. We recognize that the costs of transporting and terminating traffic during peak and off-peak hours may not be the same. As suggested by the Massachusetts Attorney General, rates that are the same during peak and off-peak hours may not reflect the cost of using the network and could lead to inefficient use of the network. The differences in the cost of transporting and terminating traffic during peak and off-peak hours, however, are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch. For example, peak periods may vary within a local service area depending upon whether the switch is located in a business or residential area. As a result, there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the benefits of such schemes. The negotiating parties, however, are likely to be in a position to more accurately determine how traffic patterns will adjust to peak-load pricing schemes and we encourage parties to reach such pricing schemes in the negotiation process. For similar reasons, we neither require nor forbid states from adopting rates that reflect peak and off-peak costs. We hope some states will evaluate the benefits and costs of pricing schemes that consist of different rates for peak and off-peak traffic. We do require, however, that peak-load pricing schemes, adopted through the arbitration process, comply with our default price level if not based on a forward-looking cost study (e.g., the average rate, weighted by the project minutes of use during peak and off-peak periods, should fall within our default price range of 0.2 to 0.4 cents or the level determined by an incremental cost study).

(6) Interim Transport and Termination Rate Levels

711. We are concerned that some new entrants that do not already have interconnection arrangements with incumbent LECs may face delays in initiating LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. In particular, a new entrant that has already constructed facilities may have a relatively weak bargaining position because it may be forced to choose either to accept transport and termination rates not in accord with these rules or to delay its commencement of service until the conclusion of the arbitration and state approval process. To promote the Act’s goal of rapid competition in the local exchange, we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination rates, and approval by the state commission. A carrier may take advantage of this interim arrangement only if it has requested negotiation with the incumbent LEC. The interim arrangement shall cease to be in effect when one of the following occurs: (1) an agreement has been negotiated and approved; (2) an agreement has been arbitrated and approved; or (3) the period for requesting arbitration has passed with no such request. We also conclude that interim prices for transport and termination shall be symmetrical. Because the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously, this requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the incumbent LEC. The ability to interconnect with an incumbent LEC prior to the completion of a forward-looking, economic cost study, based on an interim presumptive price ceiling, allows carriers, including small entrants, to enter into local exchange service expeditiously.

712. In states that have already conducted or reviewed forward-looking economic cost studies and promulgated transport and termination rates based on such studies, an incumbent LEC receiving a request for interim transport and termination rates shall use these state-determined rates as interim transport and termination rates. In states that have not conducted or reviewed a forward-looking economic cost study, but have set rates for transport and termination of traffic consistent with the default price ranges and ceilings discussed above, an incumbent LEC shall use these state-determined rates as interim rates. In states that have neither set rates consistent with the default price ceilings and ranges nor reviewed or conducted forward-looking economic cost studies, we must establish an interim default price in order to facilitate rapid competition in the local exchange market. In those states, an incumbent LEC shall set interim rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport described above. Using the ceiling as a default interim price, pending a state commission’s completion of a forward-looking economic cost analysis, should ensure that both the incumbent LEC and the competing provider recovers no less than their full transport and termination costs. We note, however, that the most credible evidence in the record suggests that the actual forward-looking economic cost of end-office switching is closer to 0.2 cents ($0.002) per minute of use than the ceiling of 0.4 cents ($0.004) per minute of use. States must adopt “true-up” mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration.

713. We conclude that section 251, in conjunction with our broad rulemaking authority under section 4(i), provides us with authority to create interim pricing rules to facilitate market entry. Because section 251(d)(1) gives the FCC authority “to establish regulations to implement the requirements of this section,” we find that section 251(d)(1) gives the Commission authority to establish interim regulations that address the “just and reasonable” rates for the “reciprocal compensation” requirement of section 251(b)(5), subject to the preservation requirements of section 251(d)(3). Courts have upheld our adoption of interim compensation arrangements pursuant to our authority under section 4(i) of the 1934 Communications Act on numerous occasions in the past. See New England Tel. and Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987); North American Telecommunications Association v. FCC, 772 F.2d 1092 (7th Cir. 1085); Lincoln Tel. and Tel. Co. v. FCC, 659 F.2d (D.C. Cir. 1989). In particular, we have authority, under section 4(i), to set interim rates subject to a later “true-up” when final rates are established. “[T]he Commission’s establishment of an interim billing and collection arrangement was both a helpful and necessary step for the Commission to take in implementing its ‘immediate’ interconnection order.” Lincoln Telephone & Telegraph Co. v. FCC, 659 F.2d 1092, 1107 (D.C. Cir. 1981) (upholding Commission decision requiring an incumbent LEC to interconnect with MCI immediately, in
order not to delay interconnection, at interim rates subject to later adjustment); see also FTC Communications v. FCC, 750 F. 2d 226 (2d Cir. 1984) (affirming Commission’s authority under Section 4(i) to set interim rates for interconnection between the domestic record carrier, Western Union, and international record carriers, subject to an accounting order, pending the conclusion of a rulemaking to set permanent rates replacing expired, contract-based rates). We therefore conclude that the default prices discussed above need not in all instances await the conclusion of the negotiation, arbitration, and state approval process set forth in section 252, but must nevertheless be in accordance with the requirements of section 251(d)(3) preserving state access regulations. We also observe that we proposed a similar interim transport and termination arrangement, albeit with different rate levels, in our NPRM in the LEC–CMRS Interconnection proceeding. LEC–CMRS Interconnection NPRM, 61 FR 3644 (February 1, 1996).

714. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Cincinnati Bell asserts that interim mechanisms are not required because large corporations are not disadvantaged by unequal bargaining power in negotiations with small and mid-size incumbent LECs. We do not adopt Cincinnati Bell’s position because some new entrants, regardless of their size, that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. We believe that the adoption of interim rates, subject to a “true-up,” advances the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions under our rules under section 251(f)(2) of the 1996 Act.

4. Symmetry
a. Background

715. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier. Incumbent LECs are not likely to purchase interconnection or unbundled elements from competitive LECs, except for termination of traffic, and possibly transport. In the NPRM, we sought comment on whether rate symmetry requirements are consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on “costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier,” and “a reasonable approximation of the additional costs of terminating such calls.”

716. In addition, we noted in the NPRM that the Illinois, Maryland, and New York commissions have established different rates for termination of traffic on an incumbent LEC’s network, depending upon whether the traffic is handed off at the incumbent LEC’s end office or tandem switch. We also observed that California and Michigan have established one rate that applies to transport and termination of all competing local exchange carrier traffic on incumbent LEC networks, regardless of whether the traffic is handed off at the incumbent LEC’s end office or tandem switch, although this rate does not currently apply to CMRS. We, therefore, address whether rates for transport and termination should be symmetrical and consist of only a single rate regardless of whether the call is handed off, or if rates should be priced on an element-by-element basis.

717. In the LEC–CMRS Interconnection NPRM, we sought comment on whether incumbent LECs were utilizing their greater bargaining power to negotiate with wireless carriers interconnection agreements that did not reflect principles of mutual compensation. We sought comment on whether we should institute some procedure or mechanism in addition to our section 208 enforcement process to ensure that incumbent LECs comply with our existing rules requiring mutual compensation. LEC–CMRS Interconnection NPRM, 61 FR 3644 (February 1, 1996).

b. Discussion
(1) Symmetry in General

718. Regardless of whether the incumbent LEC’s transport and termination prices are set using a TELRIC-based economic cost study or a default proxy, we conclude that it is reasonable to assume that the incumbent LEC’s transport and termination prices as a presumptive proxy for other telecommunications carriers’ additional costs of transport and termination. Both the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases. We also conclude that using the incumbent LEC’s forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined “on the basis of a reasonable approximation of the additional costs of terminating such calls.” Using the incumbent LEC’s cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), which prohibits “establishing with particularity the additional costs of transporting or terminating calls.” If both parties are incumbent LECs (e.g., an independent LEC and an adjacent BOC), we conclude that the larger LEC’s forward-looking costs should be used to establish the symmetrical rate for transport and termination. We conclude that larger LECs are generally in a better position to conduct a forward-looking economic cost study than smaller carriers.

719. We conclude that imposing symmetrical rates based on the incumbent LEC’s additional forward-looking costs will not substantially reduce carriers’ incentives to minimize those costs. A symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs. Moreover, symmetrical rates based on the incumbent LEC’s costs should not seriously affect incumbent LECs’ incentives to control costs. We expect that incumbent LECs will transport and terminate much more traffic that originates on their own networks than traffic that originates on competing carriers’ networks. Even if, under the additional cost standard, incumbent LECs were required to reflect any improvements in operating efficiency, and consequent cost reductions, in reduced termination rates, the cost savings realized by the incumbent LEC are likely to be much greater than its reduction in net termination revenues, because the majority of traffic transported and terminated is likely to be its own. Even if a pass-through of incumbent LEC’s cost reductions were instantaneous and complete, the number of minutes of use on which an incumbent LEC’s net termination revenues is assessed is much smaller.
than its overall number of minutes of switching and transport. Moreover, if a portion of the reduction in costs is specific to exchange traffic, under symmetrical rates, the LEC’s revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates. Consider a situation approximating traditional LEC-CMRS interconnection, in which traffic flows are substantially unbalanced: let us suppose, of 1,000,000 minutes of use, 750,000 are CMRS-to-LEC and 250,000 LEC-to-CMRS. Thus, under symmetric compensation at 0.3 cents per minute, the LEC receives 0.3 cents times 750,000, or $225.00, in reduced costs, whereas its terminating revenues would fall by only 0.3 cents times 250,000, or $75.00. Thus, it would still have substantial incentive to make the cost reduction in question. In situations closer to traffic balance, the incentive is even more favorable. And, of course, the LEC probably also reduces its cost of switching on many millions of other minutes that do not involve other networks at the same time. For example, in the case where traffic is balanced, net termination charges are zero, a figure that is unaffected by changes in the incumbent LEC’s costs, and the incumbent LEC is provided with correct incentives to minimize termination costs.

720. We also find that symmetrical rates may reduce an incumbent LEC’s ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers. As discussed by commenters in the LEC-CMRS Interconnection proceeding, LECs have used their unequal bargaining position to impose asymmetrical rates for CMRS providers and, in some instances, have charged CMRS providers origination as well as termination charges. On the other hand, symmetrical rates largely eliminate such advantages because they require incumbent LECs, as well as competing carriers, to pay the same rate for reciprocal compensation.

721. Symmetrical compensation rates are also administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers. In addition, we believe that using the incumbent LEC’s cost studies to establish the presumptive symmetrical rates will establish reasonable opportunities for local competition, including opportunities for small telecommunications companies entering the local exchange market. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that symmetrical rates do not consider the costs involved in the use of another carrier’s network. We find, however, that incumbent LECs’ costs, including small incumbent LECs’ costs, serve as reasonable proxies for other carriers’ costs of transport and termination for the purpose of reciprocal compensation. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act. In addition, symmetry will avoid the need for small businesses to construct a forward-looking economic cost studies in order for the states to arbitrate reciprocal compensation disputes.

722. Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC’s costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than the costs of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier’s cost studies.

723. We find that the “additional costs” incurred by a LEC when transporting and terminating a call that originated on a competing carrier’s network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC’s tandem switch and thus, whether some or all calls terminating on the new entrant’s network should be priced the same as the sum of transport and termination via the incumbent LEC’s tandem switch. Where the interconnecting carrier’s switch serves a geographic area comparable to that served by the incumbent LEC’s tandem switch, the appropriate proxy for the interconnecting carrier’s additional costs is the LEC tandem interconnection rate.

724. We disagree with TCI’s claim that higher charges for routing calls through tandem switches rather than directly through incumbent LECs’ end offices will materially discourage carriers from routing traffic through tandem switches, even when it is efficient to do so. New entrants will only be encouraged to interconnect at end-office switches, rather than tandem switches, when the decrease in incumbent LEC transport charges justifies the extra costs incurred by the new entrant to route traffic directly through the incumbent LEC’s end-office switches. Carriers will interconnect in a way that minimizes their costs of interconnection, including the use of cost-based LEC network elements. In addition, the flexibility given to states may allow carriers, including small entities, with different network architectures to establish rates for terminating calls originating on other carriers’ networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors’ network architectures.

725. We believe, with respect to interconnection between LECs and paging providers, that there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC’s costs for transport and termination of traffic. While paging providers, as telecommunications carriers, are entitled to mutual compensation for the
transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks, we believe that incumbent LECs' forward-looking costs may not be reasonable proxies for the costs of paging providers. Paging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities. PageNet's own network, for example, is based on a regional hub and spoke network that transmits paging calls from radio transmitters to provide regional or national coverage. This configuration is distinctly different from either LEC wireline networks, with their hierarchy of switches and transmission facilities, or cellular carriers, with their multiple cells and sophisticated systems for handing off calls as a vehicle moves across cell boundaries. In addition, most calls terminated by paging companies are brief (averaging 15 seconds) in duration and contain no voice message, but only an alpha-numeric message of a few characters. Using incumbent LEC's costs for termination of traffic as a proxy for paging providers' costs, when the LECs' costs are likely higher than paging providers' cost, might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation. Thus, using LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.

726. Given the lack of information in the record concerning paging providers' costs to terminate local traffic, we have decided to initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be and, if necessary, to set a specific paging default price. In the interim, however, in the event that LECs and paging companies cannot negotiate agreement upon rates, we direct states, when arbitration disputes under section 252(d)(2), to establish rates for the termination of traffic by paging providers based on the forward-looking economic costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state commission the costs of terminating local calls. Given the lack of information in the record concerning paging providers' costs, we further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.B.3., supra, does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching. There are no such estimates with respect to paging in the record, and as discussed above, we find that estimates of LEC costs may not reflect paging providers' costs.

(2) Existing Non-Reciprocal Agreements Between Incumbent LECs and CMRS Providers

727. Section 20.11 of our rules, which predates enactment of the 1996 Act, requires that interconnection agreements between incumbent LECs and CMRS providers comply with principles of mutual compensation, and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls. Based on the extensive record in the LEC-CMRS Interconnection proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules. Accordingly, we conclude that CMRS providers that are party to pre-existing agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties. Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and termination rate that the incumbent LEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the rules we adopt pursuant to this order.

728. In addition, we conclude that this opportunity for CMRS providers currently operating under arrangements with non-mutual transport and termination rates to renegotiate such arrangements advances the mutual compensation regime contemplated under section 251(b)(5) of the 1996 Act. We use the term "reciprocal compensation" and "mutual compensation" synonymously to mean that compensation flows in both directions between interconnecting networks. LEC-CMRS Interconnection NPRM. We find that extending the opportunity to establish symmetrical reciprocal compensation for the transport and termination of traffic addresses inequalities in bargaining power that incumbent LECs may use to disadvantage interconnecting wireless carriers. At the same time, our rule will place wireless carriers with non-mutual, existing agreements on the same footing as other new entrants, who will be able to negotiate more equitable interconnection agreements because of the rules we put in place with this Report and Order. We find that we have ample authority under section 4(l) of the 1934 Act as well as section 251 of the 1996 Act, to order this remedy. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful * * * and to modify other provisions of private contracts when necessary to serve the public interest." Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987). The Commission has adopted similar "fresh look" requirements in the past. The opportunity that we are affording to CMRS providers in this context is consistent with similar "fresh look" requirements that we have adopted in the past. See, e.g., Expanded Interconnection with Local Telephone Company Facilities Report and Order and NPRM, 57 FR 54323 (November 18, 1992), recon., 58 FR 48752 (September 17, 1993) ("fresh look" to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (1994); Competition in the Interstate Interexchange Marketplace Memorandum Opinion and Order on Reconsideration, 57 FR 20206 (May 12, 1992) ("fresh look" in context of 800 bundling with interexchange offerings); Amendment of the Commission's Rules Relative to Allocation of the 849-851/ 894-896 MHz Bands Memorandum Opinion and Order on Reconsideration, 56 FR 37853 (August 9, 1991) ("fresh look" requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

5. Bill and Keep

a. Background

729. Local Competition NPRM. In the NPRM, we defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network. Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. A bill-and-keep approach for termination of traffic does
not, however, preclude a positive flat-rated charge for transport of traffic between carriers’ networks. 730. We sought comment on what guidance we should give state commissions regarding the use of bill-and-keep arrangements in arbitrated interconnection arrangements. We sought comment on whether section 252(d)(2)(B)(ii) specifically authorizes states to impose bill-and-keep arrangements in the arbitration process, at least when certain conditions are met. We also sought comment on whether we should interpret the statute as placing any limits on the circumstances in which states may adopt bill-and-keep arrangements. We also asked for comment on the meaning of the statutory description of bill-and-keep arrangements as “arrangements that waive mutual recovery.” In addition, we sought comment on whether there are any circumstances in which the statute requires states to establish bill-and-keep arrangements.

731. LEC-CMRS Interconnection NPRM. In the LEC-CMRS Interconnection NPRM, we proposed bill and keep as an interim arrangement. LEC-CMRS Interconnection NPRM, 61 FR 3644 (February 1, 1996). We noted there that proponents have argued that bill-and-keep would be economically efficient if either of two conditions are met: (1) traffic flows between competing LECs are balanced; or (2) the per-unit cost of interconnection is de minimis. We, therefore, address whether interim bill-and-keep arrangements for LEC-CMRS traffic should be imposed.

b. Discussion

732. As an additional option for reciprocal compensation arrangements for termination services, we conclude that state commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined below. We disagree with commentators who contend that the Commission and states do not have the authority to mandate bill-and-keep arrangements under any circumstances. Section 252(d)(2)(B)(i) provides that the definition of what may be considered “just and reasonable” terms and conditions for reciprocal compensation “shall not be construed to preclude arrangements that afford mutual recovery (such as bill-and-keep arrangements).” We conclude that section 252(d)(2) would be superfluous if bill-and-keep arrangements were limited to negotiated agreements, because none of the standards in section 252(d) apply to voluntarily-negotiated agreements. Therefore, it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances. 733. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must “provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination.” In general, we find that carriers incur costs in terminating traffic that are not de minimis, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers’ incentives, encouraging them to overuse competing carriers’ termination facilities by seeking to overuse carriers’ termination facilities by seeking to overuse competitive rates. On the other hand, when states impose symmetrical rates for the termination of traffic, payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates. 734. We further conclude that states may adopt specific thresholds for determining when traffic is roughly balanced. If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state. For example, the Michigan Commission adopted a five percent threshold for the difference between the traffic flows in the two directions. States may, however, also apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists. Under such a presumption, bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof. We also find that states that have adopted bill-and-keep arrangements prior to the date that this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced. In that case, the state commission is to determine the transport and termination rates based either on the forward-looking economic cost-based methodology or consistent with the default proxies in this order. Finally, we observe that carriers have an incentive to agree to bill-and-keep arrangements if it is economically efficient to do so, and that nothing in the Act prevents parties from agreeing to bill-and-keep arrangements even if a state declines to mandate such arrangements. For example, we note that Time Warner/BellSouth interconnection agreement provides for a bill-and-keep arrangement based on the “roughly balanced traffic” concept. 735. In determining whether traffic is balanced, we find that precise traffic measurement is not necessary. It is sufficient to use approximations based on samples and studies comparable to reports on percentages of interstate use often used for access charge billing. Such an approach is likely to reduce implementation costs and complexities. Alternatively, state commissions may require that traffic flowing in the two directions be measured as accurately as possible during some defined period of time, which may commence no later than six months after an interconnection arrangement goes into effect. All affected carriers are required to cooperate with the state commission in implementing this measurement. A state commission that adopts a traffic flow measurement approach may adopt a “true-up” mechanism to ensure that no carrier is disadvantaged by an interim rate that differs from the rate established once such a measurement is undertaken. Finally, state commissions may require that local traffic and access traffic be carried on separate trunk groups if they deem such measures to be necessary to
ensure accurate measurement and billing.

736. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that bill-and-keep arrangements fail to adequately deal with each carrier’s costs. In addition to basing reciprocal compensation on the incumbent LECs costs, we believe that by allowing carriers to rebut a presumption of balanced traffic volumes, the concern that bill-and-keep arrangements fail to adequately deal with each carrier’s costs are addressed. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

737. We disagree with commenters that argue that mandating bill-and-keep arrangements in these circumstances violates the taking clause of Fifth Amendment. We reject BellSouth’s argument that mandating bill-and-keep mechanisms would constitute a physical intrusion of LEC property. As NCTA observes, bill-and-keep arrangements are not a “physical occupation” of incumbent LEC property and thus per se takings cases are irrelevant. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Lucas v. South Carolina Coastal Council, 505 U.S. 100, 2886, 2893 (1992). We also reject arguments that the bill-and-keep arrangements we adopt here would not adequately compensate incumbent LECs for transport and termination.

As Congress recognized, bill-and-keep arrangements allow each carrier compensation “in-kind” in the form of access to the other carrier’s network. Therefore, the type of bill-and-keep arrangements that we have permitted states to adopt are not unconstitutionally confiscatory.

738. Commenters in the LEC-CMRS Interconnection NPRM assert that the estimated per minute cost of LEC termination ranges from 0.2 to 1.3 cents, and most of the estimates are clustered near the lower end of this range. These estimates are based primarily on interconnection at a LEC end office, while most interconnections occur at tandem offices where LECs’ costs of call completion are higher than terminations routed directly through the end office switch. Moreover, the record contains no estimates of the cost of CMRS termination. That cost is generally considered to be greater than the cost of LEC termination; but only one oral, ex parte estimate of CMRS cost has been offered: 2.25 to 4.0 cents per minute. Further, there is no showing that the transaction costs of measuring traffic flows and making net payments would be so high that a bill-and-keep regime would be more efficient. Moreover, no party has demonstrated that aggregate cost flows between interconnecting LECs and CMRS providers are in balance.

739. In light of the overall transport and termination policy we are adopting, we do not adopt the interim bill and keep arrangement tentatively proposed in the LEC-CMRS Interconnection NPRM. Notwithstanding our conclusions about bill and keep above, under which states may rule on bill and keep for particular pairs of firms based on the circumstances prevailing between them, we conclude that we are correct in not adopting bill and keep as a single, nationwide policy that would compel all LEC-CMRS transport and termination of traffic. Thus, we reject our tentative conclusion in the LEC-CMRS Interconnection NPRM. We expect, however, that when it is economically efficient to do so, parties will adopt bill and keep arrangements in the negotiation process. Also, as described above, a state commission may impose bill-and-keep arrangements with respect to CMRS-LEC traffic when it finds that traffic is roughly balanced and is expected to remain so.

B. Access to Rights of Way

1. Overview

740. Section 251(b)(4) imposes upon each LEC the “duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.” The access provisions of section 224, as amended by the 1996 Act, differ from the requirements of section 251(b)(4) with respect to both the entities required to grant access and the entities that may demand access. Section 224(f)(1) imposes upon all utilities, including LECs, the duty to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” For purposes of section 224, the term “telecommunications carrier” excludes any incumbent LEC as that term is defined in section 251(h).

741. In the NPRM, we sought comments on various aspects of this access requirement, as well as on section 224(f)(2) which creates the following limited exception to the obligations of section 224(f)(1):

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

742. Additionally, we sought comment on section 224(h), which provides:

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that does not add to or modify its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

743. In this Order, we establish rules implementing these provisions. Based on the comments received and the plain language of the statute, and in furtherance of our original mandate to institute an expeditious procedure for determining just and reasonable pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopt herein a program for nondiscriminatory access to poles, ducts, conduits and rights-of-way. This Order includes several specific rules as well as a number of more general guidelines that are designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention. We provide for expedited dispute resolution when good faith negotiations fail, and we establish requirements concerning modifications to pole attachments and the allocation of the cost of such modifications. We also explain the division of responsibility between federal and state regulation envisioned by the 1996 Act.

2. Section 224(f): Non-Discriminatory Access

a. Background

744. Pursuant to section 224(f)(1), a utility must grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility. This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the
We believe that the rules, guidelines and presumptions established herein strike the appropriate balance between the need for uniformity, on the one hand, and the need for flexibility, on the other, which should minimize the regulatory burdens and economic impact for both small entities and small incumbent LECs.

456. We also address the impact on small incumbent LECs. For example, the Rural Telephone Coalition opposes adoption of sweeping national rules because local circumstances will be relevant to disputes over access to poles or rights-of-way. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have adopted a flexible regulatory approach to pole attachment disputes that ensures consideration of local conditions and circumstances.

474. Our determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment. The NESC, one of the national codes that virtually all commenters regard as containing reasonable attachment requirements, contains thousands of rules and dozens of tables and figures, all designed to ensure "the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment." The NESC provides acceptable minimum clearances, i.e., the minimum separations between a particular wire, cable, or other piece of equipment and other wires, cables, equipment, structures, and property. A short list of only a few of the variables in that discussion includes: the type of wire or equipment in question; the type of current being transmitted; the nature of the structure supporting the wires; the proximity and nature of other equipment and structures; the temperature of the conducting element; and the use of the land below the wires. These separation requirements dictate the required distances between various wires and other transmission and distribution equipment, as well as distances between such equipment and other objects that are not a part of the transmission and distribution network.

478. For example, with respect to overhead wires, the NESC contains 64 pages of rules dictating minimum "clearances," i.e., the minimum separations between a particular wire, cable, or other piece of equipment and other wires, cables, equipment, structures, and property. A short list of only a few of the variables in that discussion includes: the type of wire or equipment in question; the type of current being transmitted; the nature of the structure supporting the wires; the proximity and nature of other equipment and structures; the temperature of the conducting element; and the use of the land below the wires.
procedures particularly with respect to
attachments. Extreme temperatures, ice
and snow accumulation, wind, and
other weather conditions all affect a
utility’s safety and engineering
practices. In some instances, machinery
used by local industries requires higher
than normal clearances. Particular
utility work methods and equipment
may require specific separations
between attachments and may restrict
the height of the poles that a utility will
use. The installation and maintenance
of underground facilities raise distinct
safety and reliability concerns. It is
important that such variables be taken
into account when drafting pole
attachment agreements and considering an
individual attachment request. The
number of variables makes it impossible
to identify and account for them all for
purposes of prescribing uniform
standards and requirements. Universally
accepted codes such as the NESC do not
attempt to prescribe specific
requirements applicable to each
attachment request and neither shall we.
We are sensitive to concerns of
cable operators and telecommunications
carriers regarding utility-imposed
restrictions that could be used
unreasonably to prevent access. We note
in particular that a utility that itself is
engaged in video programming or
telecommunications services has the
ability and the incentive to use its
control over distribution facilities to its
own competitive advantage. A number of
utilities have obtained, or are seeking,
the right and ability to provide
telecommunications services for
video programming services. We agree,
on however, with Duquesne that the best
safeguard is not the adoption of a
comprehensive set of substantive
engineering standards, but the
establishment of procedures that will
require utilities to justify any conditions
they place on access. These procedures
are outlined in section E below. In the
next two sections, we set forth rules of
general applicability and broader
guidelines relating to specific issues that
are intended to govern access
negotiations between the parties.

(2) Specific Rules

753. We establish five rules of general
applicability. First, in evaluating a
request for access, a utility may
continue to rely on such codes as the
NESC to prescribe standards with
respect to capacity, safety, reliability,
and general engineering principles. We
have no reason to question the
reasonableness of the virtually
unanimous judgment of the
commenters, many of whom have
otherwise diverse and conflicting
interests, in this regard. Utilities may
incorporate such standards into their
pole attachment agreements in
accordance with section 224(f)(2). Other
industry codes also will be presumed
reasonable if shown to be widely-
accepted objective guides for the
installation and maintenance of
electrical and communications facilities.

754. Second, federal requirements,
such as those imposed by FERC and
OSHA, will continue to apply to
utilities to the extent such requirements
affect requests for attachments to utility
facilities under section 224(1). We see
no reason to supplant or modify
applicable federal regulations
promulgated by FERC, OSHA, or other
federal agencies acting in accordance
with their lawful authority.

755. Third, we will consider state and
local requirements affecting pole
attachments. We note that section
224(c)(1) provides:

Nothing in this section shall be construed
to apply or to give the Commission
jurisdiction with respect to rates, terms
and conditions of service, poles, ducts,
conduits, and rights-of-way as provided in
subsection (f), for pole attachments in any
case where such matters are regulated by the
State.

756. In a separate section we discuss the
authority of a state to preempt
federal regulation of pole attachments.
For present purposes, we conclude that
state and local requirements affecting
attachments are entitled to deference
even if the state has not sought to
preempt federal regulations under
section 224(c). The 1996 Act increased
significantly the Commission’s role with
respect to attachments by creating
federal access rights and obligations,
which for decades had been the subject
of state and local regulation. Such
regulations often relate to matters of
local concern that are within the
knowledge of local authorities and are
not addressed by standard codes such as the
NESC. We do not believe that
regulations of this sort necessarily
conflict with the scheme established in
this Order. More specifically, we see
nothing in the statute or in the record
that compels us to preempt such local
regulations as a matter of course.
Regulated entities and other interested
parties are familiar with existing state
and local requirements and have
adopted operating procedures and
practices in reliance on those
requirements. We believe it would be
unduly disruptive to invalidate
summarily all such local requirements.
We thus agree with commenters who
suggest that such state and local
requirements should be presumed
reasonable. Thus, even where a state has
not asserted preemptive authority in
accordance with section 224(c), state
and local requirements affecting pole
attachments remain applicable, unless a
complainant can show a direct conflict
with federal policy. Where a local
requirement directly conflicts with a
rule or guideline we adopt herein, our
rules will prevail. We note that a
standard prescribed by the NESC is not
a specific Commission rule, and
therefore a state requirement that is
more restrictive than the corresponding
NESC standard may still apply.

757. It is important to note that the
discretion of state and local authorities
to regulate in the area of pole
attachments is tempered by section 253,
which invalidates all state or local legal
requirements that “prohibit or have the
effect of prohibiting the ability of any
entity to provide any interstate or
intrastate telecommunications service.”
This restriction does not prohibit a state
from imposing “on a competitively
neutral basis and consistent with
section 254, requirements necessary to
protect the public safety and welfare,
ensure the continued quality of
telecommunications services, and
safeguard the rights of consumers.” In
addition, section 253 specifically
recognizes the authority of state and
local governments to manage public
rights-of-way and to require fair and
reasonable compensation for the use of
such rights-of-way.

758. Fourth, where access is
mandated, the rates, terms, and
conditions of access must be uniformly
applied to all telecommunications
operators and cable operators that have or
seek access. Except as specifically
provided herein, the utility must charge
all parties an attachment rate that does
not exceed the maximum amount
permitted by the formula we have
designed for such use, and that we will
revise from time to time as necessary.
Other terms and conditions also must be
applied on a nondiscriminatory basis.

759. Fifth, except as specifically noted
below, a utility may not favor itself over
other parties with respect to the
provision of telecommunications or
telecommunications services. We
interpret the statutory requirement of
nondiscriminatory access as compelling
this result, particularly when read in the
context of other provisions of the
statute. This element of
nondiscrimination is evident in section
224(g), which requires a utility to
impute to itself or to its affiliate the pole
attachment rate such entity would be
charged were it a non-affiliated entity.
Further, we believe it unlikely that
Congress intended to allow an
incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC’s facilities, given that section 224(a)(5) has just the opposite effect in that it operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs. A utility will be able to discriminate in favor of itself with respect to the provision of telecommunications or cable services only as expressly provided herein.

760. Aside from the conditions described above, we will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns. In addition, we reject the contention of some utilities that they are the primary arbiters of such concerns, or that their determinations should be presumed reasonable. We recognize that the public welfare depends upon safe and reliable provision of utility services, yet we also note that the 1996 Act reinforces the vital role of telecommunications and cable services.

As noted above, section 224(f)(1) in particular reflects Congress’ intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.

(3) Guidelines Governing Certain Issues

761. In addition to the rules articulated above, we will establish guidelines concerning particular issues that have been raised in this proceeding. These guidelines are intended to provide general ground rules upon which we expect the parties to be able to implement pro-competitive attachment policies and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums. We do not discuss herein every issue raised in the comments. Rather, we discuss only major issues that we believe will arise often. Issues not discussed herein may be important in a particular case, but are not susceptible to any general observation or presumption.

762. We note that a utility’s obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access. We understand that such agreements are the norm and encourage their continued use, subject to the requirements of section 224. Complaint or arbitration proceedings will, of course, be available when parties are unable to negotiate agreements.

(a) Capacity Expansions

763. When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity. In some cases, a request for access can be accommodated by rearranging existing facilities to make room for a new attachment. Another method of maximizing usable capacity is to permit “overlashing,” by which a new cable is wrapped around an existing wire, rather than being strung separately. A utility pole filled to capacity often can be replaced with a taller pole. New underground installations can be accommodated by the installation of new duct, including subducts that divide a standard duct into four separate, smaller ducts. Cable companies and others contend that there is rarely a lack of capacity given the availability of taller poles and additional conduits. These commenters suggest that utilities should rarely be permitted to deny access on the basis of a lack of capacity, particularly since under section 224(h) the party or parties seeking to increase capacity will be responsible for all associated costs. Utilities argue that neither the statute nor its legislative history requires facility owners to expand or alter their facilities to accommodate entities seeking to lease space. These commenters argue that, if Congress intended such a result, the statute would have imposed the requirement explicitly.

764. A utility is able to take the steps necessary to expand capacity if its own needs require such expansion. The principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers and cable operators. In addition, we note that section 224(f)(1) mandates access not only to physical utility facilities (i.e., poles, ducts, and conduit), but also to the rights-of-way held by the utility. The lack of capacity on a particular facility does not necessarily mean there is no capacity in the underlying right-of-way that the utility controls. For these reasons, we agree with commenters who argue that a lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access. Since the modification costs will be borne only by the parties directly benefitting from the modification, neither the utility nor its ratepayers will be harmed, despite the assertion of utilities to the contrary. In some cases, however, increasing capacity involves more than rearranging existing attachments or installing a new pole or duct. For example, the record suggests that utility poles of 35 and 40 feet in height are relatively standard, but that taller poles may not always be readily available. The transportation, installation, and maintenance of taller poles can entail different and more costly practices. Many utilities have trucks and other service equipment designed to maintain poles of up to 45 feet, but no higher. Installing a 50 foot pole may require the utility to invest in new and costly service equipment. Expansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities. Local regulators may seek to restrict the frequency of underground excavations. We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must replace or expand an existing facility in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

766. We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale agreement, before requesting a modification to expand capacity. As indicated elsewhere in this Order, resale will play an important role in the development of competition in telecommunications. However, as we also have noted, there are benefits to facilities-based competition as well. We do not wish to discourage unduly the latter form of competition solely because the former might better suit the preferences of incumbent utilities with respect to pole attachments.

(b) Reservation of Space by Utility

767. Utilities routinely reserve space on their facilities to meet future needs. Local economic growth and property development may require an electric utility to install additional lines or transformers that use previously available space on the pole. A utility may install an underground duct in which it can later install additional distribution lines, if necessitated by a subsequent increase in demand or by
damage to the original lines. Reserving space allows the utility to respond quickly and efficiently to changed circumstances. This practice, however, also can result in a utility denying access to a telecommunications carrier or a cable operator even though there is unused capacity on the pole or duct.

768. This issue is of particular concern because section 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification. If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time. If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.

769. Some commenters contend that utilities will reserve space on a pole and then claim there is no capacity available, as a way of forcing cable operators and telecommunications carriers to pay for new utility facilities. These commenters contend that we should restrict or eliminate the authority of utilities to reserve space.

Utilities respond that it is unfair to force a utility to accommodate full occupation of its facility by third parties and then to saddle the utility with the cost of modifying the facility when the utility's own needs change and require a costly increase in capacity.

770. The near-universal public demand for their core utility services, while imposing certain obligations, arguably entitles utilities to certain prerogatives vis-a-vis other parties, including the right to reserve capacity to meet anticipated future demand for those utility services. Recognition of such a right, however, could conflict with the nondiscrimination requirement of section 224(f)(1) which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services. In addition, allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress.

771. Balancing these concerns leads us to the following conclusions. We will permit an electric utility to reserve space if the reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. The electric utility must permit use of its reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment. An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of space were pursuant to a reasonable development plan. The record does not contain sufficient data for us to establish a presumptively reasonable amount of pole or conduit space subject that an electric utility may reserve. If parties cannot agree, disputes will be resolved on a case-by-case approach based on the reasonableness of the utility's forecast of its future needs and any additional information that is relevant under the circumstances.

772. With respect to a utility providing telecommunications or video services, we believe the statute requires a different result. Section 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of a provider on account of its ownership or control of the facility or right-of-way. Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers. As indicated above, this prohibition does not apply when an electric utility asserts a future need for capacity for electric service, to the detriment of a telecommunications carrier's needs, since the statute does not require nondiscriminatory treatment of all services; rather, it requires nondiscriminatory treatment of all telecommunications and video providers.

(c) Definition of “Utility”

773. The access obligations of section 224(f) apply to any “utility,” which is defined as:

any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications. This term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

774. Arguably a provider of utility service does not fall within this definition if it has refused to permit any wired telecommunications use of its facilities and rights-of-way since, in that case, its facilities and rights-of-way are not “used, in whole or in part, for wire communications.” Under this construction, an electric utility would have no obligation to grant access under section 224(f) until the utility voluntarily has granted access to one communications provider or has used its facilities for wire communications. Only after its facilities were being used for wire communications would the utility have to grant access to all telecommunications carriers and cable operators on a nondiscriminatory basis.

775. We conclude that this construction of the statute is mandated by its plain language and is indeed nondiscriminatory, since denial of access to all discriminates against none. We see no statutory basis, however, for the argument made by some utilities that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1). Those obligations apply to any “utility,” which section 224(a)(1) defines to include an entity that controls “poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.”

The use of the phrase “in whole or in part” demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.
776. We reject the contention that, because an electric utility’s internal communications do not pose a competitive threat to third party cable operators or telecommunications carriers, such internal communications are not “wire communications” and do not trigger access obligations. Although internal communications are used solely to promote the efficient distribution of electricity, the definition of “wire communication” is broad and clearly encompasses an electric utility’s internal communications.

(d) Application of Section 224(f)(2) to Non-Electric Utilities

777. While all utilities are subject to the access obligations of section 224(f)(1), the provisions of section 224(f)(2), permitting a utility to deny access due to a lack of capacity or for reasons of safety, reliability, and generally applicable engineering purposes, apply only to “a utility providing electric service * * *.” Based on this statutory language, some commenters suggest that LECs and other utilities that do not provide electric service must grant requests for access, regardless of any concerns relating to safety, reliability, and general engineering principles. If there is a lack of capacity, a LEC must create more capacity, according to these commenters.

778. While the express language of sections 224(f)(1) and (f)(2) suggests that only utilities providing electric service can take into consideration concerns relating to safety and reliability, we are reluctant to ignore these concerns simply because the pole owner is not an electric utility. Even parties seeking broad access rights under section 224 recognize that, in some circumstances, a LEC will have legitimate safety or engineering concerns that may need to be accommodated. We believe that Congress could not have intended for a telecommunications carrier to ignore safety concerns when making pole attachment decisions. Rather than reach this dangerous result which would require us to ignore the dictates of sections 1 and 4(o) of the Communications Act, we conclude that any utility may take into account issues of capacity, safety, reliability and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner.

779. Nevertheless, we believe that section 224(f)(2) reflected Congress’ acknowledgement of safety issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.

(e) Third-Party Property Owners

780. Section 224(f)(1) mandates that the utility grant access to any pole, duct, conduit, or right-of-way that is “owned or controlled by it.” Some utilities and LECs argue that certain private easement agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access. Moreover, they contend, access to public rights-of-way may be restricted by state law or local ordinances. Opposing commenters contend that the addition of cable television or telecommunications facilities is compatible with electric service and therefore does not violate easements that have been granted for the provision of electric service. These commenters also assert that the statute does not draw specific distinctions between private and public easements. Further, some cable operators contend that utility easements are accessible to cable operators pursuant to section 621(a)(2) of the Communications Act as long as the easements are physically compatible with such use, regardless of the terms of a written easement agreement. Another commenter suggests utilities are best positioned to determine when access requests would affect a private easement, foreclosing the need to determine whether a private owner would consent to the requested attachment. As for local ordinances restricting access to public rights-of-way, one commenter suggests that such restrictions would violate section 253(a) of the Act, which blocks state or local rules that prohibit competition.

781. The scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law. We believe a utility should be expected to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that “intends to modify or alter such * * * right-of-way * * *.”

(f) Other Matters

784. Utilities stress the importance of ensuring that only qualified workers be permitted in the proximity of utility facilities. Some utilities seek to limit access to their facilities to the utility’s own specially trained employees or contractors, particularly with respect to underground conduits. According to these commenters, parties seeking to make attachments to utility facilities should be required to pay for the use of the utility’s workers if the utility concludes that only its workers are fit for the job. While we agree that utilities should be able to require that only properly trained persons work in the proximity of the utilities’ lines, we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.
Some electric utilities argue that high voltage transmission facilities should not be accessible by telecommunications carriers or cable operators under section 224(f)(1). These commenters contend that transmission facilities, which are used for high voltage transmissions over great distances, are far more delicate and dangerous than local distribution facilities. Permitting attachments to transmission facilities, they argue, poses a greater risk to the safety and reliability of the electric distribution system than is the case with distribution lines. They further state that transmission facilities generally are not located where cable operators and telecommunications carriers need to install facilities. ConEd suggests that transmission towers do not even fall within the scope of the statute.

Section 224(f)(1) mandates access to “any pole, duct, conduit, or right-of-way,” owned or controlled by the utility. The utilities do not suggest that transmission facilities do not use poles or right-of-way, for which the statute does mandate the right of access. The utilities’ arguments for excepting transmission facilities from access requirements are based on safety and reliability concerns. We believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities. As with any facility to which access is sought, however, section 224(f)(2) permits the electric utility to impose conditions on access to transmission facilities, if necessary for reasons of safety and reliability. To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.

We note that some commenters favor a broad interpretation of “pole, duct, conduit, or right-of-way” because that approach would minimize the risk that a “pathway” vital to competition could be shut off to new competitors. Others argue for a narrow construction of this statutory phrase, contending that Congress addressed access to other LEC facilities elsewhere in the 1996 Act. We recognize that an overly broad interpretation of this phrase could impact the owners and managers of small buildings, as well as small incumbent LECs, by requiring additional resources to effectively control and monitor such equipment located on their properties. We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier’s transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to “piggyback” along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

The statute does not describe the specific type of telecommunication or cable equipment that may be attached when access to utility facilities is mandated. We do not believe that establishing an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility’s assessment of the factors determined by the statute to be pertinent—capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.

3. Constitutional Takings
a. Background

Section 224(f)(1) restricts the right of a utility to exclude third parties from its property and therefore may raise Fifth Amendment issues. While we have no jurisdiction to determine the constitutionality of a federal statute, constitutional concerns are relevant for purposes of construing a statute.

b. Discussion

Section 224(f)(1) mandates that a utility grant access to a requesting telecommunication or cable system operator, subject to certain conditions that we discuss elsewhere in this Order. That provision is not reasonably susceptible of a reading that gives the pole owner the choice of whether to grant telecommunications carriers or cable television systems access. Even if such mandatory access results in a taking, we cannot agree that it necessarily raises a constitutional issue. The Fifth Amendment permits takings as long the property owner receives just compensation for the property taken.

As for the amount of compensation provided under the statute, GTE suggests that mandatory access will result in an unconstitutional taking when considered in conjunction with the methodology for pole attachment rates set forth in section 224(e)(2). We, of course, have no power to declare any provision of the Communications Act unconstitutional. In any event, we cannot agree. Congress has provided for compensation to pole owners, in the event that they cannot resolve a dispute with telecommunications carriers regarding the charges for use of the owners’ poles, that would allow them to recover the cost of providing usable space to each entity and two-thirds of the cost of the unusable space apportioned among such users. The Commission soon will initiate a separate rulemaking proceeding that will give greater content to this statutory standard. GTE and others may present their just compensation arguments with respect to the ratemaking standards the Commission adopts in that proceeding. GTE has not shown here, however, how the statutory standard contained in section 224(e) necessarily would deny pole owners just compensation.

4. Modifications

a. Background

In the NPRM we sought comment on section 224(h) which provides:

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

b. Discussion

The NPRM requested comment addressing the manner and timing of the notice that must be provided to ensure a reasonable opportunity to add to or modify its attachment. In addition, we sought comment regarding the establishment of rules apportioning the cost of a modification among the various users of the modified facility. Finally, we requested comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. If, for example, an owner modifies a pole to allow additional attachments that generate additional fees for the owner, should such revenues offset the share of modification costs borne by entities with preexisting access to the pole?
b. Discussion

794. We recognize that, when a modification is planned, parties with preexisting attachments to a pole or conduit need time to evaluate how the proposed modification affects their interest and whether activity related to the modification presents an opportunity to adjust the attachment in a desirable manner. At the same time, we also recognize that not all adjustments to utility facilities are alike. Some adjustments may be sufficiently routine or minor as to not create the type of opportunity that triggers the notice requirement. Indeed, it is possible that in some cases lengthy notice requirements could delay unnecessarily the kinds of modifications that would expedite the onset of meaningful competition in the provision of telecommunications services. Although the period of advance notice has varied widely among commenters, we note that 60 days has been advocated by several parties.

795. Several commenters expressed a preference for negotiated notification terms. They have explained that circumstances will vary among owners of facilities. The time needed to commence a modification could vary according to pole conditions, technological improvements and demand growth. Attaching parties in rural markets may need more time to study facilities than facility users in urban markets. To demonstrate their ability to develop appropriate negotiated agreements, some commenters have described notice requirements in existing agreements. Such cases, they contend, illustrate that notification rules are unnecessary.

796. We conclude that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. These notice requirements should provide small entities with sufficient time to evaluate the impact of or opportunities made possible by the proposed modifications on their interests and plan accordingly. If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply except that notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed.

Further, we believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit. Utilities and parties with attachments should exchange maintenance handbooks or other written descriptions of their standard maintenance practices. Changes to these practices should be made only upon 60 days written notice. Recognizing that the parties themselves are best able to determine the circumstances where notice would be reasonable and sufficient, as well as the types of modifications that should trigger notice obligations, we encourage the owner of a facility and parties with attachments to negotiate acceptable notification terms.

797. Even with the adoption of a specific notice period, however, we still encourage communication among owners and attaching parties. Indeed, in cases where owners and users routinely share information about upgrades and modifications, agreements regarding notice periods and procedures are ancillary matters.

798. With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user’s modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party. Where multiple parties join in the modification, each party’s proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a CAP’s access request might require the installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.

799. As a general approach, requiring that modification costs be paid only by entities that initiate and pay for the modification simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the “piggybacking” entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.

800. We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another’s modification, may confer incidental benefits on other parties with preexisting attachments to the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity “that takes advantage of such opportunity to modify its own attachments.” This suggests that an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost. As for pole owners themselves, the imposition of cost burdens to modifications that should not have occurred could particularly cumbersome if excess space created by modifications remained unused for extended periods.

801. Apart from entities that initiate modifications and preexisting attaching parties that use the opportunity to modify their own attachments, some entities may seek to add new attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility’s capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost. Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from such costs that should be shared by others, we will allow the modifying party or parties to...
recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.

802. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses. We will postpone consideration of these issues until such time.

803. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that “adds to or modifies its existing attachment after receiving notice” of a proposed modification. The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute did not grant.

The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial of access cases. By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided. In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day.

806. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b) of the Commission’s rules. Final decisions relating to access will be resolved by the Commission.
expeditiously. Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

809. A telecommunications carrier seeking access to the facilities or property of an incumbent LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access “on rates, terms, and conditions that are consistent with section 224,” we believe that the section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

810. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of, or in addition to, section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers. In pertinent part, section 252(a)(1) provides:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.

811. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues. In resolving the dispute, the state commission must ensure, among other things, that the ultimate resolution “meets the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.” The Commission may assume the state’s authority under section 252 if the state “fails to carry out its responsibility” under that section.

812. Section 251(c)(1) creates an obligation on the part of an incumbent LEC “to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements” to fulfill its section 251(b)(4) obligation. Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252 procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

813. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

814. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilties or property of a LEC. A LEC’s obligation under section 251(b)(4) is to afford access “on rates, terms, and conditions that are consistent with section 224.” Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

6. Reverse Preemption

a. Background

815. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to “regulate the rates, terms, and conditions for pole attachments.” Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission’s jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f). At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission’s jurisdiction. Section 224(c)(1) now provides:

Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.

b. Discussion

816. To resolve this issue, we will begin with access requests that can arise solely under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission’s authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state’s authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.

817. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, “[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224.” We believe the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

818. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress’ clear grant of authority to the states to preempt federal regulation in these cases undercut the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.
821. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state’s regulations. If a state has not exercised such preemptive authority, the LEC must comply with the federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252(c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

820. We note that Congress did not amend section 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters. If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.

C. Imposing Additional Obligations on LECs

1. Background

821. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations on incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

822. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 CFR § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, “[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.”

823. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to non-incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).

2. Discussion

824. We conclude that allowing states to impose on non-incumbent LEC obligations that the 1996 Act designates as “Additional Obligations on Incumbent Local Exchange Carriers,” distinct from obligations on all LECs, would be inconsistent with the statute. We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). See, e.g., Colorado Commission comments at 11–12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60–65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act. Some parties assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and 253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

825. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbent LECs. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.

XI. Exemptions, Suspensions, and Modifications of Section 251 Requirements

A. Background

826. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated. A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity “(A) provides common carrier service to any local exchange carrier study area that does not include either— (i) any incorporated place of 10,000 inhabitants or more, or any part thereof; * * *; or (ii) any territory, incorporated or unincorporated, included in an urbanized area * * *; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.” 47 U.S.C. 153(37). Section 251(f)(2) allows LECs with fewer than two percent of the nation’s subscriber lines to petition a state commission for a suspension or modification of any requirement of sections 251(b) and (c). Section 251(f)
imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

827. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act. Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to “avoid a significant adverse economic impact on users of telecommunications services generally,” and subsection 251(f)(2)(B) requires a suspension or modification to be “consistent with the public interest, convenience, and necessity.” Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state commissions.

828. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. Need for National Rules

1. Discussion

829. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions. Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission’s implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should not be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

830. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f).

C. Application of Section 251(f)

1. Discussion

831. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or inappropriate to apply all of the requirements to smaller or rural telephone companies. We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission’s section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

832. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of section 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that fails within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements. We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date if we believe it is necessary and appropriate.

833. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has “in the aggregate nationwide.” Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

834. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers. We conclude that section 251(f) adequately provides for varying treatment of smaller or rural LECs where such variances are justified in particular instances. We conclude
that there is no basis in the record for adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

XIII. Advanced Telecommunications Capabilities

835. Section 706(a)(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." In the NPRM, we sought comment on how we can advance Congress's section 706(a) goal within the context of our implementation of sections 251 and 252. 836. A number of parties suggest that rules allowing them to compete effectively and earn a profit in the telecommunications industry would assist the industry in providing telecommunications services to all Americans. MFS suggests that "all LECs should be required, as a condition of eligibility for universal service subsidies, to meet network modernization standards for rural telephone companies." Several state commissions indicate that they have already established programs to assist institutions eligible under section 706 in deploying advanced telecommunications services. The Alliance for Public Technology asserts that section 706 should underlie all of the FCC's proceedings. Ericsson states that the industry should work with government agencies to promote leading edge technology to ensure that it is introduced on a reasonably timely basis. For example, it contends that "Plug and Play Internet use" will greatly help the public and schools access information, and that advanced technology such as asynchronous transfer mode (ATM), wireless data/video, and AIN will enhance interconnection capabilities of public and private networks. The Illinois Commission contends that, depending on the pricing standard the Commission adopts for interconnection and access to unbundled elements, and the Commission's interpretation of the prohibition against discrimination, the Commission should adopt special rules for carriers when they provide interconnection or access to unbundled network elements to serve a school, library, or healthcare provider.

837. We decline to adopt rules regarding section 706 in this proceeding. We intend to address issues related to section 706 in a separate proceeding.

XIV. Provisions of Section 252

A. Section 252(e)(5)

1. Background

838. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. In the NPRM, we asked whether the Commission should establish rules and regulations necessary to carry out our obligation under section 252(e)(5). In addition, we sought comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). In particular, we sought comment on what constitutes notice of failure to act and, if any, we should establish for parties to notify the Commission, and what are the circumstances under which a state commission should be deemed to have "fail[ed] to act" under section 252(e)(5). Section 252(e)(6)(4) provides that, if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be deemed approved. "We sought comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). We also sought comment on whether the Commission, once it assumes the responsibility of the state commission, is bound by all of the laws and standards that would have applied to the state commission, and whether the Commission is authorized to determine whether an agreement is consistent with applicable state law as the state commission would have under section 252(e)(3). In addition, we sought comment on whether, once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction, or whether that matter or proceeding subsequently should be remanded to the state.

840. Finally, we sought comment on whether we should adopt, in this proceeding, some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). We noted some of the benefits and drawbacks of both "final offer" arbitration and open-ended arbitration, and asked for comment on both.

2. Discussion

841. After careful review of the record, we are convinced that establishing regulations to carry out our obligations under section 252(e)(5) will provide for an efficient and fair transition from state jurisdiction should we have to assume the responsibility of the state commission under section 252(e)(5). The rules we establish in this section with respect to arbitration under section 252 apply only to instances where the Commission assumes jurisdiction under section 252(e)(5); we do not purport to advise on how to conduct arbitration when the Commission has not assumed jurisdiction. The rules we establish will give notice of the procedures and standards the Commission would apply to mediation and arbitration, avoid delay if the Commission had to arbitrate disputes in the near future, and may also offer guidance the states may, at their discretion, wish to consider in implementing their own mediation and arbitration procedures and standards. We decline to adopt national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that address the concerns of small entities and small incumbent LECs participating in mediation or arbitration.

842. The rules we adopt herein are minimum, interim procedures. Adopting minimum interim procedures now will allow the Commission to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action. We note that the Commission is not required to adopt procedures and standards for mediation and arbitration within the six-month statutory deadline and that, by adopting minimum interim procedures, the Commission can better direct its resources to more pressing matters that fall within the six-month statutory deadline.

843. Regarding what constitutes a state's "failure to act to carry out its responsibility under" section 252, the Commission was presented with numerous options. The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where the state commission fails to respond, within a reasonable time, to a request for
mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act. See, e.g., in the Matter of the Implementation of the Mediation and Arbitration Provisions of the Telecommunications Act of 1996, Case No. 96-463-TP-UNC, Ohio Commission, (May 30, 1996); Illinois Commerce Commission On Its Own Motion Adoption of B3 83 III. Adm. Code 761 to Implement the Arbitration Provisions of Section 252 of the Telecommunications Act of 1996, Docket No. 96-0297, Illinois Commission (June 14, 1996).

844. We agree with the majority of comments that argue that our authority to assume the state commission's responsibilities is not triggered when an agreement is “deemed approved” under section 252(e)(4) due to state commission inaction. Section 252(e)(4) provides for automatic approval if a state fails to approve or reject a negotiated or arbitrated agreement within 90 days or 30 days, respectively. Rules of statutory construction require us to give meaning to all provisions and to read provisions consistently, where it is possible to do so. We thus conclude that the most reasonable interpretation is that automatic approval under section 252(e)(4) does not constitute a failure to act.

845. We also believe that we should establish interim procedures for interested parties to notify the Commission that a state commission has failed to act under section 252. We believe that parties should be required to file a detailed written petition, backed by affidavit, that will, at the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission. Allowing less detailed notification increases the likelihood that frivolous requests will be made. With less detailed notification, the Commission's investigations would be broader and more burdensome. A detailed written petition will facilitate a decision about whether the Commission should assume jurisdiction based on section 252(e)(5).

846. The moving party should submit a petition to the Secretary of the Commission stating with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to the applicable provision(s) of the Act and the factual circumstances which support a finding that a state has failed to act. The moving party must ensure that the applicable state commission and the parties to the proceeding or matter for which preemption is sought are served with the petition on the same date the petition is filed with the Commission. The petition will serve as notice to parties to the state proceeding and the state commission who will have fifteen days from the date the petition is filed with the Commission to comment. Under section 252(e)(5), the Commission must “issue an order preempting the state commission's jurisdiction of that proceeding or matter” no later than 90 days from the date the petition is filed. If the Commission takes notice, as section 252(e)(5) permits, that a state commission has failed to act, it will, on its own motion, issue a public notice and provide fifteen days for interested parties to submit comment on whether the Commission should assume responsibility under section 252(e)(5). If the Commission assumes authority under section 252(e)(5), the Commission must also decide whether it retains authority for that proceeding or matter. We agree with those parties who argue that, once the Commission assumes jurisdiction of a proceeding or matter, it retains authority for that proceeding or matter. For example, if the Commission obtains jurisdiction after a state commission fails to respond to a request for arbitration, the Commission maintains jurisdiction over the arbitration proceeding. Therefore, once the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission. We note that there is no provision in the Act for returning jurisdiction to the state commission; moreover, the Commission, with significant knowledge of the issues at hand, would be in the best position efficiently to conclude the matter. Thus, as both a legal and policy matter, we believe that the Commission retains jurisdiction over any matter and proceeding for which it assumes responsibility under Section 252(e)(5).

848. We reject the suggestion by some parties that, once the Commission has mediated or arbitrated an agreement, the Commission must be submitted to the state commission for approval under state law. We note that section 252(e)(5) provides for the Commission to “assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.” This includes acting for the state commission under section 252(e)(1), which calls for state commission approval of “any interconnection agreement adopted by negotiation or arbitration.” We, therefore, do not read section 252(e)(1) or any other provision as calling for state commission approval or rejection of agreements mediated or arbitrated by the Commission. In those instances where a state has failed to act, the Commission acts on behalf of the state and no additional state approval is required.

849. Requirements set forth in section 252(c) for arbitrated agreements would apply to arbitration conducted by the Commission. We see no reason, and no party has suggested a policy or legal basis, for not applying such standards when the Commission conducts arbitration. Thus, arbitrated agreements must: (1) meet the requirements of section 251, including regulations prescribed by the Commission pursuant to section 251; (2) establish any rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. We reject the suggestion made by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would not have applied to the state commission. While states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under section 252(c). Moreover, the resources and time potentially needed to review adequately and interpret the different laws and standards of each state render this suggestion untenable. Finally, we conclude that it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(C) imposes on state commissions. The Commission, in some instances, might not even assume jurisdiction until nine months (or more) have lapsed since a section 251 request was initiated.
have the option of choosing one of the two proposals in its entirety, or the arbitrator could decide on an issue-by-issue basis. Each final offer must: (1) meet the requirements of section 251, including the Commission’s rules thereunder; (2) establish rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with these requirements, the arbitrator would have discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c), including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements in section 252(c).

851. The parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision. Under this approach, the Commission will encourage negotiations, with or without the assistance of the arbitrator, to continue after arbitration offers are exchanged. Parties are not precluded from submitting subsequent final offers following such negotiations. We believe that permitting post-offer negotiations will increase the likelihood that the parties will reach consensus on unresolved issues. In addition, permitting post-offer negotiations will increase flexibility and will allow parties to tailor counter-proposals after arbitration offers are exchanged. To provide an opportunity for final post-offer negotiation, the arbitrator will not issue a decision for at least 15 days after submission of the final offers by the parties. In addition, the offers must be consistent with section 251, including the requirements prescribed by the Commission. We reject SBC’s suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to require incumbent LECs to provide interconnection, services, and unbundled elements, impose a duty to negotiate in good faith and a right to arbitration, and then permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing providers do not have an affirmative duty to enter into agreements under section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

852. Adopting a “final offer” method of arbitration and encouraging negotiations to continue allows us to maintain the benefits of final offer arbitration, giving parties an incentive to submit realistic “final offers,” while providing additional flexibility for the parties to agree to a resolution that best serves their interests. To the extent that these procedures encourage parties to negotiate voluntarily rather than arbitrate, such negotiated agreements will be subject to review pursuant to section 252(e)(2)(A), which would allow the Commission to reject agreements if they are inconsistent with the public interest. This approach also addresses the argument that under “final offer” arbitration neither offer might best serve the public interest, because it allows the parties to obtain feedback from the arbitrator on public interest matters.

853. We believe that the arbitration proceedings generally should be limited to the requesting carrier and the incumbent local exchange provider. This will allow for a more efficient process and minimize the amount of time needed to resolve disputed issues. We believe that opening the process to all third parties would be unwieldy and would delay the process. We will, however, consider requests by third parties to submit written pleadings. This may, in some instances, allow interested parties to identify important public policy issues not raised by parties to an arbitration.

B. Requirements of Section 252(i)

1. Background

854. Section 251 requires that interconnection, unbundled element, and collocation rates be “nondiscriminatory” and prohibits the imposition of “discriminatory conditions” on the resale of telecommunications services. Section 252(i) of the 1996 Act provides that a “local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.” In the NPRM, we expressed the view that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251, and we sought comment on whether we should adopt national standards for resolving disputes under section 252(i) in the event that we must assume the state’s responsibilities pursuant to section 252(e)(5). In addition, because we may need to interpret section 252(i) if we assume the state commission’s responsibilities, we sought comment on the meaning of section 252(i).

855. We also sought comment in the NPRM on whether section 252(i) requires that only similarly-situated carriers may enforce against incumbent LECs provisions of agreements filed with state commissions, and, if so, how “similarly-situated carrier” should be defined. In particular, we asked whether section 252(i) requires that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or whether it would be consistent with the statute to permit different rates if the costs of serving carriers are different. We also asked whether section 252(i) can be interpreted to allow incumbent LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interchange) as the original parties to the agreement. In the NPRM, we tentatively concluded that the language of the statute appears to preclude such differential treatment among carriers.

856. Additionally, we sought comment in the NPRM on whether section 252(i) permits requesting telecommunications carriers to choose among individual provisions of publicly-filed interconnection agreements or whether they must subscribe to an entire agreement. We also sought comment regarding what time period an agreement must remain available for use by other requesting telecommunications carriers.

2. Discussion

857. We conclude that it will assist the carriers in determining their respective obligations, facilitate the development of a single, uniform legal interpretation of the Act’s requirements and promote a procompetitive, national policy framework to adopt national standards to implement section 252(i). Issues such as whether section 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agreements or requires them to accept an entire agreement that should not vary from state to state and are also central to the statutory scheme and to
the emergence of competition. National standards will help state commissions and parties to expedite the resolution of disputes under section 252(i).

858. We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. As we note above, section 252(i) provides that a "local exchange carrier shall make available any interconnection, service, or network element[s] provided under an agreement * * * to which it is a party to any other requiring telecommunications carrier upon the same terms and conditions as those provided in the agreement." Thus, Congress drew a distinction between "any interconnection, service, or network element[s] provided under an agreement," which the statute lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words "any interconnection, service, or network element.

859. We disagree with BellSouth regarding the significance of the legislative history quoted in the NPRM. The Conference Committee amended section 251(g), S. 652's predecessor to section 252(i), and changed "service, facility, or function" to "interconnection, service, or element." The House of Representatives' bill did not contain a version of section 252(i). Although H.R. 1555's section 244(d) contained its language and structure are sufficiently different from that of section 252(i) that we do not consider section 244(d) to be a prior version of section 252(i). We find that section 252(i)'s language does not differ substantively from the text of the Senate bill's section 251(g). The Senate Commerce Committee stated its provision, section 251(g), was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated." 860. We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement. In addition, we observe that different new entrants may have different technical constraints and costs. Since few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans, requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i).

861. We also choose this interpretation despite concerns voiced by some incumbent LECS that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements. Unbundled access to agreement provisions will enable small carriers who lack bargaining power to obtain favorable terms and conditions—including rates—negotiated by large IXCs, and speed the emergence of robust competition.

862. We conclude that incumbent LECS must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. We find that this level of disaggregation is mandated by section 252(a)(1), which requires that agreements shall include "charges for interconnection and each service or network element included in the agreement," and section 251(c)(3), which requires incumbent LECS to provide "non-discriminatory access to network elements on an unbundled basis." In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement. We agree with ALTS that such a view comports with the statute, and lessens the concerns of incumbent LECS that such a view would appear to eviscerate the "all or none" clauses in their agreements. Moreover, incumbent LEC efforts to restrict availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions. See Section VII.d.3.

864. We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements. We incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers obtain access to terms and conditions on a nondiscriminatory basis.

865. We find that the statute supports differential treatment based on the LEC's cost of serving a carrier. We
further observe that section 252(d)(1) requires that unbundled element rates be cost-based, and sections 251(c)(2) and (c)(3) require incumbent LECs to provide only technically-feasible forms of interconnection and access to unbundled elements, while section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC. We conclude that these provisions, read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection arrangement that is both cost-based and technically feasible. However, as discussed in Section VII regarding discrimination, where an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

865. We conclude, however, that section 252(i) does not permit LECs to limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement. In our view, the class of customer served or type of service provided by a carrier, does not necessarily bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible. Accordingly, we conclude that an interpretation of section 252(i) that attempts to limit availability by class of customer served or type of service provided would be at odds with the language and structure of the statute, which contains no such limitation.

866. We conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress’s stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis. Because of the importance of section 252(i) in preventing discrimination, however, we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies.

870. We conclude as well that agreements negotiated prior to enactment of the 1996 Act must be available for use by subsequent, requesting carriers. Section 252(i) must be read in conjunction with section 252(a)(1), which clearly states that “agreement” for purposes of section 252, “includes any interconnection agreement negotiated before the date of enactment * * *.” We conclude that this language demonstrates that Congress intended 252(i) to apply to agreements negotiated prior to enactment of the 1996 Act and approved by the state commission pursuant to section 252(e), as well as those approved under the section 251/252 negotiation process. Accordingly, we find that agreements negotiated prior to enactment of the 1996 Act must be disclosed publicly, and be made available to requesting telecommunications carriers pursuant to section 252(i).

871. We also find that section 252(i) applies to interconnection agreements between adjacent, incumbent LECs. We note that section 252(i) requires a local exchange carrier to make available to requesting telecommunications carriers “any interconnection service, or network element provided under an agreement approved under this section * * *.” The plain meaning of this section is that any interconnection agreement approved by a state commission, including one between adjacent LECs, must be available to requesting carriers pursuant to section 252(i). Requiring availability of such agreements will provide new entrants with a realistic benchmark upon which to base negotiations, and this will further the Congressional purpose of increasing competition. As stated in Section III of this Order, adjacent, incumbent LECs will be given an opportunity to renegotiate such agreements before they become subject to section 252(i)’s requirements. In Section III, we also consider, and reject, the Rural Tel. Coalition’s argument that making agreements between adjacent, non-competing LECs available under section 252 will have a detrimental effect on small, rural carriers. See Section III, supra.

XV. Final Regulatory Flexibility Analysis

872. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. The Commission sought written public comment on the proposals in the NPRM. The Commission’s Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RFA as amended by the Contract With America Advancement Act of 1996 (CWAAA),
A. Need for and Objectives of This Report and Order and the Rules Adopted Herein

873. The Commission, in compliance with section 251(d)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the 1996 Act), promulgates the rules in this Order to ensure the prompt implementation of sections 251 and 252 of the 1996 Act, which are the local competition provisions. Congress sought to establish through the 1996 Act “a pro-competitive, de-regulatory national policy framework” for the United States telecommunications industry. Three principal goals of the telephony provisions of the 1996 Act are: (1) opening local exchange and exchange access markets to competition; (2) promoting increased competition in telecommunications markets that are already open to competition, particularly long distance services markets; and, (3) reforming our system of universal service so that universal service is preserved and advanced as local exchange and exchange access markets move from monopoly to competition.

874. The rules adopted in this Order implement the first of these goals—opening local exchange and exchange access markets to competition. The objective of the rules adopted in this Order is to implement as quickly and effectively as possible the national telecommunications policies embodied in the 1996 Act and to promote the development of competitive, deregulated markets envisioned by Congress. In doing so, we are mindful of the balance that Congress struck between this goal of bringing the benefits of competition to all consumers and its concern for the impact of the 1996 Act on small incumbent local exchange carriers, particularly rural carriers, as evidenced in section 251(f) of the 1996 Act.

B. Analysis of Significant Issues Raised in Response to the IRFA

875. Summary of the Initial Regulatory Flexibility Analysis (IRFA). In the NPRM, the Commission performed an IRFA. In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small business as defined by section 601(3) of the RFA. The Commission stated that its regulatory impact analysis was inapplicable to incumbent LECs because such entities are dominant in their field of operation. The Commission noted, however, that it would take appropriate steps to ensure that the special circumstances of smaller incumbent LECs are carefully considered in our rulemaking. The Commission also found that the proposed rules may overlap or conflict with the Commission’s Part 69 access charge and Expanded Interconnection rules. Finally, the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.

1. Treatment of Small LECs

876. Discussion. In essence, SBA and Rural Tel. Coalition argue that we exceeded our authority under the RFA by certifying all incumbent LECs as dominant in their field of operation, and concluding on that basis that they are not small businesses under the RFA. SBA and Rural Tel. Coalition contend that the authority to make a size determination rests solely with SBA and that, by excluding a group (small incumbent LECs) from coverage under the RFA, the Commission made an unauthorized size determination. Neither SBA nor Rural Tel. Coalition cites any specific authority for this latter proposition.

877. We have found incumbent LECs to be “dominant in their field of operation” since the early 1980’s, and we consistently have certified under the RFA that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses. We have made similar determinations in other areas. We recognize SBA’s special role and expertise with regard to the RFA, and intend to continue to consult with SBA outside the context of this proceeding to ensure that the Commission is fully implementing the RFA. Although we are not fully persuaded on the basis of this record that our prior practice has been incorrect, in light of the special concerns raised by SBA and Rural Tel. Coalition in this proceeding, we will, nevertheless, include small incumbent LECs in this FRFA to remove any possible issue of RFA compliance. We, therefore, need not address Rural Tel. Coalition’s arguments that incumbent LECs are not dominant.

2. Other Issues

878. Discussion. We disagree with SBA’s assessment of our IRFA. Although the IRFA referred only generally to the reporting and recordkeeping requirements imposed on incumbent LECs, our Federal Register notice set forth in detail the general reporting and recordkeeping requirements as part of our Paperwork Reduction Act statement. The IRFA also sought comment on the many alternatives discussed in the body of the NPRM, including the statutory exemption for certain rural telephone companies. The numerous general public comments concerning the impact of our proposal on small entities in response to the NPRM, including comments filed directly in response to the IRFA, enabled us to prepare this FRFA. Thus, we conclude that the IRFA was sufficiently detailed to enable parties to comment meaningfully on the proposed rules and, thus, for us to prepare this FRFA. We have been working with, and will continue to work with SBA, to ensure that both our IRFAs and FRFAs fully meet the requirements of the RFA.

879. SBA also objects to the NPRM’s requirement that responses to the IRFA be filed under a separate and distinct heading, and proposes that we integrate RFA comments into the body of general comments on a rule. Almost since the adoption of the RFA, we have requested that IRFA comments be submitted under a separate and distinct heading. Neither the RFA nor SBA’s rules prescribe the manner in which comments may be submitted in response to an IRFA and, in such circumstances, it is well established that an administrative agency can structure its proceedings in any manner that it concludes will enable it to fulfill its statutory duties. Based on our past practice, we find that separation of comments responsive to the IRFA facilitates our preparation of a compulsory summary of such comments and our responses to them, as required by the RFA. Comments on the impact of our proposed rules on small entities have been integrated into our analysis and consideration of the final rules. We, therefore, reject SBA’s argument that we improperly required commenters to include their comments on the IRFA in a separate section.

880. We also reject SBA’s assertion that none of the alternatives in the NPRM is designed to minimize the impact of the proposed rules on small businesses. For example, we proposed that incumbent LECs be required to offer competitors access to unbundled local loop, switching, and transport facilities. These proposals permit potential competitors to enter the market by relying, in part or entirely, on the incumbent LEC’s facilities. Reduced economic entry barriers are designed to provide reasonable opportunities for new entrants, particularly small entities, to enter the market. Although the initial investment needed to begin providing service. In addition, we
believe section 251(f) and our rules provide states with significant flexibility to “deal with the needs of individual companies in light of public interest concerns,” as requested by the Idaho Commission. With regard to the potential burdens on small entities other than incumbent LECs, we believe our rules permit states to structure arbitration procedures, for example, in ways that minimize filing or other burdens on new entrants that are small entities.

We also disagree with SCBA’s assertion that the IRFA was deficient because it did not identify small cable operators as entities that would be affected by the proposed rules. The IRFA in the NPRM states: “Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant impact on a substantial number of small entities.” The phrase “new LEC entrants” clearly encompasses small cable operators that become providers of local exchange service. The NPRM even identifies cable operators as potential new entrants.

881. We agree with SCBA’s argument that the Commission should identify minimum standards to provide guidance on the requirement that parties negotiate in good faith. As discussed in Section III.B, we conclude that we should establish minimum standards that will offer parties guidance in determining whether they are acting in good faith. We believe that these minimum standards address SCBA’s assertion that federal guidelines for good faith negotiations may be particularly important for small entities because unreasonable delays in negotiations could represent an entry barrier for small entities.

882. We also agree with SCBA’s recommendation that we should establish guidelines for the application of section 251(f) regarding exemptions, suspensions, and modifications of our rules governing interconnection with rural carriers. As discussed in section XII.B, we find that a rural incumbent LEC should not be able to obtain an exemption, suspension, or modification of its obligations under section 251 unless it offers evidence that the application of those requirements would be likely to cause injury beyond the financial harm typically associated with efficient competitive entry. We are also persuaded by the suggestion of SCBA and others that incumbent LECs should bear the burden of showing that they should be exempt pursuant to section 251(f)(1) from national interconnection requirements. We believe that this finding is consistent with the pro-competitive goals of the 1996 Act and our determination in Section XII that Congress did not intend to withhold from consumers the benefits of local telephone competition that could be provided by small entities, such as small cable operators.

884. We do not adopt SCBA’s proposal to establish abbreviated arbitration procedures. Most commenters oppose adoption of federal rules to govern state mediation and arbitration proceedings. As set out in section XI.B, we conclude that state commissions are better positioned to develop rules for mediation and arbitration that support the objectives of the 1996 Act. The rules we adopt in section XII.B apply only where the Commission assumes a state commission’s responsibilities pursuant to section 252(e)(5). States may develop specific measures that address the concerns of small entities participating in mediation or arbitration, as suggested by SCBA. In addition, although we do not specifically incorporate SCBA’s request that the Commission designate a “small company contact person at incumbent LECs and state commissions,” we find that a refusal throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delay the resolution of issues, would constitute failure to negotiate in good faith. Therefore, while the potential benefits of SCBA’s proposal are achieved by our determination that the failure of an incumbent LEC to designate a person authorized to bind his or her company in negotiations is a violation of the good faith obligation of section 251.

C. Description and Estimates of the Number of Small Entities Affected by this Report and Order

885. For the purposes of this Order, the RFA defines a “small business” to be the same as a “small business concern” under the Small Business Act, 15 U.S.C. 632, unless the Commission has developed one or more definitions that are appropriate to its activities. Under the Small Business Act, a “small business concern” is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA). SBA has defined business size by the North American Industry Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees. We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

886. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our FRFA. Accordingly, our use of the terms “small entities” and “small businesses” does not encompass “small incumbent LECs.” We use the term “small incumbent LECs” to refer to any incumbent LECs that arguably might be defined by SBA as “small business concerns.”

1. Telephone Companies (SIC 481)

887. Total Number of Telephone Companies Affected. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census (“the Census Bureau”) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not “independently owned and operated.” For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

888. Wireline Carriers and Service Providers. SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies.
The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to SBA’s definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 97 small entity LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to SBA’s definition, a small business radiotelephone company is one employing fewer than 1,500 persons. According to SBA’s definition, a small business radiotelephone company is one employing fewer than 1,500 persons. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone (wireless) companies. The most reliable source of information regarding the number of radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

889. Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies that might qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

890. Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

891. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

892. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services. Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

893. Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

894. Wireless (Radiotelephone) Carriers. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992. According to SBA’s definition, a small business radiotelephone company is one employing fewer than 1,500 persons. The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned or operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be
affected by the decisions and rules adopted in this Order.

895. Cellular Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

896. Mobile Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA’s definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

897. Broadcast PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 CFR § 24.720(b), the Commission has defined “small entity” in the context of broadband PCS auctions as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a “small entity” in the context of broadband PCS auctions has been approved by SBA. The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licenses affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction. 898. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 D Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million. We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

899. SMR Licensees. Pursuant to 47 CFR § 90.814(b)(1), the Commission has defined “small entity” in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that has had average annual gross revenues of less than $15 million in the three previous calendar years. The definition of “small entity” in the context of 800 MHz and 900 MHz SMR has been approved by SBA. The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

900. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes those small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

901. Resellers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA’s definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

2. Cable System Operators (SIC 4841)

902. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than
the Communications Act. Cable operators under the definition in Section 251 of the Communications Act contains a definition of a small cable company, which is a cable system entity whose gross annual revenues in the aggregate exceed $250,000,000. There were 63,196,310 basic cable subscribers at the end of 1992. According to our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,468 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

904. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that directly or through an affiliate serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." There were 63,196,310 basic cable subscribers at the end of 1995, and 1,450 cable system operators serving fewer than one percent (631,960) of subscribers. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

D. Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements and Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected

905. Structure of the Analysis. In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs as a result of this Order. As a part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected. Due to the size of this Order, we set forth our analysis separately for individual sections of the item, using the same headings as were used above in the corresponding sections of the Order.

906. We provide this summary analysis to provide context for our analysis in this FRFA. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Summary Analysis of Section II—Scope of the Commission’s Rules

907. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. As discussed in Section II.E, a common carrier, which may be a small entity or a small incumbent LEC, may be subject to an action for relief in several different fora if a party believes that small entity or incumbent LEC violated the standards under section 251 or 252. Should a small entity or a small incumbent LEC be subjected to such an action for relief, it will require the use of legal skills.

908. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. We believe that our actions establishing minimum national rules will facilitate the development of competition in the local exchange and exchange access markets for the reasons discussed in Sections II.A and II.B above. For example, national rules may: help equalize bargaining power; minimize the need for duplicative marketing strategies and multiple network configurations; lower administrative costs; lessen the need to re-litigate the same issue in multiple jurisdictions; and reduce delay and transaction costs, which can pose particular burdens for small businesses. In addition, our rules are designed to accommodate differences among regions and carriers, and the reduced regulatory burdens and increased certainty produced by national rules may be expected to minimize the economic impact of our decisions for all parties, including any small entities and small incumbent LECs. As set forth in Section II.A above, we reject suggestions to adopt more, or fewer, national rules than we ultimately adopt in this Order. We reject the arguments that we should establish "preferred outcomes" from which parties could deviate upon an adequate showing, or that we establish a process by which state commissions could seek a waiver from the Commission’s rules, for the reasons set forth in Section II.B above.

909. We believe that our determination that there are multiple methods for bringing enforcement actions against parties regarding their obligations under sections 251 and 252 will assist all parties, including small entities and small incumbent LECs, by providing a variety of methods and fora for seeking enforcement of such obligations. (Section II.E—Authority to Take Enforcement Action.) Similarly, our conclusion that Bell Operating Companies (BOC) statements of generally available terms and conditions are governed by the same national rules that apply to agreements arbitrated under section 252 should ease administrative burdens for all parties in markets served by BOCs, which may include small entities, because they will not need to evaluate and comply with different sets of rules. (Section II.F—BOC Statements of Generally Available Terms.) Finally, we decline to adopt different requirements for agreements arbitrated under section 252 and BOC statements of generally available terms and conditions for the reasons set forth in Section II.F above.

Summary Analysis of Section III—Duty To Negotiate in Good Faith

910. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Incumbent LECs, including small incumbent LECs that receive requests for access to network elements and/or services pursuant to sections 251 and 252 of the Act will be required to negotiate in good faith over the terms of interconnection agreements. As set forth in Section III.C above, this Order identifies several practices as violations of the duty to
negotiate in good faith, including: (1) a party’s seeking or entering into an agreement prohibiting disclosure of information requested by the FCC or a state commission, or supplied in support of a request for arbitration pursuant to section 252(b)(2)(B); (2) seeking or entering into an agreement precluding amendment of the agreement to account for changes in federal or state rules; (3) an incumbent’s denial of a reasonable request for cost data during negotiations; and (4) an entrant’s failure to provide to the incumbent LEC information necessary to reach agreement. Complying with the projected requirements of this section may require the use of legal skills. In addition, incumbent LECs and new entrants having interconnection agreements that predate the 1996 Act must file such agreements with the state commission for approval under section 252(e), as discussed above in section III.D.

911. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. As set forth above, we believe our decision to establish national rules and a review process concerning parties’ duties to negotiate in good faith are designed to facilitate good faith negotiations, which should minimize regulatory burdens and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. (Section III.B—Advantages and Disadvantages of National Rules.) We also explain how economic impacts to be minimized for small entities seeking to enter into agreements with incumbent LECs as a result of the decision that incumbent LECs may not impose a bona fide request requirement on carriers seeking agreements pursuant to sections 251 and 252. (Section III.C—Specific Practices that may Constitute a Violation of Good Faith Negotiation.) For the reasons set forth in Section III.C above, we also find that certain additional practices are not always violations of the duty to negotiate in good faith, including the suggested alternative that all nondisclosure agreements violate the good faith duty.

912. We do not require immediate filing of preexisting interconnection agreements, including those involving small incumbent LECs and small entities. We set an outer time limit of June 30, 1997, by which preexisting agreements between Class A carriers must be filed with the relevant state commission. This decision will ensure that the burden of reviewing and taking advantage of the terms of preexisting agreements. It also limits burdens that a national filing deadline might impose on small carriers. In addition, the determination that preexisting agreements must be filed with state commissions seems likely to foster opportunities for small entities and small incumbent LECs to gain access to such agreements without requiring investigation or discovery proceedings or other administrative burdens that could increase regulatory burdens. (Section III.C—Applicability of Section 252 to Preexisting Agreements). For the reasons set forth in Section III.C above, we reject the alternative of not requiring certain agreements to be filed with state commissions.

Summary Analysis of Section IV—Interconnection

913. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Incumbent LECs, including small incumbent LECs, are required by section 251(c) to provide interconnection to requesting telecommunications carriers for the transmission and routing of telephone exchange service and exchange access service. Such interconnection must be: (1) provided at any technically feasible point; (2) at least equal in quality to that provided to the incumbent LEC itself and to any other parties with interconnection agreements; and (3) provided on rates, terms, and conditions that are “just, reasonable, and nondiscriminatory * * *.” We conclude that interconnection refers solely to the physical linking of networks for the mutual exchange of traffic, and identify a minimum set of technically feasible points of interconnection. The minimum points at which an incumbent LEC, which may be a small incumbent LEC, must provide interconnection are: (1) the line side of a local switch; (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

914. To obtain interconnection pursuant to section 251(c)(2), telecommunications carriers must seek interconnection for the purpose of transmitting and routing telephone exchange service, exchange access traffic, or both. (Section IV.D.—Definition of “Technically Feasible.”) This will require new entrants to provide either local exchange service or exchange access service to obtain section 251(c)(2) interconnection. A requesting carrier will be required to bear the additional costs imposed on incumbent LECs as a result of interconnection. (Section IV.E.—Technically Feasible Points of Interconnection.) Carriers seeking interconnection, including small entities, may be required to collect information to refute claims by incumbent LECs that the requested interconnection poses a legitimate threat to network reliability. (Id.)

915. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The decision to adopt clear national rules in this section of the Order is also intended to help equalize bargaining power between incumbent LECs and requesting carriers, expedite and simplify negotiations, and facilitate comprehensive business and network planning. This could decrease entry barriers and provide reasonable opportunities for all carriers, including small entities and small incumbent LECs, to provide service in markets for local exchange and exchange access services. (Section IV.B.—National Interconnection Rules). National rules should also facilitate the consistent development of standards and resolution of issues, such as technical feasibility, without imposing additional litigation costs on parties, including small entities and small incumbent LECs. We determine that successful interconnection at a particular point in a network creates a rebuttable presumption that interconnection is technologically feasible at other comparable points in the network. (Section IV.E.—Definition of “Technically Feasible.”) We also identify minimum points of interconnection where interconnection is presumptively technically feasible: (1) the line side of a switch; (2) the trunk side of a switch; (3) trunk interconnection points at a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. These decisions may be expected to facilitate negotiations by promoting certainty and reducing transaction costs, which should minimize regulatory burdens and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. We decline, however, to identify additional points where interconnection is technically feasible for the reasons set forth in section IV.F above.
916. The ability to enter local markets by offering only telephone exchange service or only exchange access service may minimize regulatory burdens and the economic impact of our decisions for some entrants, including small entities. We decline, however, to interpret section 251(c)(2) as requiring incumbent LECs to provide interconnection to carriers seeking to offer only interexchange services for the reasons set forth in section IV.C above. In addition, we determine that an incumbent LEC may refuse to interconnect on the grounds that specific, significant, and demonstrable network reliability concerns may make interconnection at a particular point sufficiently infeasible. We further determine that the incumbent LEC must prove such infeasibility to the state commission. (Section IV.E. Definition of "Technically Feasible.")

917. Competitive carriers, many of whom may be small entities, will be permitted to request interconnection at any technically feasible point, and the determination of feasibility must be conducted without consideration of the cost of providing interconnection at a particular point. (Section IV.D.—Definition of "Technically Feasible.") Consequently, our rules permit the party requesting interconnection, which may be a small entity, and not the incumbent LEC to decide the points that are necessary to compete effectively. (Section IV.E.—Definition of "Technically Feasible.") We decline, however, to impose reciprocal terms and conditions for interconnection on carriers requesting interconnection. Our decision that a party requesting interconnection must pay the costs of interconnecting should minimize regulatory burdens and the economic impact of our interconnection decisions for small incumbent LECs. Similarly, regulatory burdens and the economic impact of our decisions may be minimized through the decision that, while a requesting party is permitted to obtain interconnection that is of higher quality than that which the incumbent LEC provides, the requesting party must pay the additional costs of receiving the higher quality interconnection. (Section IV.H.—Interconnection that is Equal in Quality.)

Summary Analysis of Section V—Access to Unbundled Network Elements

918. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Under section 251(c), incumbent LECs are required to provide nondiscriminatory access to unbundled network elements. We identify a minimum set of network elements: (1) local loops; (2) local and tandem switches; (3) intraoffice transmission facilities; (4) network interface devices; (5) signaling and call-related database facilities; (6) operations support systems and functions; and (7) operator and directory assistance facilities. (Section V.J.—Specific Unbundling Requirements.) Incumbent LECs are required to provide nondiscriminatory access to operations support systems and information by January 1, 1997. States may require incumbent LECs to provide additional network elements on an unbundled basis. As discussed in Section V.F., above, LECs must perform the functions necessary to combine unbundled elements in a manner that allows requesting carriers to offer a telecommunications service, and the incumbent LEC may not impose restrictions on the subsequent use of network elements. Compliance with these requirements may require the use of engineering, technical, operational, accounting, billing, and legal skills.

919. If a requesting carrier, which may be a small entity, seeks access to an incumbent LEC's unbundled elements, the requesting carrier is required to compensate the incumbent LEC for any costs incurred to provide such access. For example, in the case of operation support systems functions, such work may include the development of interfaces for competing carriers to access incumbent LEC functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing. Requesting carriers may also have to deploy their own operations support systems interfaces, including electronic interfaces, in order to access the incumbent LEC's operations support systems functions. The development of interfaces may require new entrants, including small entities, to perform engineering work. (Section V.J.5—Operations Support Systems Unbundling.)

920. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The establishment of minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize costs incurred by the requesting party. As set forth in Section V.B, above, we reject several alternatives in making this determination, including proposals suggesting that the Commission should: (1) not identify any required elements; (2) allow the states exclusively to identify required elements; or (3) adopt an exhaustive list of elements.

921. As set forth above, the 1996 Act defines a network element to include "all facility(ies) or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service." (Section V.C.—Network Elements.) As a result, new entrants, which may include small entities, should have access to the same technologies and economies of scale and scope that are available to incumbent LECs. In reaching our determination, we reject for the reasons set forth in Section V.C above, the following alternatives: (1) that we should not adopt a method for identifying elements beyond those identified in the 1996 Act; and (2) that features sold directly to end users as retail services are not network elements. Finally, we reject the argument that requesting carriers, which may include small entities, are required to provide all services typically furnished by means of an element they purchase. (Id.) Our rejection of this last alternative may reduce burdens for some small entities by permitting them to offer some, but not all, of the services provided by the incumbent LEC.

922. We conclude that the requirement to provide "access" to unbundled network elements is independent of the interconnection duty imposed by section 251(c)(2), and that such "access" must be provisioned under the rates, terms and conditions applicable to unbundled network elements. We believe these conclusions may provide small entities seeking to compete with incumbent LECs with the flexibility to offer other telecommunications services in addition to local exchange and exchange access services. (Section V.D.—Access to Network Elements.) For the reasons set forth above in Section V.D, we reject the argument that incumbent LECs are not required to provide access to an element's functionality, and that "access" to unbundled elements can only be achieved by interconnecting under the terms of section 251(c)(2).

923. As set forth above, we conclude that, as set forth above, which may be a small incumbent LEC, may decline to provide a network element beyond
those identified by the Commission where it can demonstrate that the network element is proprietary, and that the competing provider could offer the proposed telecommunications service using other nonproprietary elements within the incumbent's network. (Section V.E—Standards Necessary to Identify Unbundled Network Elements.)

This should minimize regulatory burdens and the economic impact of our decisions for incumbent LECs, including small incumbent LECs, by permitting such entities to retain exclusive use of certain proprietary network elements.

924. We conclude that incumbent LECs: (1) cannot impose restrictions, requirements or limitations on requests for, or the sale or use of, unbundled network elements; (2) must provide requested carriers with all of the functionalities of a particular element so that requesting carriers can provide any telecommunications services that can be offered by means of that element; (3) must permit new entrants to combine network elements so that new entrants purchase access to, if so requested; (4) must prove to a state commission that they cannot combine elements that are not ordinarily combined within their network, or that are not ordinarily combined in that manner, because such combination is not technically feasible or it would impair the ability of other carriers to access unbundled elements and interconnect with the incumbent LEC; and (5) must provide the operational and support systems necessary to permit and combine network elements. As a result of these conclusions, many small entities should face significantly reduced barriers to entry in markets for local exchange services. (Section V.F—Provision of a Telecommunications Service Using Unbundled Elements.)

For the reasons set forth in section V.F, we reject the following alternatives: (1) that incumbent LECs, in all instances, must combine elements that are not ordinarily combined in their networks; and (2) that incumbent LECs are not obligated to combine elements for requesting carriers.

925. By establishing minimum national rules concerning nondiscriminatory access to unbundled network elements, requesting carriers, including small entities, may face reduced transaction and regulatory costs in seeking to enter local telecommunications markets. Among these minimum rules are: (1) access and elements which new entrants receive are to be the same as that new entrant between carriers; (2) incumbent LECs must prove technical infeasibility; (3) the rates, terms and conditions established for the provisioning of unbundled elements must be equal between all carriers, and where applicable, between requesting carriers and the incumbent LEC itself, and they must provide sufficient competitors with a meaningful opportunity to compete; and (4) incumbent LECs must provide carriers purchasing unbundled elements with access to electronic interfaces if incumbents use such functions themselves in provisioning telecommunications services. (Section V.G—Nondiscriminatory Access to Unbundled Network Elements.)

926. As set forth above, we conclude that section 251(c)(3) does not require new entrants to own or control their own local exchange facilities in order to purchase and use unbundled network elements and, thus, new entrants can provide services solely by recombining unbundled network elements. (Section V.H—The Relationship Between Sections 251(c)(3) and 251(c)(4).)

927. As discussed in Section V.J above, we adopt a minimum list of required unbundled network elements that incumbent LECs, including small incumbent LECs, must make available to requesting carriers. In adopting this list, we sought to minimize the regulatory burdens and economic impact for small incumbent LECs. For example, we declined to adopt a detailed list including many additional elements, as set forth in Section V.B. We also provided for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors, as discussed in Section V.J.2.(c),(ii).

Summary Analysis of Section VI—Methods of Obtaining Interconnection and Access to Unbundled Network Elements

928. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. We conclude that Section 251(c)(6) requires incumbent LECs, including small incumbent LECs, to provide for any technically feasible method of interconnection or access to unbundled network elements, including physical collocation, virtual collocation, and meet-point interconnection. With certain modifications, we adopt some of the requirements concerning physical and virtual collocation that we adopted in the Expanded Interconnection proceeding. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

929. As discussed in the new entrant will build out facilities to the agreed-upon point, which will likely entail the use of engineering and installation personnel as well as the acquisition of equipment. We allow incumbent LECs to impose reasonable restrictions on the warehousing of space by collocation. Therefore, small entities collocating equipment may be required to use the provided space for the collocation of equipment necessary for interconnection or access to unbundled network elements or risk losing the right to use that space. (Section VI.B.1.e—Allocation of Space.) To take advantage of its right to collocate equipment on an incumbent LEC's premises, competitive entrants, which may include small entities, will be required to build or lease transmission facilities between their own equipment, located outside of the incumbent LECs' premises, and the collocated space. (Section VI.B.1.f—Leasing Transport Facilities.)

930. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. By adopting our Expanded Interconnection terms and conditions, which allow competitors to collocate equipment for interconnection with the incumbent LEC, regulatory burdens have likely been reduced because the terms and conditions for collocation have already been established. (Section VI.B.1.h—Security Arrangements.)

931. Due to our conclusion that requesting carriers may choose any method of technically feasible interconnection or access to unbundled elements, new entrants, including small entities, should have the flexibility to obtain interconnection or access in the manner that best suits their needs. (Section VI.A.1.—Methods of Obtaining Interconnection and Access to Unbundled Elements.)
932. We adopt a broad definition of the term "premises," which should allow carriers, including small entities, to collocate equipment for interconnection and access to unbundled network elements at a range of incumbent LEC locations. (Section VI.B.1.c—The Meaning of the Term "Premises.") For the reasons set forth in Section VI.B above, we interpret the term "premises" broadly to include incumbent LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house incumbent LEC facilities. However, as set forth above, we reject the suggestion that security measures be provided only at the request of the entrant, which should minimize regulatory burdens and the economic impact of our decisions for small incumbent LECs. (Id.)

933. We interpret the statute broadly to allow collocation of any equipment used for interconnection or access to unbundled network elements. (Section VI.B.1.d—Collocation Equipment.) This standard should offer all competitors, including small entities, flexibility in collocating equipment they need to interconnect their networks to those of incumbent LECs. Incumbent LECs will also be required to make space available to requesting carriers on a first-come, first-served basis, and collocators seeking to expand their collocated space should be allowed to use contiguous space when available. (Section VI.B.1.e—Allocation of Space.) These provisions should minimize regulatory burdens and economic impacts for small entity entrants by reducing opportunities for discriminatory treatment based on the size of the requesting carrier. We decline, however, to require incumbent LECs to file reports on the status, planned increase, and use of space for the reasons set forth in Section VI.B.1. above, which will reduce the regulatory burdens and economic impacts of our decisions for small incumbent LECs.

934. We conclude that a competitive entrant should be permitted to lease transmission facilities from the incumbent LEC. (Section VI.B.1.f—Leasing Transport Facilities.) This provision will allow small entities to lease transmission facilities from incumbent LECs to transmit traffic between the collocated space and their own networks, which may be comparatively less burdensome for small entity entrants than the alternative of bringing their own facilities to the collocated equipment on the incumbent LEC's premises. We also require incumbent LECs to permit two or more carriers that are collocating at the incumbent LEC's premises to interconnect their networks. (Section VI.B.1.g—Co-Carrier Cross-Connect.) This requirement should make it easier for new entrants to interconnect their networks with those of competitors.

935. We require incumbent LECs to provide the relevant state commissions with detailed floor plans or diagrams of any premises where the incumbent LEC alleges that there are space constraints. (Section VI.B.1.h—Allowing Virtual Collocation In Lieu of Physical.) This requirement may reduce burdens for all parties, including small entities and small incumbent LECs, by aiding state commissions with their evaluation of incumbent LEC refusals to allow physical collocation on the grounds of space constraints. For the reasons set forth in Section VI.B.1 above, however, we decline to require incumbent LECs to lease additional space or provide trunking at no cost where they have insufficient physical collocation, which should minimize the regulatory burdens and economic impact of our decisions for incumbent LECs, including small incumbent LECs.

Summary Analysis of Section VII—Pricing of Interconnection and Unbundled Network Elements

936. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. Pursuant to sections 251(c) and 252(d) of the 1996 Act, incumbent LECs must provide interconnection and access to unbundled network elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In Section VII above, we adopt a methodology for setting arbitrated prices for interconnection and unbundled elements on the basis of forward-looking economic cost studies prepared in conformance with a methodology prescribed by the Commission. Until states utilize economic studies to develop cost-based prices, they must use default proxies established by the Commission. Small incumbent LECs may be required, therefore, to prepare economic cost studies. In addition, small entities seeking arbitration for rates for interconnection or unbundled elements may find it useful to prepare economic cost studies or prepare critiques of cost studies prepared by incumbent LECs and others. In both cases, this may entail the use of economic experts, legal advice, and possibly accounting personnel.

937. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. Our conclusion that prices for interconnection and unbundled elements should be set at forward-looking long-run economic cost, including a reasonable share of forward-looking joint and common costs, should permit new entrants, including small entities, to interconnect with, and acquire unbundled elements from, incumbent LECs at prices that replicate, to the extent possible, those in a competitive market. (Section VII.B.2—Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) Our forward-looking economic cost methodology for determining prices is designed to permit incumbent LECs to recover their economic costs of providing interconnection and unbundled elements, which should minimize the economic impact of our decisions on small incumbent LECs.

938. Our conclusion that embedded costs, opportunity costs and other costs that may not be included in the rates for interconnection and unbundled elements is intended, in part, to avoid distortions in investment decisions, which should lead to more efficient allocation of resources, thereby reducing regulatory burdens and economic impacts for some small entities and small incumbent LECs. (Section VII.B.2—Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We reject proposals that would have permitted incumbent LECs to recover their embedded costs in prices for interconnection and unbundled elements as discussed above in Section VII.B.2.a.(3)(b). As discussed in Section VII.B.2.a.(3)(b), we reject the use of the efficient component pricing rule (ECPR) to set prices for interconnection and unbundled elements.

939. Our conclusion that forward-looking common costs should be allocated in a reasonable manner should ensure that the prices of network elements that are least likely to be subject to competition are not artificially inflated by large allocations of common costs. This, in turn, may also produce more efficient allocations of resources, thereby minimizing regulatory burdens and economic effects for many parties, including small entities and small incumbent LECs. (Section VII.B.2—Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We permit, but do not require, states to impose peak-sensitive pricing systems for
shared facilities as discussed in Section VII.B.3.b.

940. We conclude that incumbent LECs should not recover access charges from entrants that use unbundled network facilities to provide access services to customers that they win from incumbent LECs. We do, however, permit incumbent LECs to impose on purchasers of unbundled local switching the carrier common line charge and a charge equal to seventy-five percent of the transport interconnection charge for an interim period that shall end no later than June 30, 1997, as discussed in Section VII.B.2.a.(3)(b). As further explained in that section, this mechanism should serve to reduce any short-term disruptive impact of our decisions on incumbent LECs, including small incumbent LECs.

941. We conclude that the Act requires rates for interconnection and unbundled elements to be geographically deaveraged, using a minimum of three geographic zones, in a manner that appropriately reflects the costs of the underlying elements. (Section VII.B.3.c.—Geographic/Class-of-Service Averaging.) We also conclude that distinctions between the rates charged to requesting carriers for network elements should not vary based on the classes of service that the requesting carriers provide to their customers. We expect these decisions to lead to increased competition and a more efficient allocation of resources.

942. The default proxies we adopt for rates for interconnection and unbundled elements, which states may use to establish prices, are designed to approximate prices that will enable efficient competitors, including small entities, to enter local exchange markets. (Section VII.C.—Default Proxy Ceilings and Ranges.) We reject the use of rates in interconnection agreements that predate the 1996 Act as proxy-based ceilings for interconnection and unbundled element rates as discussed in Section VII.C.1. We also decline to adopt a generic cost model at this time, as discussed in Section VII.C.3.

943. We determine that the nondiscrimination provisions in the Act prohibit price differences that are not based on cost differences. This should permit small entities to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration. (Section VII.D.3—Discrimination.)

Summary Analysis of Section VIII—Resale

944. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. Pursuant to section 251(b)(1), all LECs, which may include small entity competing LECs and small incumbent LECs, may not impose unreasonable or discriminatory conditions on, or limit the resale of, their telecommunications services. Pursuant to section 251(c)(4), incumbent LECs are required to offer for resale at wholesale rates any telecommunications services that they offer to subscribers other than telecommunications carriers. Providing such services for resale may require some small entities and small incumbent LECs to use additional billing, technical, and operational skills.

945. Under section 252(a), resellers, which may include small entities, are required to prepare and present to incumbent LECs requests for services to resell. We do not establish guidelines for the content of these requests. Such requests may involve legal, engineering, and accounting skills. Resellers may also have to engage in arbitration proceedings with incumbent LECs if voluntary negotiations resulting from the initial request fail to yield an agreement. This may involve legal and general negotiation skills. Where a reseller is negotiating or arbitrating with an incumbent LEC, the reseller may choose to offer arguments concerning economic and accounting data presented by state commissions or incumbent LECs. Resellers may also choose to make legal and economic arguments that certain resale restrictions are unreasonable. These tasks may require legal, economic, and accounting skills.

946. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. As set forth in Section VIII.B, above, our decision to adopt clear national rules should reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. Moreover, our decision not to impose eligibility requirements on resellers should minimize regulatory burdens for resellers. We reject proposals that the Commission not require resale of bundled service offerings, promotions and discounts lasting longer than 90 days, residential service, and services offered at rates below cost for reasons set forth in Section VIII.A.

947. As discussed in Section VIII.B, we expect the opportunity to resell telecommunications services currently offered exclusively by incumbent LECs will lead to increased competition in the provision of telecommunications services. We also determine that non-cost-based factors shall not be considered when arriving at wholesale discounts, and we reject the argument that indirect costs should not be considered avoided costs. We also reject proposals that we either require or forbid a state to include a measure of profit in its avoided cost calculation. As set forth in Section VIII.B, we considered the concerns of small incumbent LECs and small entity resellers when adopting the default range for wholesale discounts. In addition, we allow a state to consider including in wholesale rates the costs that incumbent LECs incur in selling services on a wholesale basis, which may minimize the economic impact for small incumbent LECs.

948. As discussed in Section VIII.C, we remove obstacles faced by small businesses in reselling telecommunications services by establishing a presumption, applicable to incumbent and non-incumbent LECs, that most restrictions on resale are unreasonable. This presumption should reduce unnecessary burdens on resellers, which may include small entities. It may also produce increased opportunities for resale competition, which may be expected to be beneficial for some small entities and small incumbent LECs. We do not permit state commissions to require non-incumbent LECs to offer their services at wholesale rates for the reasons set forth in Section VIII.D. For the reasons discussed in Section VIII.C, above, we decline to forbear from the application of section 251(b)(1) to non-incumbent LECs. We also conclude that incumbent LECs are to continue to receive access charge revenues when local services are resold under section 251(c)(4) for reasons set forth in Section VIII.E, and that such access services are not subject to resale at wholesale rates for reasons set forth in Section VIII.A.

Summary Analysis of Section IX—Duties Imposed on "Telecommunications Carriers" by Section 251(a)

949. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. Small entities that provide telecommunications services are subject to the same obligations imposed on all telecommunications carriers under section 251(a)(1) and section 251(a)(2), and any reporting requirements that attend such obligations. Among these duties is the duty to interconnect, directly or indirectly, with requesting
telecommunications carriers. (Section IX—Duties Imposed on “Telecommunications Carriers” By Section 251(a).) This will likely require small entities to comply with the technical, economic, and legal requirements involved with interconnection, including negotiating contracts, utilizing engineering studies, and adding operational capacity. (Id.) Small incumbent LECs may incur similar compliance requirements to the extent they are required to interconnect with entities that qualify as “telecommunications carriers.”

950. Small incumbent LECs and small entities providing telecommunications services will also be under a duty not to install network features, functions, and capabilities that do not comply with standards and guidelines under sections 255 and 256. (Section IX—Duties Imposed on “Telecommunications Carriers” By Section 251(a)(2).) In addition, small entities that provide both information services and telecommunications services are classified as telecommunications carriers and are subject to certain requirements under section 251(a). (Section IX—Duties Imposed on “Telecommunications Carriers” By Section 251(a)(2).)

951. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. Small entities who provide for a fee local, interexchange and international services are defined as telecommunications carriers and, thus, also receive the benefits of section 251 including interconnection, services, and network elements, which may increase their ability to compete. (Section IX—Duties Imposed on “Telecommunications Carriers” By Section 251(a)(2).) We reject the suggestion that CMRS providers, some of which likely are small entities, should not be included in the definition of a “telecommunications carrier.” (Id.) We determine that entities operating private, internal or shared communications networks do not qualify as telecommunications carriers, however, which excludes them from the obligations and benefits under section 251(a). Small entities providing information services but not telecommunications services are also not classified as telecommunications carriers and, thus, will not be bound by the duties of section 251(a). A carrier that provides both information and telecommunications services is deemed subject to the requirements of section 251(a).

952. We conclude that competitive telecommunications carriers that have the obligation to interconnect with requesting carriers may choose, based upon their own characteristics, whether to allow direct or indirect interconnection. (Section IX—Duties Imposed on “Telecommunications Carriers” By Section 251(a).) This should allow significant flexibility for small entities to choose the most efficient and economical arrangement for their particular strategy. As set forth in Section IX, we reject an argument to forbear, under section 10 of the Communications Act, from imposing any interconnection requirements on non-dominant carriers.

Summary Analysis of Section X—Commercial Mobile Radio Services

953. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. We are applying sections 251 and 252 to LEC-CMRS interconnection at this time. (Section X.D.—Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates.) We may revisit our determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates if we determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers, many of which may be small entities, in obtaining interconnection on terms and conditions that are just, reasonable, and nondiscriminatory. (Id.) We determine that entities operating private, internal or shared communications networks do not qualify as telecommunications carriers, however, which excludes them from the obligations and benefits under section 251(a). Small entities providing information services but not telecommunications services are also not classified as telecommunications carriers and, thus, will not be bound by the duties of section 251(a). A carrier that provides both information and telecommunications services is deemed subject to the requirements of section 251(a).

954. Pursuant to our findings in Section X.D, a small CMRS entity seeking to enter into a reciprocal compensation agreement with an incumbent LEC, which may be a small incumbent LEC, will have to comply with sections 251 and 252, and state law. The reporting, recordkeeping, and other compliance requirements associated with reciprocal compensation are summarized in the following section concerning obligations under section 251(b).

955. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The Commission is determining to minimize the economic impact on CMRS providers, many of which are small entities, by declaring that CMRS providers are not required to comply with the obligations of LECs under section 251(b)(5). We decline to adopt the alternative of finding that a CMRS provider is a LEC for the reasons set forth in Section X.A. We also determine that CMRS providers are entitled to request reciprocal compensation under section 251(b)(5), and that certain CMRS providers are also entitled to request interconnection under section 251(c)(2). As discussed in the following section concerning obligations under section 251(b), these decisions may permit small entity CMRS providers the opportunity to considerably expand their businesses.

Summary Analysis of Section XI—Obligations Imposed on LECs by 251(b)

956. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. All local exchange carriers, including small incumbent LECs and perhaps some small entities offering competing local exchange services, have a duty to establish reciprocal compensation for the transport and termination of local telecommunications traffic, as defined by state commissions. As such, small incumbent LECs and small entities offering competitive local exchange services may be required to measure the exchange of traffic, and to bill and collect payment from other carriers. (Section XI.A—Reciprocal Compensation for Transport and Termination of Telecommunications.) Reciprocal compensation for the transport and termination of traffic may be based on the incumbent LEC’s cost studies, which may require small incumbent LECs to use economic skills to perform cost studies. To the extent that a competing provider of local exchange services, which may include a small entity, believes its costs for the transportation and termination of traffic differ from those of the incumbent LEC, it would also be required to provide a forward-looking, economic cost study. (Id.)

957. If a CMRS provider entered into an agreement with an incumbent LEC prior to August 8, 1996 that does not provide for mutual compensation, the CMRS provider may demand to renegotiate the agreement. This may impose the burden of re-negotiation on small incumbent LECs, which may require legal, accounting, and economic skills. In addition, the successful completion of negotiation or arbitration, symmetrical reciprocal
compensation shall apply, which may have the effect of raising the amount small incumbent LECs currently pay CMRS providers to terminate LEC-originated traffic. This may have the effect of increasing small incumbent LECs' costs. Finally, a state commission may impose bill-and-keep arrangements between carriers if the state commission determines that the amount of local telecommunications traffic flowing in the opposite directions, and is expected to remain thus. This could have the effect of reducing small incumbent LECs' revenues and decreasing the expenses of small entities. It also might place a burden on small entities and small incumbent LECs of establishing that traffic volumes are imbalanced, which might require accounting, economic, and legal skills.

958. We require paging companies seeking to recover fees for terminating local calls to demonstrate to the state the costs of terminating such calls. (Section XI.A.—Reciprocal Compensation for Transport and Termination of Traffic.) Consequently, small entity paging companies and possibly small incumbent LECs may be required to use legal, economic, and possibly accounting skills.

959. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. Our adoption of national default price ceilings and range in Section XI.A.3 above, and termination of local traffic being arbitrated by the states should provide all parties, including small incumbent LECs and many new entrant small entities, with a clear understanding of the terms and conditions that will govern should they fail to reach an agreement. This should minimize regulatory burdens and economic impacts for those companies, in part by reducing the transaction costs of arbitration. (Section XI.A.3.4—Deferral of Bill-and-Keep Arrangements for CMRS Providers and Reciprocal and non-reciprocal CMRS providers with non-reciprocal agreements to renegotiate their agreements, and imposing symmetrical reciprocal compensation pending completion of negotiation or arbitration, will provide all parties with certainty as to applicable rates as of the date of this order, and minimize litigation and regulatory costs. We believe this decision is consistent with the pro-competitive goals of the 1996 Act.

960. We define transport and termination services—each with its own cost calculation for the purposes of sections 251 and 252. This definition may permit interconnecting carriers, including small entities, to obtain transport and termination services at lower rates and avoid paying above-cost rates or rates for unneeded services. (Section XI.A.2—Definition of Transport and Termination of Telecommunications.) We also conclude that a LEC may not charge a CMRS provider or other carrier, which may be a small entity, for receiving and terminating LEC-originated traffic. (Section XI.A.4—Symmetry.) We do not permit interexchange carriers to use transport and termination services to avoid the obligation to pay access charges for terminating interexchange traffic with incumbent LECs. (Section XI.A.2—Definition of Transport and Termination of Telecommunications.)

961. Our decision to permit new entrants to base reciprocal compensation arrangements on incumbent LECs' cost studies may reduce barriers to entry by permitting competing LECs to avoid performing their own forward-looking, economic cost studies which may be expected to reduce the overall burdens and minimize the economic impact of regulation on these small entities. (Section XI.A.4—Symmetry.) The ability of state commissions to impose bill and keep arrangements where the costs of terminating traffic are nearly symmetrical, traffic volume is roughly balanced, and both are expected to remain so, may allow small entities and small incumbent LECs to avoid the cost of measuring traffic exchange. (Section XI.A.5—Bill and Keep.) For the reasons set forth in Section XI.A.5 above, we reject the proposed alternative of permitting states to adopt bill-and-keep arrangements for the transport and termination of traffic where the cost of terminating traffic is not nearly symmetrical.

962. By requiring rates for transport and termination be cost based, we believe that all parties in telecommunications markets, including small incumbent LECs and small entities, may benefit from increased opportunities to compete effectively in local exchange markets. (Section XI.A.3—Pricing Methodology.) In addition, we conclude that termination rates for LECs, including small incumbent LECs, should include an allocation of forward-looking common costs, but not an element for the recovery of lost contributions. These decisions may be expected to minimize the economic impact of our decisions on small incumbent LECs and small entities.

963. This Order eliminates certain charges paging companies may now be assessed by LECs and enables paging companies to claim new revenues from LECs for terminating paging calls. (Section XI.A.—Reciprocal Compensation for Transport and Termination of Telecommunications.) Paging companies, including small entities, may thereby incur lower costs. Such entities also may increase their revenues, depending on the outcome of any proceedings concerning their termination costs. For the reasons set forth in Section XI.A.3 above, we cannot conclude, at this time, that a LEC's forward-looking costs may be used as a reasonable proxy for the costs of call termination by paging providers. We further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.A.3 above does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching.

B. Access to Rights-of-Way

964. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. Small incumbent LECs that meet the definition of a utility (The Act defines "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication.") and own poles, ducts, conduits and rights-of-way where access was not previously mandated are now required to provide access to requesting telecommunications carriers (other than incumbent LECs and cable television systems) which may require the use of legal, engineering, and accounting resources for evaluation and processing of attachment requests. (Section XI.B.2—Section 224(f): Non-discriminatory Access.) This may also require small incumbent LECs and small entities to employ technical personnel to modify pole attachment arrangements.

965. A complaint of unjustified denial of access must be supported by a written request for access, the utility's response, and information supporting the complainant's position. This will likely impose some recordkeeping requirements on small incumbent LECs and small entities seeking access to rights-of-way. Our requirements may also impose administrative requirements, including legal and engineering expertise, which may impose some recordkeeping requirements on small incumbent LECs and small entities.

966. The Regulatory Flexibility Act, a "small governmental jurisdiction" is one type
of “small entity,” and is defined as the “governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than fifty thousand.” 5 U.S.C. 601(5). that resolve disputes arising under section 224 of the Communications Act. (Section XI.B.5.c.2—Dispute Resolution.) In addition, small governmental jurisdictions that have established rules and regulations for access to poles, ducts and conduits specifically, and interconnection generally, are also likely to have some level of reporting and recordkeeping requirements for competing telecommunications carriers that use the poles, some of which may be small entities. (Section XI.B.6—Reverse Preemption.)

966. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. In placing the burden of proof on the denying utility with respect to the propriety of a denial of access, we recognize that new entrants, which may be small entities, are not likely to have access to such information without cooperation from the utilities. Complaints should not be dismissed where the petitioner was unable to obtain a written response from the denying utility, or where the utility also denied the petitioner any relevant information needed to establish a prima facie case. These provisions should allow an entrant to pursue a claim without the need for expensive discovery, and should not preclude or discourage entities with limited resources from seeking redress where access is denied. (Section XI.B.5—Dispute Resolution.) For the reasons set forth in Section XI.B.5, we reject the recommendation that an applicant be allowed to seek injunctive relief in federal court and select federal jurisdiction for enforcement or appeal of any matter regarding pole attachments. Our conclusion that state and local pole attachment requirements are presumed reasonable may minimize burdens on small governmental jurisdictions by preserving existing rules and procedures, and the local government’s expertise with its own rules. (Section XI.B.2—Specific Rules.) In reaching this result, we reject the alternative of invalidating such state regulations in favor of federal rules for the reasons stated in Section XI.B.2. Our determination not to prescribe numerous specific rules in this area recognizes the varying technologies and facilities deployed by incumbent LECs, including small incumbent LECs. For example, we recognize that utilities, including small incumbent LECs, normally have their own operating standards that dictate conditions of access. Thus, we leave in place such conditions of access. For the reasons set forth in Section XI.B, we reject the alternative of prescribing a comprehensive set of substantive engineering standards governing access to rights-of-way.

967. When an attaching entity modifies poles for its use, it will be entitled to recover a share of its expenses from any later-attaching entities. (Section XI.B.4—Modifications.) This should permit attaching entities that modify poles, some of which may be small entities, to bear only their proportionate costs and prevent them from effectively subsidizing their later-entering competitors. The requirement that utilities provide attaching entities with 60 days’ notice prior to commencing modifications to any pole, duct or conduit should provide attaching entities, some of which may be small entities, sufficient time to evaluate the impact of the proposed modification on their interests and to plan and coordinate any modifications to their own attachments. (Id.)

C. Imposing Additional Obligations on LECs

968. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements.

969. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The determination that the 1996 Act does not permit the particular obligations for incumbent LECs set forth in section 251(c) to be imposed on non-incumbent carriers, absent a finding by the Commission under section 251(h)(2), should limit potential burdens on new entrants, including small entities. (Section XI.C—Imposing Obligations on LECs.)

Summary Analysis of Section XII—Exemptions, Suspensions and Modifications of Section 251 Requirements

970. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Section 251(f)(1) grants rural telephone companies, which may be small incumbent LECs, an exemption from the requirements of section 251(c) (which only apply to incumbent LECs) until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state determination that the exemption should be terminated. Section 251(f)(2) provides that LECs with fewer than two percent of the nation’s subscriber lines may petition a state commission for a suspension or modification of any requirements of sections 251(b) and 251(c). The latter provision, section 251(f)(2), is available to all LECs including competitive LECs, which may be small entities.

971. After a carrier has made a bona fide request under Section 251, a rural telephone company, which may be a small incumbent LEC, seeking to retain its exemption under section 251(f)(1) must prove to the state commission that it should retain its exemption. To remove the exemption, a state commission must find that the bona fide interconnection request is not unduly economically burdensome, is technically feasible, and is consistent with section 254. The parties involved in such a proceeding may need to use legal, accounting, and engineering services. A small incumbent LEC or a competitive LEC, which may be a small entity, seeking under 251(f)(2) to modify or suspend the national interconnection requirements imposed by section 251(b) or 251(c) bears the burden of proving that interconnection would: (1) create a significant adverse economic impact on telecommunications users; (2) be unduly economically burdensome; or (3) be technically infeasible.

972. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. As set forth in Section XII above, the determination whether a section 251(f) exemption, suspension, or modification should be continued or granted lies primarily with the relevant state commission. By largely leaving this determination to the states, our decisions permit this fact-specific inquiry to be administered in a manner that minimizes regulatory burdens and the economic impact on small entities and small incumbent LECs. However, to further minimize regulatory burdens and minimize the economic impact of our decision, we adopt several rules as set forth in Section XII above, which may facilitate the efficient resolution of such inquiries, provide guidance, and minimize uncertainty. As set forth in Section XII above, we find that the rural LEC or smaller LEC must prove to the state commission that the financial harm shown by just economic impact, suspension, or modification would be greater than the harm that might...
Alternatively, if the state fails to act to carry out its responsibility under section 252(e)(5), the Commission may assume authority under section 252(e)(5) to arbitrations agreements. These rules should benefit small entities and small incumbent LECs by reducing the transaction costs associated with arbitration. The rules should also encourage parties, to negotiate after offers are submitted which should provide additional flexibility for parties including small entities and small incumbent LECs, to agree to a resolution tailored to their interests. (Section XIV.A — Section 252(e)(5)).

For the reasons set forth above in Section XIV.A, we reject the alternative of adopting national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that best address the concerns of small entities and small incumbent LECs participating in mediation or arbitration.

As set forth above in Section XIV.A, we reject the suggestion that the Commission return jurisdiction over an arbitration to the state commission. We further reject the argument that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We decline to adopt the alternative suggested by some parties that, if the Commission takes steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. (Section XIV.A — Section 252(e)(5)).

As explained above in Section XIV.A, we also reject the alternative that an arbitration agreement not be binding on the parties. Finally, we reject the alternative of opening the arbitration process to all third parties, which should minimize the costs involved in such proceedings.

B. Requirements of Section 252(i)

Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incentive LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. Incumbent LECs must also permit third parties to obtain any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. Moreover, incumbent LECs must prove with specificity that terms and conditions contained in filed agreements are legitimately related to the purchase of the individual element or service being sought. Incumbent LECs must provide “most favored nation” status with regard to subsequent carriers regardless of whether they include “most favored nation” clauses in their agreements. Complying with these requirements may require small incumbent LECs and requesting small entities to use legal and negotiation skills.

Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. In this Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). These rules should benefit small entities and small incumbent LECs by reducing the transaction costs associated with arbitration. (Section XIV.A — Section 252(e)(5)).

The Commission concludes that, if it arbitrates agreements, it will use a “final offer” arbitration method, whereby each party to the arbitration proposes its best and final offer, and the arbitrator chooses between the proposals. The arbitrator may choose either proposal in its entirety, or could choose different parties’ proposals on an issue-by-issue basis. This method of arbitration should minimize the economic impact on small entities and small incumbent LECs by reducing the transaction costs associated with arbitration. Our rules should also encourage parties, to negotiate after offers are submitted which should provide additional flexibility for parties including small entities and small incumbent LECs, to agree to a resolution tailored to their interests. (Section XIV.A — Section 252(e)(5)).

For the reasons set forth above in Section XIV.A, we reject the alternative that the Commission return jurisdiction over an arbitration to the state commission. We further reject the argument that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We decline to adopt the alternative suggested by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. (Section XIV.A — Section 252(e)(5)).

As explained above in Section XIV.A, we also reject the alternative that an arbitration agreement not be binding on the parties. Finally, we reject the alternative of opening the arbitration process to all third parties, which should minimize the costs involved in such proceedings.
incumbent LECs to incur no greater costs than did the original carrier, which should minimize the economic impact on small incumbent LECs. We also minimize the regulatory burden for small entities and small incumbent LECs by finding that a new entrant seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain access to agreements on an expedited basis.

984. As set forth above, we conclude that section 252(i) permits differential treatment of carriers based on differences in the costs of serving those carriers, but does not permit incumbent LECs to limit the availability of interconnection, services, or network elements only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. (Section XIV—Section 252(i)). These decisions should minimize the impact on small entities by preventing discrimination and enabling them to obtain the same terms and conditions as larger carriers that possess greater bargaining power. For the reasons set forth in Section XIV, we reject the interpretation favored by commenters arguing that new entrants should not be able to choose among provisions of interconnection agreements filed with state commissions.

E. Report to Congress

985. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

XVI. Ordering Clauses

986. Accordingly, it is ordered that, pursuant to Sections 1–4, 201–209, 214, 218, 224, 251, 252, and 303(r) of the Communications Act of 1934, as amended, and Section 601 of the Telecommunications Act of 1996, 47 U.S.C. 151–154, 201–209, 214, 218, 224, 251, 252, 303(r), the Report and order is adopted, effective September 30, 1996. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

987. It is further ordered that Part 51 of the Commission’s rules, 47 CFR § 51 is added as set forth below.

988. It is further ordered that, to the extent issues from CC Docket No. 95–185, in the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers, are resolved here, we incorporate the relevant portions of the record in that docket.

989. It is further ordered that, to the extent issues from CC Docket No. 91–346, in the Matter of Intelligent Networks, are resolved here, we incorporate the relevant portions of the record in that docket.


List of Subjects

47 CFR Part 1
  Access to rights of way.
  Telecommunications.

47 CFR Part 20
  Communications common carriers,
  Interconnection.

47 CFR Part 51
  Collocation, Communications
  common carriers, Interconnection,
  Network elements, Pricing standard,
  Proxies, Reciprocal compensation,
  Resale, Transport and termination.

47 CFR Part 90
  Common carriers.

Federal Communications Commission.

William F. Caton,
Acting Secretary.

Rule Changes

Parts 1, 20, 51 and 90 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154, 251, 252, 303, and 309[j] unless otherwise noted.

2. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.

3. Section 1.1402 is amended by revising paragraph (d) to read as follows:

§ 1.1402 Definitions.

* * * * *

(d) The term complaint means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

* * * * *

4. Section 1.1403 is revised to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement;
to section 47 U.S.C. § 224(f), the
of-way despite a request made pursuant
to access to a pole, duct, conduit or right-
system operator or telecommunications

* * * * *

or any person owned by the Federal
government agencies that regulate any
service on the named respondent, and
accompanied by a certification of

§ 1.1404 Complaint.

(b) The complaint shall be
accompanied by a certification of
service on the named respondent, and
each of the Federal, State, and local
governmental agencies that regulate any
aspect of the services provided by the
complainant or respondent.

(c) In a case where it is claimed that
a rate, term, or condition is unjust or
unreasonable, the complaint shall
contain a statement that the State has
certified to the Commission that it
regulates the rates, terms and conditions
for pole attachments. The complaint
shall include a statement that the utility
is not owned by any railroad, any
person who is cooperatively organized
or any person owned by the Federal
Government or any State.

(k) In a case where a cable television
system operator or telecommunications
carrier claims that it has been denied
access to a pole, duct, conduit or right-
of-way despite a request made pursuant
to section 47 U.S.C. § 224(f), the
complaint shall be filed within 30 days
of such denial. In addition to meeting
the other requirements of this section,
the complaint shall include the data and
information necessary to support the
claim, including:

(1) The reasons given for the denial of
access to the utility's poles, ducts,
conduits and rights-of-way;
(2) The basis for the complainant's
claim that the denial of access is
improper;
(3) The remedy sought by the
complainant;
(4) A copy of the written request to
the utility for access to its poles, ducts,
conduits or rights-of-way; and
(5) A copy of the utility's response to
the written request including all
information given by the utility to
support its denial of access. A
complaint alleging improper denial of
access will not be dismissed if the
complainant is unable to obtain a
utility's written response, or if the
utility denies the complainant any other
information needed to establish a prima
facie case.

6. Section 1.1409 is amended by
revising paragraphs (b) and (d) to read as follows:

§ 1.1409 Commission consideration of the
complaint.

(b) The complainant shall have the
burden of establishing a prima facie

* * * * *

51.307 Duty to provide access on an
unbundled basis to network elements.

PART 20—COMMERCIAL MOBILE
RADIO SERVICES

8. The authority citation for part 20 is
revised to read as follows:

Authority: Secs. 4, 251–2, 303, and 332, 48
Stat. 1066, 1062, as amended; 47 U.S.C. 154,
251–4, 303, and 332 unless otherwise noted.

9. Section 20.11 is amended by
adding paragraph (c) to read as follows:

§ 20.11 Interconnection to facilities of local
exchange carriers.

* * * * *

(c) Local exchange carriers and
commercial mobile radio service
providers shall also comply with
applicable provisions of part 51 of this
chapter.

10. A new part 51 is added to read as
follows:

PART 51—INTERCONNECTION

Subpart A—General Information
Sec.
51.1 Basis and purpose.
51.3 Applicability to negotiated agreements.
51.5 Terms and definitions.

Subpart B—Telecommunications Carriers
51.100 General duty.

Subpart C—Obligations of All Local
Exchange Carriers
51.201 Resale.
51.203 Number portability.
51.219 Access to rights of way.
51.221 Reciprocal compensation.
51.223 Application of additional
requirements.

Subpart D—Additional Obligations of
Incumbent Local Exchange Carriers
51.301 Duty to negotiate.
51.303 Preexisting agreements.
51.305 Interconnection.
51.307 Duty to provide access on an
unbundled basis to network elements.
Subpart I—Procedures for Implementation of Section 252 of the Act

§ 51.801 Commission action upon a state commission's failure to act in response to a § 51.405 application for a declaratory ruling under section 252(e)(2) of the Act.

§ 51.803 Commission action under section 252(e)(2)(A) of the Act, a state commission's failure to act in response to an application for a declaratory ruling under section 252(e)(2) of the Act.

§ 51.805 The Commission's authority over the state commission's failure to act.

§ 51.807 Arbitration and mediation of disputes concerning a state commission's failure to act.

§ 51.809 Arbitration and mediation of disputes concerning a state commission's failure to act.


Subpart A—General Information

§ 51.51 Basis and purpose.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

§ 51.53 Applicability.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

§ 51.55 Application of access charges.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

Subpart F—Pricing of Elements

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

§ 51.405 Burden of proof.

§ 51.407 General rate structure standard.

§ 51.409 Determination of avoided retail costs.

§ 51.411 Forward-looking economic cost.

§ 51.413 Restrictions on resale.

§ 51.415 Application of access charges.

§ 51.417 Use of unbundled network elements.

§ 51.419 Combination of unbundled network elements.

§ 51.421 Standards for identifying network elements to be made available.

§ 51.423 Specific unbundling requirements.

§ 51.425 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

§ 51.427 Standards for physical collocation and virtual collocation.

Subpart G—Resale

§ 51.601 Scope of resale rules.

§ 51.603 Resale obligation of all local exchange carriers.

§ 51.605 Additional obligations of incumbent local exchange carriers.

§ 51.607 Wholesale pricing standard.

§ 51.609 Determination of avoided retail costs.

§ 51.611 Interim wholesale rates.

§ 51.613 Restrictions on resale.

§ 51.615 Withdrawal of services.

§ 51.617 Assessment of end user common line charge on resellers.

Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

§ 51.701 Scope of transport and termination pricing rules.

§ 51.703 Reciprocal compensation obligations of LECs.

§ 51.705 Incumbent LECs' rates for transport and termination.

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

§ 51.709 Rate structure for transport and termination.

§ 51.711 Symmetrical reciprocal compensation.

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

§ 51.715 Interim transport and termination pricing.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.

Subpart I—Procedures for Implementation of Section 252 of the Act

§ 51.801 Commission action upon a state commission's failure to act in response to a § 51.405 application for a declaratory ruling under section 252(e)(2) of the Act.

§ 51.803 Commission action under section 252(e)(2)(A) of the Act, a state commission's failure to act in response to an application for a declaratory ruling under section 252(e)(2) of the Act.

§ 51.805 The Commission's authority over the state commission's failure to act.

§ 51.807 Arbitration and mediation of disputes concerning a state commission's failure to act.

§ 51.809 Arbitration and mediation of disputes concerning a state commission's failure to act.


Subpart A—General Information

§ 51.51 Basis and purpose.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

§ 51.53 Applicability.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

§ 51.55 Application of access charges.

The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended.

Subpart F—Pricing of Elements

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

§ 51.405 Burden of proof.

§ 51.407 General rate structure standard.

§ 51.409 Determination of avoided retail costs.

§ 51.411 Forward-looking economic cost.

§ 51.413 Restrictions on resale.

§ 51.415 Application of access charges.

§ 51.417 Use of unbundled network elements.

§ 51.419 Combination of unbundled network elements.

§ 51.421 Standards for identifying network elements to be made available.

§ 51.423 Specific unbundling requirements.

§ 51.425 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

§ 51.427 Standards for physical collocation and virtual collocation.

Subpart G—Resale

§ 51.601 Scope of resale rules.

§ 51.603 Resale obligation of all local exchange carriers.

§ 51.605 Additional obligations of incumbent local exchange carriers.

§ 51.607 Wholesale pricing standard.

§ 51.609 Determination of avoided retail costs.

§ 51.611 Interim wholesale rates.

§ 51.613 Restrictions on resale.

§ 51.615 Withdrawal of services.

§ 51.617 Assessment of end user common line charge on resellers.

Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

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§ 51.709 Rate structure for transport and termination.

§ 51.711 Symmetrical reciprocal compensation.

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

§ 51.715 Interim transport and termination pricing.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.
services include, but are not limited to, busy line verification, emergency interrupt, and operator-assisted directory assistance services.

Physical collocation. "Physical collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) Place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) Enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) Obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements.

Meet point. A "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes the responsibility of the state commission, pursuant to section 252(e)(5) of the Act. This term shall also include any person or persons to whom the state commission has delegated its authority under section 251 and 252 of the Act.

State proceeding. A "state proceeding" is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to

population statistics of the Bureau of the Census; or

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) Provides telephone exchange service, including exchange access, to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

Service control point. A "service control point" is a computer database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call.

Service creation environment. A "service creation environment" is a computer containing generic call processing software that can be programmed to create new advanced intelligent network call processing services.

Signal transfer point. A "signal transfer point" is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks.

State commission. A "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes the responsibility of the state commission, pursuant to section 252(e)(5) of the Act. This term shall also include any person or persons to whom the state commission has delegated its authority under section 251 and 252 of the Act.

State proceeding. A "state proceeding" is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to
unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Telecommunications carriers. A "telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of the Act). A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. This definition includes CMRS providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private Mobile Radio Service providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

"Virtual collocation" or "virtual collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

1. Designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC’s premises, and dedicated to such telecommunications carrier’s use;
2. Use such equipment to interconnect with an incumbent LEC’s network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC’s unbundled network elements for the provision of a telecommunications service; and
3. Electronically monitor and control its communications channels terminating in such equipment.

Subpart B—Telecommunications Carriers

§51.100 General duty.
(a) Each telecommunications carrier has the duty:
1. To interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
2. To not install network features, functions, or capabilities that do not comply with the guidelines and standards as provided in the Commission’s rules or section 255 or 256 of the Act.

(b) A telecommunications carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Subpart C—Obligations of All Local Exchange Carriers

§51.201 Resale.
(1) The rules governing resale of services by an incumbent LEC are set forth in subpart G of this part.

§51.203 Number portability.
(1) The rules governing number portability are set forth in part 52, subpart C of this chapter.

§51.219 Access to rights of way.
(1) The rules governing access to rights of way are set forth in part 1, subpart J of this chapter.

§51.221 Reciprocal compensation.
(1) The rules governing reciprocal compensation are set forth in subpart H of this part.

§51.223 Application of additional requirements.
(1) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

(a) A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act.

Subpart D—Additional Obligations of Incumbent Local Exchange Carriers

§51.301 Duty to negotiate.
(a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.

(b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.

(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:
1. Demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act;
2. Demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law;
3. Refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules;
4. Conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;
5. Intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;
6. Intentionally obstructing or delaying negotiations or resolutions of disputes;
7. Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and
8. Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:
(1) Refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and
§51.303 Preexisting agreements.

(a) All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval pursuant to section 252(e) of the Act.

(b) Interconnection agreements negotiated before February 8, 1996, between Class A carriers, as defined by §32.11(a)(1) of this chapter, shall be filed by the parties with the appropriate state commission no later than June 30, 1997, or such earlier date as the state commission may require.

(c) If a state commission approves a preexisting agreement, it shall be made available to other parties in accordance with section 252(l) of the Act and §51.809 of this part. A state commission may reject a preexisting agreement on the grounds that it is inconsistent with the public interest, or for other reasons set forth in section 252(e)(2)(A) of the Act.

§51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC’s network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC’s network including, at a minimum:
   (i) The line-side of a local switch;
   (ii) The trunk-side of a local switch;
   (iii) The trunk interconnection points for a tandem switch;
   (iv) Central office cross-connect points;
   (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
   (vi) The points of access to unbundled network elements as described in §51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC’s network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) That, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission’s rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC’s network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove by evidence of the substantial similarity of network facilities that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

§51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission’s rules.

(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element’s features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

(d) An incumbent LEC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested network element separate from access to the facility or functionality of other network elements, for a separate charge.

§51.309 Use of unbundled network elements.

(a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

(b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time,
or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier’s purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

§51.311 Nondiscriminatory access to unbundled network elements.

(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.

(b) Exceeding, as provided in paragraph (c) of this section, the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier.

(d) Previous successful access to an unbundled network element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(e) Previous successful provision of access to an unbundled network element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

§51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

(c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC’s operations support systems.

§51.317 Standards for identifying network elements to be made available.

(a) In determining what network elements should be made available for purposes of section 251(c)(3) of the Act beyond those identified in § 51.319, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

(b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis, the state commission may decline to require unbundling of the network element only if:

(1) The state commission concludes that:

(i) The network element is proprietary, or contains proprietary information that will be revealed if the network element is provided on an unbundled basis; and

(ii) A requesting telecommunications carrier could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled network elements within the incumbent LEC’s network; or

(2) The state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC’s network.

§51.319 Specific unbundling requirements.

An incumbent LEC shall provide nondiscriminatory access in accordance
with § 51.311 and section 251(c)(3) of the Act to the following network elements on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(a) Local Loop. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises.

(b) Network Interface Device. The network interface device network element is defined as a cross-connect device used to connect loop facilities to inside wiring.

(2) An incumbent LEC shall permit a requesting telecommunications carrier to connect to its own local loops to the inside wiring of premises through the incumbent LEC's network interface device. The requesting telecommunications carrier shall establish this connection through an adjoining network interface device deployed by such telecommunications carrier.

(c) Switching Capability.

(1) Local Switching Capability.

(A) Line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribution frame and a switch line card;

(B) Trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and

(C) All features, functions, and capabilities of the switch, which include, but are not limited to:

(i) The basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as a telephone number, white page listing, and dial tone; and

(ii) All other features that the switch is capable of providing, including but not limited to custom calling, custom local area signaling service features, and Centrex, as well as any technically feasible custom routing functions provided by the switch.

(ii) An incumbent LEC shall transfer a customer's local service to a competing carrier within a time period no greater than the interval within which the incumbent LEC currently transfers end users between telecommunications carriers. If such transfer requires only a change in the incumbent LEC's software:

(2) Tandem Switching Capability. The tandem switching capability network element is defined as:

(i) Trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card;

(ii) The basic switching function of connecting trunks to trunks; and

(iii) The functions that are centralized in tandem switches (as distinguished from separate end-office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features.

(d) Interoffice Transmission Facilities.

(1) Interoffice transmission facilities are defined as incumbent LEC interoffice facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

(2) The incumbent LEC shall:

(i) Provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;

(ii) Provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;

(iii) Permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities; and

(iv) Permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to interexchange carriers.

(e) Signaling Networks and Call-Related Databases.

(1) Signaling Networks.

(i) Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(ii) An incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(iii) An incumbent LEC shall provide a requesting telecommunications carrier with its own switching facilities access to the incumbent LEC's signaling network for each of the requesting telecommunications carrier's switches.

(iv) An incumbent LEC is not required to unbundle those signaling links that connect service control points of switching transfer points or to permit a requesting telecommunications carrier to link its own signaling points directly to the incumbent LEC's switch or call-related databases;

(2) Call-Related Databases.

(i) Call-related databases are defined as databases, other than operations related databases, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service.

(ii) For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including, but not limited to, the Cross Connect Database, Toll Free Calling database, downstream number portability databases, and Advanced Intelligent Network databases, by means of physical access at the signaling transfer point linked to the unbundled database.

(iii) An incumbent LEC shall allow a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases;

(iv) An incumbent LEC shall allow a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier.

(v) For purposes of switch query and database response, an incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(iv) An incumbent LEC shall provide a requesting telecommunications carrier with its own switching facilities access to the incumbent LEC's signaling network for each of the requesting telecommunications carrier's switches.

(vi) An incumbent LEC is not required to unbundle those signaling links that connect service control points of switching transfer points or to permit a requesting telecommunications carrier to link its own signaling points directly to the incumbent LEC's switch or call-related databases;

(2) Call-Related Databases.

(i) Call-related databases are defined as databases, other than operations related databases, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service.

(ii) For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including, but not limited to, the Cross Connect Database, Toll Free Calling database, downstream number portability databases, and Advanced Intelligent Network databases, by means of physical access at the signaling transfer point linked to the unbundled database.

(iii) An incumbent LEC shall allow a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier.

(iv) An incumbent LEC shall allow a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier.

(v) An incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(vi) An incumbent LEC is not required to unbundle those signaling links that connect service control points of switching transfer points or to permit a requesting telecommunications carrier to link its own signaling points directly to the incumbent LEC's switch or call-related databases.

(vii) An incumbent LEC shall allow a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier.

(viii) An incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.
vi. An incumbent LEC shall provide a requesting telecommunications carrier access to call-related databases in a manner that complies with section 222 of the Act;

(3) Service Management Systems.

(i) A service management system is defined as a computer database or system not part of the public switched network that, among other things:

(A) Interconnects to the service control point and sends to that service control point the information and call processing instructions needed for a network switch to process and complete a telephone call; and

(B) Provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call.

(ii) An incumbent LEC shall provide a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the particular incumbent LEC service management system.

(iii) An incumbent LEC shall provide a requesting telecommunications carrier the same access to design, create, test, and deploy Advanced Intelligent Network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(iv) A state commission shall consider whether mechanisms mediating access to an Advanced Intelligent Network service management systems and service creation environments are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(v) An incumbent LEC shall provide a requesting telecommunications carrier access to service management systems in a manner that complies with section 222 of the Act.

(f) Operations Support Systems Functions.

(1) Operations support systems functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.

(2) An incumbent LEC that does not currently comply with this requirement shall do so as expeditiously as possible, but, in any event, no later than January 1, 1997.

(g) Operator Services and Directory Assistance. An incumbent LEC shall provide access to operator service and directory assistance facilities where technically feasible.

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on an incumbent LEC’s network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC’s network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC’s premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations.

(f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission’s other requirements.

§ 51.323 Standards for physical collocation and virtual collocation.

(a) An incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers.

(b) An incumbent LEC shall provide the collocation of any type of equipment used for interconnection or access to unbundled network elements.

When an incumbent LEC subjects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements.

Equipment used for interconnection and access to unbundled network elements includes, but is not limited to:

(1) Transmission equipment including, but not limited to, optical terminating equipment and multiplexers; and

(2) Equipment being collocated to terminate basic transmission facilities pursuant to §§ 64.1401 and 64.1402 of this chapter as of August 1, 1996.

(c) Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services.

(d) When an incumbent LEC provides physical collocation, virtual collocation, or both, the incumbent LEC shall:

(1) Provide an interconnection point or points, physically accessible by both the incumbent LEC and the collocating telecommunications carrier, at which the fiber optic cable carrying an interconnector’s circuits can enter the incumbent LEC’s premises, provided that the incumbent LEC shall designate interconnection points as close as reasonably possible to its premises;

(2) Provide at least two such interconnection points at each incumbent LEC premises at which there are at least two entry points for the incumbent LEC’s cable facilities, and at which space is available for new
facilities in at least two of those entry points;
(3) Permit interconnection of copper or coaxial cable if such interconnection is first approved by the state commission; and
(4) Permit physical collocation of microwave transmission facilities except where such collocation is not practical for technical reasons or because of space limitations, in which case virtual collocation of such facilities is required where technically feasible.
(e) When providing virtual collocation, an incumbent LEC shall, at a minimum, install, maintain, and repair collocated equipment identified in paragraph (b) of this section within the same time periods and with failure rates that are no greater than those that apply to the performance of similar functions for comparable equipment of the incumbent LEC itself.
(f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:
(1) An incumbent LEC shall make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted;
(2) To the extent possible, an incumbent LEC shall make contiguous space available within or on its premises to requesting telecommunications carriers that seek to expand their existing collocation space;
(3) When planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LEC shall take into account projected demand for collocation of equipment;
(4) An incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use;
(5) An incumbent LEC shall relinquish any space held for future use before denying a request for virtual collocation on the grounds of space limitations, unless the incumbent LEC proves to the state commission that virtual collocation at that point is not technically feasible; and
(6) An incumbent LEC may impose reasonable security arrangements on the warehousing of unused space by collocating telecommunications carriers, provided, however, that the incumbent LEC shall not set maximum space limitations applicable to such carriers unless the incumbent LEC proves to the state commission that space constraints make such restrictions necessary.
(g) An incumbent LEC shall permit collocating telecommunications carriers to collocate equipment and connect such equipment to unbundled network transmission elements obtained from the incumbent LEC, and shall not require such telecommunications carriers to bring their own transmission facilities to the incumbent LEC’s premises in which they seek to collocate equipment.
(h) An incumbent LEC shall permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC’s premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises provided that the collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC’s unbundled network elements.
(i) An incumbent LEC shall provide the connection between the equipment in the collocated spaces of two or more telecommunications carriers, unless the incumbent LEC permits one or more of the collocating parties to provide this connection for themselves; and
(2) An incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC’s premises outside of the actual physical collocation space.
(i) An incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier’s space from the incumbent LEC’s facilities.
(j) An incumbent LEC shall permit a collocating telecommunications carrier to subcontract the construction of physical collocation arrangements with contractors approved by the incumbent LEC, provided, however, that the incumbent LEC shall not unreasonably withhold approval of contractors. Approval by an incumbent LEC shall be based on the same criteria it uses in approving contractors for its own purposes.
§ 51.405 Burden of proof.
(a) Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.
(b) A LEC with fewer than two percent of the nation’s subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.
(c) In order to justify continued exemption under section 251(f)(1) of the Act once a bona fide request has been made, an incumbent LEC must offer evidence that the application of the requirements of section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.
(d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.
interconnection, and methods of obtaining interconnection and access to unbundled elements.

§ 51.503 General pricing standard.
(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.
(b) An incumbent LEC’s rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission—
(1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511; or
(2) Consistent with the proxy ceilings and ranges set forth in § 51.513.
(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

§ 51.505 Forward-looking economic cost.
(a) In general. The forward-looking economic cost of an element equals the sum of:
(1) The total element long-run incremental cost of the element, as described in paragraph (b); and
(2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).
(b) Total element long-run incremental cost. The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC’s provision of other elements.
(1) Efficient network configuration. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC’s wire centers.
(2) Forward-looking cost of capital. The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.
(3) Depreciation rates. The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.
(c) Reasonable allocation of forward-looking common costs.

(1) Forward-looking common costs. Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.
(2) Reasonable allocation.
(i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.
(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC’s total network, so as to provide all the elements and services offered.
(d) Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:
(1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC’s books of accounts;
(2) Retail costs. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609;
(3) Opportunity costs. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and
(4) Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.
(e) Cost study requirements. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 in a state proceeding that meets the requirements of paragraph (e)(2) of this section.
(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

§ 51.507 General rate structure standard.
(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.
(b) The costs of dedicated facilities shall be recovered through flat-rated charges.
(c) The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users.
(d) Recurring costs shall be recovered through recurring charges, unless an incumbent LEC proves to a state commission that such recurring costs are de minimis. Recurring charges shall be considered de minimis when the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.
(e) State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.
(f) State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences.
(1) To establish geographically-deaveraged rates, state commissions may use existing density-related zone pricing plans described in § 69.123 of this chapter, or other such cost-related
zone plans established pursuant to state law.
(2) In states not using such existing plans, state commissions must create a minimum of three cost-related rate zones.

§ 51.509 Rate structure standards for specific elements.

In addition to the general rules set forth in § 51.507, rates for specific elements shall comply with the following rate structure rules.

(a) Local loops. Loop costs shall be recovered through flat-rated charges.

(b) Local switching. Local switching costs shall be recovered through a combination of a flat-rated charge for line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports.

(c) Dedicated transmission links. Dedicated transmission link costs shall be recovered through flat-rated charges.

(d) Shared transmission facilities between tandem switches and end offices. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(e) Tandem switching. Tandem switching costs may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(f) Signaling and call-related database services. Signaling and call-related database service costs shall be usage-sensitive, based on either the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, the cost of which shall be recovered through flat-rated charges.

(g) Collocation. Collocation costs shall be recovered consistent with the rate structure policies established in the Expanded Interconnection proceeding, CC Docket No. 91-141.

§ 51.511 Forward-looking economic cost per unit.

(a) The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in § 51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.

(b) With respect to elements that an incumbent LEC offers on a flat-rate basis, the number of units is defined as the discrete number of elements (e.g., local loops or local switch ports) that the incumbent LEC uses or provides.

(2) With respect to elements that an incumbent LEC offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (e.g., minutes of use or call-related database queries) of the element.

§ 51.513 Proxies for forward-looking economic cost.

(a) A state commission may determine that the cost information available to it with respect to one or more elements does not support the adoption of a rate or rates that are consistent with the requirements set forth in §§ 51.505 and 51.511. In that event, the state commission may establish a rate for an element that is consistent with the proxies specified in this section, provided that:

(1) Any rate established through use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511, and has concluded that such study is a reasonable basis for establishing element rates; and

(2) The state commission sets forth in writing a reasonable basis for its selection of a particular rate for the element.

(b) The constraints on proxy-based rates described in this section apply on a geographically averaged basis. For purposes of determining whether geographically deaveraged rates for elements comply with the provisions of this section, a geographically averaged proxy-based rate shall be computed based on the weighted average of the actual, geographically deaveraged rates that apply in separate geographic areas in a state.

(c) Proxies for specific elements.

(1) Local loops. For each state listed below, the proxy-based monthly rate for unbundled local loops, on a statewide weighted average basis, shall be no greater than the figures listed in the table below. (The Commission has not established a default proxy ceiling for loop rates in Alaska.)

<table>
<thead>
<tr>
<th>State</th>
<th>Proxy ceiling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$17.25</td>
</tr>
<tr>
<td>Arizona</td>
<td>12.85</td>
</tr>
<tr>
<td>Arkansas</td>
<td>21.18</td>
</tr>
<tr>
<td>California</td>
<td>11.10</td>
</tr>
<tr>
<td>Colorado</td>
<td>14.97</td>
</tr>
</tbody>
</table>

(2) Local switching. The blended proxy-based rate for unbundled local switching shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, where a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute, that rate may be retained pending completion of a forward-looking economic cost study. The blended rate for unbundled local switching shall be calculated as the sum of the following:

(i) The applicable flat-rated charges for subelements associated with unbundled local switching, such as line ports, divided by the projected average minutes of use per flat-rated subelement; and

(ii) The applicable usage-sensitive charges for subelements associated with
unbundled local switching, such as switching and trunk ports. A weighted average of such charges shall be used in appropriate circumstances, such as when peak and off-peak charges are used.

(3) Dedicated transmission links. The proxy-based rates for dedicated transmission links shall be no greater than the incumbent LEC’s tariffed interstate charges for comparable entrance facilities or direct-trunked transport offerings, as described in §§ 69.110 and 69.112 of this chapter.

(4) Shared transmission facilities between tandem switches and end offices. The proxy-based rates for shared transmission facilities between tandem switches and end offices shall be no greater than the weighted per-minute equivalent of DS1 and DS3 interoffice dedicated transmission link rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using a loading factor of 9,000 minutes per month per voice-grade circuit, as described in §69.112 of this chapter.

(5) Tandem switching. The proxy-based rate for tandem switching shall be no greater than 0.15 cents ($0.0015) per minute of use.

(6) Collocation. To the extent that the incumbent LEC offers a comparable form of collocation, as described in §§ 64.1401 and 69.121 of this chapter, the proxy-based rates for collocation shall be no greater than the effective rates for equivalent services in the interstate expanded interconnection tariff. To the extent that the incumbent LEC does not offer a comparable form of collocation in its interstate expanded interconnection tariffs, a state commission may, in its discretion, establish a proxy-based rate, provided that the state commission sets forth in writing a reasonable basis for concluding that its rate would approximate the result of a forward-looking economic cost study, as described in §51.505.

(7) Signaling, call-related database, and other elements. To the extent that the incumbent LEC has established rates for offerings comparable to other elements in its interstate access tariffs, and has provided cost support for those rates pursuant to §61.49(h) of this chapter, the proxy-based rates for those elements shall be no greater than the effective rates for equivalent services in the interstate access tariffs. In other cases, the proxy-based rate shall be no greater than a rate based on direct costs plus a reasonable allocation of overhead loadings, pursuant to §61.49(h) of this chapter.

§51.515 Application of access charges.

(a) Neither the interstate access charges described in part 69 of this chapter nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services.

(b) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in §51.319(c)(1), for interstate minutes of use traversing such unbundled local switching elements, the carrier common line charge described in §69.105 of this chapter, and a charge equal to 75% of the interconnection charge described in §69.124 of this chapter, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;
(2) The later of the effective date of a final Commission decision in CC Docket No. 96–45, Federal-State Joint Board on Universal Service, or the effective date of a final Commission decision in a proceeding to consider reform of the interstate access charges described in part 69; or
(3) With respect to a Bell operating company only, the date on which that company is authorized to offer interLATA service in a state pursuant to section 271 of the Act. The effective date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(c) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in §51.319(c)(1), for intrastate toll minutes of use traversing such unbundled local switching elements, intrastate access charges comparable to those listed in paragraph (b) and any explicit intrastate universal service mechanism based on access charges, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;
(2) The effective date of a state commission that an incumbent LEC may not assess such charges; or
(3) With respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in the state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer in-region interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

Subpart G—Resale

§51.601 Scope of resale rules.

The provisions of this subpart govern the terms and conditions under which LECs offer telecommunications services to requesting telecommunications carriers for resale.

§51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

§51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates that are, at the election of the state commission—

(1) Consistent with the avoided cost methodology described in §§51.607 and 51.609; or
(2) Interim wholesale rates, pursuant to §51.611.

(b) Except as provided in §51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

§51.607 Wholesale pricing standard.

(a) The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC’s existing retail rate for the telecommunications services, less avoided retail costs, as described in §51.609.

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale.
§ 51.609 Determination of avoided retail costs.

(a) Except as provided in § 51.611, the amount of avoided retail costs shall be determined on the basis of a cost study that complies with the requirements of this section.

(b) Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier.

(c) For incumbent LECs that are designated as Class A companies under § 32.11 of this chapter, except as provided in paragraph (d) of this section, avoided retail costs shall:

(1) Include, as direct costs, the costs recorded in USOA accounts 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion services), 6622 (number services), and 6623 (customer services) (§§ 32.6611, 32.6612, 32.6613, 32.6621, 32.6622, and 32.6623 of this chapter);

(2) Include, as indirect costs, a portion of the costs recorded in USOA accounts 6121–6124 (general support expenses), 6711, 6712, 6721–6728 (corporate operations expenses), and 5301 (telecommunications uncollectibles) (§§ 32.6121–32.6124, 32.6711, 32.6712, 32.6721–32.6728, and 32.5301 of this chapter); and

(3) Not include plant-specific expenses and plant non-specific expenses, other than general support expenses (§§ 32.6110–32.6116, 32.6210–32.6565 of this chapter).

(d) Costs included in accounts 6611–6613 and 6621–6623 described in paragraph (c) of this section (§ 32.6611–32.6613 and 32.6621–32.6623 of this chapter) may be included in wholesale rates only to the extent that the incumbent LEC proves to the state commission that specific costs in these accounts will be incurred and are not avoidable with respect to services sold at wholesale, or that specific costs in these accounts are not included in the retail prices of resold services. Costs included in accounts 6110–6116 and 6210–6565 described in paragraph (c) of this section (§§ 32.6110–32.6116, 32.6210–32.6565 of this chapter) may be treated as avoided retail costs, and excluded from wholesale rates, only to the extent that a party proves to a state commission that specific costs in these accounts can reasonably be avoided when an incumbent LEC provides a telecommunications service for resale to a requesting carrier.

(e) For incumbent LECs that are designated as Class B companies under § 32.11 of this chapter and that record information in summary accounts instead of specific USOA accounts, the entire relevant summary accounts may be used in lieu of the specific USOA accounts listed in paragraphs (c) and (d) of this section.

§ 51.611 Interim wholesale rates.

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the methodology prescribed in § 51.609, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC’s existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with § 51.609.

§ 51.613 Restrictions on resale.

(a) Notwithstanding § 51.605(b), the following types of restrictions on resale may be imposed:

(1) Cross-class selling. A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

(c) Branding. Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC’s brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier’s brand name or other identifying information.

§ 51.615 Withdrawal of services.

When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased such a service in the past.

§ 51.617 Assessment of end user common line charge on resellers.

(a) Notwithstanding the provision in § 69.104(a) of this chapter that the end user common line charge be assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69 of this chapter, other than the end user common line charge, upon reseller unbranding or rebranding carrier that use the incumbent LEC’s facilities to provide interstate or international services.
telecommunications services to the interexchange carriers' subscribers.

Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) Local telecommunications traffic. For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) Telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) Reciprocal compensation. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

§ 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;

(2) Default proxies, as provided in § 51.707; or

(3) A bill-and-keep arrangement, as provided in § 51.713.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to § 51.711.

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements of §§ 51.505 and 51.511. In that event, the state commission may establish rates for transport and termination of local telecommunications traffic, or for specific components included therein, that are consistent with the proxies specified in this section, provided that:

(1) Any rate established through use of such proxies is superseded once that state commission establishes rates for transport and termination pursuant to §§ 51.705(a)(1) or 51.705(a)(3); and

(2) The state commission sets forth in writing a reasonable basis for its selection of a particular proxy for transport and termination of local telecommunications traffic, or for specific components included within transport and termination.

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic on the basis of default proxies, such rates must meet the following requirements:

(1) Termination. The incumbent LEC's rates for the termination of local telecommunications traffic shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, if a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute for such calls, that rate may be retained pending completion of a forward-looking economic cost study.

(2) Transport. The incumbent LEC's rates for the transport of local telecommunications traffic, under this section, shall comply with the proxies described in § 51.513(d) (3), (4), and (5) that apply to the analogous unbundled network elements used in transporting a call to the end office that serves the called party.

§ 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost-based pricing methodology described in §§ 51.505 and 51.511, that the forward-looking costs for a network
section, an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of local telecommunications traffic at symmetrical rates.

(1) In a state in which the state commission has established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall use these state-determined rates as interim transport and termination rates.

(2) In a state in which the state commission has established transport and termination rates consistent with the default price ranges and ceilings described in § 51.707, an incumbent LEC shall use these state-determined rates as interim rates.

(3) In a state in which the state commission has neither established transport and termination rates based on forward-looking economic cost studies nor established transport and termination rates consistent with the default price ranges and ceilings described in § 51.707, an incumbent LEC may set interim transport and termination rates at default ceilings for on-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport (as described in § 51.707(b)(2)).

(c) An interim arrangement shall cease to be in effect when one of the following occurs with respect to rates for transport and termination of local telecommunications traffic subject to the interim arrangement:

(1) A voluntary agreement has been negotiated and approved by a state commission;

(2) An agreement has been arbitrated and approved by a state commission; or

(3) The period for requesting arbitration has passed with no such request.

(d) If the rates for transport and termination of local telecommunications traffic in an interim arrangement differ from the rates established by a state commission pursuant to § 51.705, the state commission shall require carriers to make adjustments to past compensation. Such adjustments to past compensation shall allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equalled the rates later established by the state commission pursuant to § 51.705.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.

(a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.

(b) From the date that a CMRS provider makes a request under paragraph (a) of this section until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

Subpart I—Procedures for Implementation of Section 252 of the Act

§ 51.801 Commission action upon a state commission’s failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding on another matter under section 252 of the Act, the Commission shall issue an order preempting the state commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

(c) A state shall not be deemed to have failed to act for purposes of section 252(e)(5) of the Act if an agreement is...
deemed approved under section 252(e)(4) of the Act.

§ 51.803 Procedures for Commission notification of a state commission’s failure to act.

(a) Any party seeking preemption of a state commission’s jurisdiction, based on the state commission’s failure to act, shall notify the Commission in accordance with the following procedures:

(1) Such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the state commission has failed to act;

(2) Such party shall ensure that the state commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (a)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) Within fifteen days from the date of service of the petition required in paragraph (a)(1) of this section, the applicable state commission and parties to the proceeding may file with the Commission a response to the petition.

(b) The party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.

(c) The Commission, pursuant to section 252(e)(5) of the Act, may take notice upon its own motion that a state commission has failed to act. In such a case, the Commission shall issue a public notice that the Commission has taken notice of a state commission’s failure to act. The applicable state commission and the parties to a proceeding or matter in which the Commission has taken notice of a state commission’s failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter.

(d) The Commission shall issue an order determining whether it is required to preempt the state commission’s jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (a) of this section or taking notice under paragraph (c) of this section of a state commission’s failure to carry out its responsibilities under section 252 of the Act.

§ 51.805 The Commission’s authority over proceedings and matters.

(a) If the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, the Commission shall retain jurisdiction over such proceeding or matter. At a minimum, the Commission shall approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration for which the Commission, pursuant to section 252(e)(5) of the Act, has assumed the state commission’s responsibilities.

(b) Agreements reached pursuant to mediation or arbitration by the Commission pursuant to section 252(e)(5) of the Act are not required to be submitted to the state commission for approval or rejection.

§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

(a) The rules established in this section shall apply only to instances in which the Commission assumes jurisdiction under section 252(e)(5) of the Act.

(b) When the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, it shall not be bound by state laws and standards that would have applied to the state commission in such proceeding or matter.

(c) In resolving, by arbitration under section 252(b) of the Act, any open issues and in imposing conditions upon the parties to the agreement, the Commission shall:

(1) Ensure that such resolution and conditions meet the requirements of section 251 of the Act, including the rules prescribed by the Commission pursuant to that section;

(2) Establish any rates for interconnection, services, or network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section;

(3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) An arbitrator, acting pursuant to the Commission’s authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(1) At the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.

(2) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit subsequent final offers following such negotiations.

(3) To provide an opportunity for final post-offer negotiations, the arbitrator will not issue a decision for at least fifteen days after submission to the arbitrator of the final offers by the parties.

(e) Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act, including the rules prescribed by the Commission pursuant to that section.

(f) Each final offer shall:

(1) Meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section;

(2) Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and

(3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

(g) Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and any requesting parties.

(h) Absent mutual consent of the parties to change any terms, the arbitrator may submit a result to one or more parties if the arbitrator fails to comply with the requirements of this section, the arbitrator shall have discretion to adopt a result that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection agreement or arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.
incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

11. The authority citation for Part 90 is revised to read as follows:

Authority: Secs. 4, 251–2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251–2, 303, 309 and 332, unless otherwise noted.

12. Section 90.5 is amended by redesignating paragraphs (k) and (l) as paragraphs (l) and (m), and adding new paragraph (k) to read as follows:

§ 90.5 Other applicable rule parts.

(k) Part 51 contains rules relating to interconnection.

This Amendment A will not be published in the Code of Federal Regulations.

Attachment A

List of Commenters in CC Docket No. 96–98

360° Communications Company (360 Communications)
Ad Hoc Coalition of Corporate Telecommunications Managers
Ad Hoc Telecommunications Users Committee
AirTouch Communications, Inc. (AirTouch)
Alabama Public Service Commission (Alabama Commission)
Alaska Telephone Association (Alaska Tel. Ass'n)
Alaska Public Utilities Commission (Alaska Commission)
Alliance for Public Technology
Allied Association Partners, LP & Geld Information Systems (Allied Ass'n)
ALLTEL Telephone Services Corporation (ALLTEL)
American Communications Services, Inc. (ACSI)
American Foundation for the Blind
American Mobile Telecommunications Association, Inc. (American Mobile Telecomm. Ass'n)
American Network Exchange, Inc. & U.S. Long Distance, Inc. (American Network Exchange)
American Personal Communications
American Petroleum Institute
American Public Communications Council
American Public Power Association (APPA)
America's Carriers Telecommunication Association (ACTA)
Ameritech
Anchorage Telephone Utility (Anchorage Tel. Utility)
Arch Communications Group, Inc. (Arch)
Arizona Corporation Commission (Arizona Commission)
Association for Study of Afro-American Life and History, Inc. (ASALH)
Association for Local Telecommunications Services (ALT5)
Association of Telecommunications Services International
AT&T Corp. (AT&T)
Attorneys General of Connecticut, Delaware, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, North Dakota, Pennsylvania, West Virginia and Wisconsin (Attorneys General)
Bay Springs Telephone Co., Crockett Telephone Co., National Telephone Company of Alabama, Peoples Telephone Company, Roanoke Telephone Co. & West Tennessee Telephone Company (Bay Springs, et al.)
Black Data Processing Associates
Bell Atlantic
Bell Atlantic Telecommunications Corporation (Bell Atlantic)
Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic NYNEX Mobile)
BellSouth Corporation, Bell Enterprises, Inc., BellSouth Telecommunications, Inc. (BellSouth)
Bogue, Kansas
Buckeye Cablevision, Inc. (Buckeye Cablevision)
Cable & Wireless, Inc. (Cable & Wireless)
Century Link
Centennial Cellular Corp.
Chrysler Minority Dealers Association
Cincinnati Bell Telephone Company (Cincinnati Bell)
Citizens Utilities Company (Citizens Utilities)
Classic Telephone, Inc. (Classic Tel.)
Colorado Independent Telephone Association (Colorado Independent Tel. Ass'n)
Colorado Public Utilities Commission (Colorado Commission)
COMCAV, Corp. (COMAV)
Consumer Project on Technology on Competition & Unbundling (Consumer Project)
Continental Cablevision, Inc. (Continental)
Cox Communications, Inc. (Cox)
Defense, Secretary of Defense, Secretary of DeSoto County, Mississippi Economic Development Council
District of Columbia Public Service Commission (District of Columbia Commission)
Economides, Nicholas N. Economides
Ericsson Corporation, The (Ericsson)
Excel Telecommunications, Inc. (Excel)
Florida Public Service Commission (Florida Commission)
Fred Williamson & Associates, Inc. (F. Williamson)
Frontier Corporation (Frontier)
General Communication, Inc. (GCI)
General Services Administration/Department of Defense (GSA/DOD)
Georgia Public Service Commission (Georgia Commission)
Greater Washington Urban League
GST Telecom, Inc. (GST)
GTE Service Corporation (GTE)
Guam Telephone Authority
GVNW Inc./Management (GVNW)
Hart Engineers/Robert A. Hart, IV (Hart Engineers)
Hawaii Public Utilities Commission (Hawaii Commission)
Home Telephone Company, Inc. (Home Tel.)
Hyperion Telecommunications, Inc. (Hyperion)
Idaho Public Utilities Commission (Idaho Commission)
Illinois Commerce Commission (Illinois Commission)
Illinois Independent Telephone Association (Illinois Ind. Tel. Ass'n)
Independent Cable & Telecommunications Association (Ind. Cable & Telecom. Ass'n)
Independent Data Communications Manufacturers Association (IDCMA)
Indiana Utility Regulatory Commission Staff (Indiana Commission Staff)
Information Technology Industry Council (ITIC)
Intelsat Communications (Intelsat)
Intermedia Communications, Inc. (Intermedia)
International Communications Association (Intl. Comm. Ass'n)
Iowa Utilities Board (Iowa Commission)
John Staurulakis, Inc. (John Staurulakis)
Joint Consumer Advocates (Joint Consumer Advocates)
Jones Intercable, Inc. (Jones Intercable)
Justice, U. S. Department of (Doj)
Kansas Corporation Commission (Kansas Commission)
| Koch, Richard N. (R. Koch) | Nebraska Rural Development Commission Network Reliability Council, Secretariat of Second (Network Reliability Council) | TCA, Inc. (TCA) |
| LDDS Worldcom (LDDS) | New Jersey Cable Telecommunications Association, South Carolina Cable Television Association & Texas Cable Telecommunications Association (New Jersey Cable Ass’n, et al.) | Telecommunications Carriers for Competition (TCC) |
| Lincoln Telephone & Telegraph Company (Lincoln Tel.) | New Jersey, Staff of Board of Public Utilities (New Jersey Commission Staff) | Telecommunications, Inc. (TCI) |
| Louisiana Public Service Commission (Louisiana Commission) | New York State Consumer Protection Board | Telecommunications Industry Association (TIA) |
| Lucent Technologies, Inc. (Lucent) | New York State Department of Public Service (New York Commission) | Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER) |
| Margaretville Telephone Co., Inc. (Margaretville Tel.) | Nextel Communications, Inc. (Nextel) | Telecommunications Resellers Association (Telemcomm. Resellers Ass’n) |
| Maryland Public Service Commission (Maryland Commission) | NEXTLINK Communications, L.L.C. (NEXTLINK) | Telefonica Larga Distancia de Puerto Rico, Inc. (TLD) |
| Massachusetts Assistive Technology Partnership Center World Institute on Disability, Alliance for Technology Access, Trace Research and Development Center, CPB/WGBH National Center for Accessible Media (Mass. Assistive Tech. Partnership, et al.) | North Carolina Utility Commission Public Staff (North Carolina Commission Staff) | Teleport Communications Group, Inc. (Teleport) |
| Massachusetts, Commonwealth of Department of Public Utilities (Mass. Commission) | North Dakota Public Service Commission (North Dakota Commission) | Texas Office of Public Utility Counsel (Texas Public Utility Counsel) |
| Matanuska Telephone Association, Inc. (Matanuska Tel.) | NYNEX Telephone Companies (NYNEX) | Texas Statewide Telephone Cooperative, Inc. |
| MCI | Ohio Public Utilities Commission (Ohio Commission) | Texas Telephone Association (Texas Tel. Ass’n) |
| Metromic, Inc. (Metromic) | Office of the Ohio Consumers’ Counsel (Ohio Consumers’ Counsel) | Time Warner Communications Holdings, Inc. (Time Warner) |
| MFS | Oklahoma Corporation Commission | Unicom, Inc. (Unicom) |
| Michigan Exchange Carriers Association (MECA) | Oklahoma Corporation Commission (Oklahoma Commission) | United Calling Network, Inc. (United Calling Network) |
| Michigan, Illinois, and Texas Communities, et al. | Omnipoint Corporation (Omnipoint) | United Cerebral Palsy Association |
| Michigan Public Service Commission Staff (Michigan Commission Staff) | Optel, Inc. (Optel) | USTN Services, Inc. (USTN) |
| Minnesota Independent Coalition (Minnesota Independent Coalition) | Oregon Public Utility Commission (Oregon Commission) | U.S. Network Corporation (U.S. Network) |
| Minnesota Public Utilities Commission (Minnesota Commission) | Pacific Telesis Group (PacTel) | U.S. West, Inc. (U S West) |
| Missouri Public Service Commission (Missouri Commission) | Paging Network, Inc. (PageNet) | Utah Division of Public Utilities |
| Missouri Public Service Commission, Harold Crumpton (Missouri Commissioner) | Pennsylvania Public Utility Commission (Pennsylvania Commission) | UTC |
State Proxy Ceilings for the Local Loop

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This Attachment B will not be published in the Code of Federal Regulations.

ATTACHMENT B.—STATE PROXY CEILINGS FOR THE LOCAL LOOP

List of Commenters in CC Docket No. 91-346

[FR Doc. 96-21589 Filed 8-28-96; 8:45 am]

BILLING CODE 6712-01-P
Part III

State Justice Institute

Grant Guideline; Notice
STATE JUSTICE INSTITUTE

Grant Guideline

AGENCY: State Justice Institute.

ACTION: Proposed Grant Guideline.

SUMMARY: This Guideline sets forth the administrative, programmatic, and financial requirements attendant to Fiscal Year 1997 State Justice Institute grants, cooperative agreements, and contracts.

DATES: The Institute invites public comment on the Guideline until September 30, 1996.

ADDRESSES: Comments should be sent to the State Justice Institute, 1650 King St. (Suite 600), Alexandria, VA 22314, (703) 684-6100.

FOR FURTHER INFORMATION CONTACT: David I. Tevelin, Executive Director, or Richard Van Duizend, Deputy Director, State Justice Institute, 1650 King St. (Suite 600), Alexandria, VA 22314, (703) 684-6100.

SUPPLEMENTARY INFORMATION: Pursuant to the State Justice Institute Act of 1984, 42 U.S.C. 10701, et seq., as amended, the Institute is authorized to award grants, cooperative agreements, and contracts to State and local courts, nonprofit organizations, and others for the purpose of improving the quality of justice in the State courts of the United States.

Status of FY 1997 Appropriations

At the time of publication, the status of SJI’s fiscal year 1997 Congressional appropriation is uncertain. The House of Representatives voted no new appropriations for the Institute in FY 1997, believing that carryover funds and funds anticipated from interagency agreements would suffice to support the Institute’s operations in FY 1997. The Senate Appropriations Committee approved a $10 million appropriation for the Institute in FY 1997. A conference on the House and Senate bills is anticipated in September. The grant program proposed in this Guideline and the funding targets noted for specific programs are contingent on the availability of about $10 million to support the Institute and its programs in FY 1997. Publication of the Final Grant Guideline is scheduled for approximately October 11, 1996.

In addition, Congress is currently considering legislation reauthorizing the Institute. If the bill is enacted into law during this session of Congress, the Final Guideline will incorporate any relevant changes that affect the administration or scope of the grant program.

Types of Grants Available and Funding Schedules

The SJI grant program is designed to be responsive to the most important needs of the State courts. To meet the full range of the courts’ diverse needs, the Institute offers five different categories of grants. The types of grants available in FY 1997 and the funding cycles for each program are provided below:

Project Grants

These grants are awarded to support innovative education, research, demonstration, and technical assistance projects that can improve the administration of justice in State courts nationwide. Except for “Single Jurisdiction” grants awarded under section II.C.1. (see below), project grants are intended to support innovative projects of national significance. As provided in section V. of the Guideline, project grants may ordinarily not exceed $200,000 a year; however, grants in excess of $150,000 are likely to be rare, and awarded only to support projects likely to have a significant national impact.

Applicants must ordinarily submit a concept paper (see section VI.) and an application (see section VII.) in order to obtain a project grant. As indicated in Section V.I., the Board may make an “accelerated” grant of less than $40,000 on the basis of the concept paper alone when the need for the project is clear and little additional information about the operation of the project would be provided in an application.

The FY 1997 mailing deadline for project grant concept papers is November 27, 1996. Papers must be postmarked or bear other evidence of submission by that date. The Board of Directors will meet in late February, 1997 to invite formal applications based on the most promising concept papers. Applications will be due in May and awards will be approved by the Board in July.

Single Jurisdiction Project Grants

Section II.C. of the Guideline allocates funds for two types of “Single Jurisdiction” grants.

Section II.C.1. reserves up to $300,000 for Projects Addressing a Critical Need of a Single State or LocalJurisdiction. To receive a grant under this program, an applicant must demonstrate that: (1) the proposed project is essential to meeting a critical need of the jurisdiction and (2) the need cannot be met solely with State and local resources within the foreseeable future. Applicants are encouraged to submit proposals to replicate approaches or programs that have been evaluated as effective under an SJI grant. “Replication” grants are limited to no more than $30,000 each. Examples of projects that could be replicated are listed in Appendix [IV].

Section II.C.2. reserves up to $400,000 for Technical Assistance Grants. Under this program, a State or local court may receive a grant of up to $30,000 to engage outside experts to provide technical assistance to diagnose, develop, and implement a response to a jurisdiction’s problems.

Letters of application for a Technical Assistance grant may be submitted at any time. Applicants submitting letters between June 18 and September 30, 1996 will be notified of the Board’s decision by December 9, 1996; those submitting letters between October 1, 1996 and January 10, 1997 will be notified by March 28, 1997; those submitting letters between January 11, 1997 and March 14, 1997 will be notified by May 27, 1997; and those submitting letters between March 15, 1997 and June 13, 1997 will be notified by August 31, 1997. Subject to the availability of appropriations in FY 1998, applicants submitting letters between June 14 and September 30, 1997 will be notified of the Board’s decision by December 19, 1997.

Curriculum Adaptation Grants

A grant of up to $20,000 may be awarded to a State or local court to replicate or modify a model training program developed with SJI funds. The Guideline allocates up to $175,000 for these grants in FY 1997. See section II.B.2.b.ii.

Letters requesting Curriculum Adaptation grants may be submitted at any time during the fiscal year. However, in order to permit the Institute sufficient time to evaluate these proposals, letters must be submitted no later than 90 days before the projected date of the training program. See section II.B.2.b.ii.(c).

Scholarships

The Guideline allocates up to $200,000 of FY 1997 funds for scholarships to enable judges and court managers to attend out-of-State education and training programs. See section II.B.2.b.iii.

The Guideline establishes four deadlines for scholarship requests: October 1, 1996 for training programs beginning between January 1 and March 31, 1997; January 7, 1997 for programs beginning between April 1 and July 1, 1997; April 1, 1997 for programs beginning between July 1 and
September 30, 1997; and July 1, 1997 for programs beginning between October 1 and December 31, 1997.

Renewal Grants

There are two types of renewal grants available from SJI: Continuation grants (see sections III.G., V.C. and D., and IX.A.) and On-going support grants (see sections III.H., V.C. and D., and IX.B.). Continuation grants are intended to enhance the specific program or service begun during the initial grant period. On-going support grants may be awarded for up to a three-year period to support national-scope projects that provide the State courts with critically needed services, programs, or products.

The Guideline establishes a target for renewal grants of no more than $2 million, approximately 25% of the total amount projected to be available for grants in FY 1997. See section IX. Grantees should accordingly be aware that the award of a grant to support a project does not constitute a commitment to provide either continuation funding or on-going support.

An applicant for a continuation or on-going support grant must submit a letter notifying the Institute of its intent to seek such funding, no later than 120 days before the end of the current grant period. The Institute will then notify the applicant of the deadline for its renewal grant application. See section IX.

Special Interest Categories

The Guideline includes 10 Special Interest categories, i.e., those project areas that the Board has identified as being of particular importance to the State courts this year. The selection of these categories was based on the Board and staff's experience and observations over the past year, the recommendations received from judges, court managers, lawyers, members of the public, and other groups interested in the administration of justice, and the issues identified in recent years' concept papers and applications.

Section II.B. of the Proposed Guideline includes the following Special Interest categories:

1. Improving Public Confidence in the Courts; Education and Training for Judges and Other Key Court Personnel (this category includes Curriculum Adaptation grants and Scholarships for Judges and Key Court Personnel); Dispute Resolution and the Courts; Application of Technology; Court Management, Financing, and Planning; Resolution of Current Evidentiary Issues;

Substance Abuse and the Courts; Children and Families in Court; Improving the Court's Response to Domestic Violence and Other Gender-Related Crimes of Violence; and The Relationship Between State and Federal Courts.

Recommendations to Grant Writers

Over the past 10 years, Institute staff have reviewed approximately 3,000 concept papers and 1,500 applications. On the basis of those reviews, inquiries from applicants, and the views of the Board, the Institute offers the following recommendations to help potential applicants present workable, understandable proposals that can meet the funding criteria set forth in this Guideline.

The Institute suggests that applicants make certain that they address the questions and issues set forth below when preparing a concept paper or application. CONCEPT PAPERS AND APPLICATIONS SHOULD, HOWEVER, BE PRESENTED IN THE FORMATS SPECIFIED IN SECTIONS VI. AND VII. OF THE GUIDELINE, RESPECTIVELY.

1. What is the subject or problem you wish to address? Describe the subject or problem and how it affects the courts and the public. Discuss how your approach will improve the situation or advance the state of the art or knowledge, and explain why it is the most appropriate approach to take.

2. What do you want to do? Explain the goal(s) of the project in simple, straightforward terms. The goals should describe the intended consequences or expected overall effect of the proposed project (e.g., to enable judges to sentence drug-abusing offenders more effectively, or to dispose of civil cases within 24 months), rather than the tasks or activities to be conducted (e.g., hold three training sessions, or install a new computer system).

To the greatest extent possible, an applicant should avoid a specialized vocabulary that is not readily understood by the general public. Technical jargon does not enhance a paper.

3. How will you do it? Describe the methodology carefully so that what you propose to do and how you would do it are clear. All proposed tasks should be set forth so that a reviewer can see a logical progression of tasks and relate those tasks directly to the accomplishment of the project's goal(s).

When in doubt about whether to provide a more detailed explanation or to assume a particular level of knowledge or expertise on the part of the reviewers, provide the additional information. A description of project tasks also will help identify necessary budget items. All staff positions and project costs should relate directly to the tasks described. The Institute encourages applicants to attach letters of cooperation and support from the courts and related agencies that will be involved in or directly affected by the proposed project.

4. How will you know it works? Include an evaluation component that will determine whether the proposed training, procedure, service, or technology accomplished the objectives it was designed to meet. Concept papers and applications should present the criteria that will be used to evaluate the project's effectiveness, identify program elements which will require further modification, and describe how the evaluation will be conducted, when it will occur during the project period, who will conduct it, and what specific measures will be used. In most instances, the evaluation should be conducted by persons not connected with the implementation of the procedure, training, service, or technique, or the administration of the project.

The Institute has also prepared a more thorough list of recommendations to grant writers regarding the development of project evaluation plans. Those recommendations are available from the Institute upon request.

5. How will others find out about it? Include a plan to disseminate the results of the training, research, or demonstration beyond the jurisdictions and individuals directly affected by the project. The plan should identify the specific methods which will be used to inform the field about the project, such as the publication of law review or journal articles, or the distribution of key materials. A statement that a report or research findings "will be made available to" the field is not sufficient. The specific means of distribution or dissemination as well as the types of recipients should be identified. Reproduction and dissemination costs are allowable budget items.

6. What are the specific costs involved? The budget in both concept papers and applications should be presented clearly. Major budget categories such as personnel, benefits, travel, supplies, equipment, and indirect costs should be identified separately. The components of "Other" or "Miscellaneous" items should be...
specified in the application budget narrative, and should not include set-asides for undefined contingencies.

7. What, if any, match is being offered? Courts and other units of State and local government (not including publicly-supported institutions of higher education) are required by the State Justice Institute Act to contribute a match (cash, non-cash, or both) of not less than 50 percent of the grant funds requested from the Institute. All other applicants also are encouraged to provide a matching contribution to assist in meeting the costs of a project.

The match requirement works as follows: If, for example, the total cost of a project is anticipated to be $150,000, a State or local court or executive branch agency may request up to $75,000 (50% of the $150,000 requested from SJI) be provided as match.

Cash match includes funds directly contributed to the project by the applicant, or by other public or private sources. It does not include income generated from tuition fees or the sale of project products. Non-cash match refers to in-kind contributions by the applicant, or other public or private sources. This includes, for example, the monetary value of time contributed by existing personnel or members of an advisory committee (but not the time spent by participants in an educational program attending program sessions).

When match is offered, the nature of the match (cash or in-kind) should be explained and, at the application stage, the tasks and line items for which costs will be covered wholly or in part by match should be specified.

8. Which of the two budget forms should be used? Section VII.A.3. of the SJI Grant Guideline encourages use of the spreadsheet format of Form C1 if the application requests $100,000 or more. Form C1 also works well for projects with discrete tasks, regardless of the dollar value of the project. Form C, the tabular format, is preferred for projects lacking a number of discrete tasks, or for projects requiring less than $100,000 of Institute funding. Generally, use the form that best lends itself to representing most accurately the budget estimates for the project.

9. How much detail should be included in the budget narrative? The budget narrative of an application should provide the basis for computing all project-related costs, as indicated in section VII.D. of the SJI Grant Guideline. To avoid shortcomings of application budget narratives, include the following information:

- Personnel estimates that accurately provide the amount of time to be spent by personnel involved with the project and the total associated costs, including current salaries for the designated personnel (e.g., Project Director, 50% for one year, annual salary of $50,000=$25,000). If salary costs are computed using an hourly or daily rate, the annual salary and number of hours or days in a work-year should be shown.
- Estimates for supplies and expenses supported by a complete description of the supplies to be used, nature and extent of printing to be done, anticipated telephone charges, and other common expenditures, with the basis for computing the estimates included (e.g., 100 reports=75 pages each x.05/page=$375.00). Supply and expense estimates offered simply as “based on experience” are not sufficient.

In order to expedite Institute review of the budget, make a final comparison of the amounts listed in the budget narrative with those listed on the budget form. In the rush to complete all parts of the application on time, there may be many last-minute changes; unfortunately, when there are discrepancies between the budget narrative and the budget form or the amount listed on the application cover sheet, it is not possible for the Institute to verify the amount of the request. A final check of the numbers on the form against those in the narrative will preclude such confusion. The Institute will provide an illustrative budget narrative and budget form upon request.

10. What travel regulations apply to the budget estimates?

Transportation costs and per diem rates must comply with the policies of the applicant organization, and a copy of the applicant's travel policy should be submitted as an appendix to the application. If the applicant does not have a travel policy established in writing, then travel rates must be consistent with those established by the Institute or the Federal Government (a copy of the Institute's travel policy is available upon request). The budget narrative should state which regulations are in force for the project.

The budget narrative should also include the estimated fare, the number of persons traveling, the number of trips to be taken, and the length of stay. The estimated costs of travel, lodging, ground transportation, and other subsistence should be listed and explained separately. It is preferable for the budget to be based on the actual costs of travel and from the project or region of origin. If the points of origin or destination are not known at the time the budget is prepared, an average airfare may be used to estimate the travel costs. For example, if it is anticipated that a project advisory committee will include members from around the country, a reasonable airfare from a central point to the meeting site or the average of airfares from each coast to the meeting site may be used.

Applicants should arrange travel so as to be able to take advantage of advance purchase price discounts whenever possible.

13. What meeting costs may be covered with grant funds? SJI grant funds may cover the reasonable cost of meeting rooms, necessary audio-visual equipment, meeting supplies, and working meals. However, they cannot be used to reimburse the cost of coffee or other types of refreshments, or for alcoholic beverages.

14. Does the budget truly reflect all costs required to complete the project? After preparing the program narrative portion of the application, applicants may find it helpful to list all the major tasks or activities required by the proposed project, including the preparation of products, and note the individual expenses, including personnel time, related to each. This will help to ensure that, for all tasks described in the application (e.g., development of a videotape, research site visits, distribution of a final report), the related costs appear in the budget and are explained correctly in the budget narrative.

Recommendations To Grantees

The Institute's staff works with grantees to help assure the smooth operation of the project and compliance with the Guideline. On the basis of monitoring more than 1,100 grants, the Institute staff offers the following suggestions to aid grantees in meeting the administrative and substantive requirements of their grants.

1. After the grant has been awarded, when are the first quarterly reports due? Quarterly Progress Reports and Financial Status Reports must be submitted within 30 days after the end of every calendar quarter—i.e., no later than January 30, April 30, July 30, and October 30—regardless of the project's start date. The reporting periods covered by each quarterly report end 30 days before the respective deadline for the report. When an award period begins December 1, for example, the first Quarterly Progress Report describing project activities between December 1 and December 31 will be due on January 30. A Financial Status Report should be submitted even if funds have not been obligated or expended.
By documenting what has happened over the past three months, Quarterly Progress Reports provide an opportunity for project staff and Institute staff to resolve any questions before they become problems, and make any necessary changes in the project time schedule, budget allocations, etc. The Quarterly Project Report should describe project activities, their relationship to the approved timeline, and any problems encountered and how they were resolved, and outline the tasks scheduled for the coming quarter. It is helpful to attach copies of relevant memos, draft products, or other requested information. An original and one copy of a Quarterly Progress Report and attachments should be submitted to the Institute.

Additional Quarterly Progress Report or Financial Status Report forms may be obtained from the grantee's Program Manager at SJI, or photocopies may be made from the supply received with the award.

1. Do procedures for submitting requests for reimbursement differ for renewal grants? Recipients of a continuation or on-going support grant are required to submit quarterly progress and financial status reports on the same schedule and with the same information as recipients of a grant for a single new project.

A continuation grant and each yearly grant under an on-going support award should be considered as a separate phase of the project. The reports should be numbered on a grant rather than project basis. Thus, the first quarterly report filed under a continuation grant or a yearly increment of an on-going support award should be designated as number one, the second as number two, and so on, through the final progress and financial status reports due within 90 days after the end of the grant period.

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3. What is a Grant Adjustment? A Grant Adjustment is the Institute's form for acknowledging the satisfaction of special conditions, or approving changes in grant activities, schedule, staffing, sites, or budget allocations requested by the project director. It also may be used to correct errors in grant documents, add small amounts to a grant award, or deobligate funds from the grant.

6. What schedule should be followed in submitting requests for reimbursements or advance payments? Requests for reimbursements or advance payments may be made at any time after the project start date and before the end of the 90-day close-out period. However, the Institute follows the U.S. Treasury's policy limiting advances to the minimum amount required to meet immediate cash needs. Given normal processing time, grantees should not seek to draw down funds for periods greater than 30 days from the date of the request.

7. Do procedures for submitting requests for reimbursement or advance payment differ for renewal grants? The basic procedures are the same for any grant. A continuation grant or the yearly grant under an on-going support award should be considered as a separate phase of the project. Payment requests should be numbered on a grant rather than a project basis. The first request for funds from a continuation grant or a yearly increment under an on-going support award should be designated as number one, the second as number two, and so on through the final payment request for that grant.

8. If things change during the grant period, can funds be reallocated from one budget category to another? The Institute recognizes that some flexibility is required in implementing a project design and budget. Thus, grantees may shift funds among direct cost budget categories. When any one reallocation or the cumulative total of reallocations are expected to exceed five percent of the approved project budget, a grantee must specify the proposed changes, explain the reasons for the changes, and request Institute approval.

The same standard applies to renewal grants. In addition, prior written Institute approval is required to shift leftover funds from the original award to cover activities to be conducted under the renewal award, or to use renewal grant monies to cover costs incurred during the original grant period.

9. What is the 90-day close-out period? Following the last day of the grant, a 90-day period is provided to allow for all grant-related bills to be received and posted, and grant funds drawn down to cover these expenses. No obligations of grant funds may be incurred during this period. The last day on which an expenditure of grant funds can be obligated is the end date of the grant period. Similarly, the 90-day period is not intended as an opportunity to finish and disseminate grant products. This should occur before the end of the grant period.

During the 90 days following the end of the award period, all monies that have been obligated should be expended. All payment requests must be received by the end of the 90-day “close-out period.” Any unexpended monies held by the grantee that remain after the 90-day follow-up period must be returned to the Institute. Any funds remaining in the grant that have not been drawn down by the grantee will be deobligated.

10. Are funds granted by SJI “Federal” funds? The State Justice Institute Act provides that, except for purposes under the “State Justice Institute Act” “the Institute shall not be considered a department, agency, or instrumentality.
of the Federal Government.” 42 U.S.C. § 10704(c)(1). Because SJI receives appropriations from Congress, some grantee auditors have reported SJI grants as “Other Federal Assistance.” This classification is acceptable to SJI but is not required.

11. If SJI is not a Federal Agency, do OMB circulars apply with respect to audits? Except to the extent that they are inconsistent with the express provisions of the SJI Grant Guideline, Office of Management and Budget (OMB) Circulars A-110, A-21, A-87, A-88, A-102, A-122, A-128 and A-133 are incorporated into the Grant Guideline by reference. Because the Institute’s enabling legislation specifically requires the Institute to “conduct, or require each recipient to provide for, an annual fiscal audit” [see 42 U.S.C. § 10711(c)(1)], the Grant Guideline sets forth options for grantees to comply with this statutory requirement. (See Section XI.J.)

SJI will accept audits conducted in accordance with the Single Audit Act of 1984 and OMB Circulars A-128, or A-133, in satisfaction of the annual fiscal audit requirement. Grantees that are required to undertake these audits in conjunction with Federal grants may include SJI funds as part of the audit even if the receipt of SJI funds would not require such audits. This approach gives grantees an option to fold SJI funds into the governmental audit rather than to undertake a separate audit to satisfy SJI’s Guideline requirements. In sum, educational and nonprofit organizations that receive payments from the Institute that are sufficient to meet the applicability thresholds of OMB Circular A-133 must have their annual audit conducted in accordance with Government Auditing Standards issued by the Comptroller General of the United States rather than with generally accepted auditing standards. Grantees in this category that receive amounts below the minimum threshold referenced in Circular A-133 must also submit an annual audit to SJI, but they would have the option to conduct an audit of the entire grantee organization in accordance with generally accepted auditing standards; include SJI funds in an audit of Federal funds conducted in accordance with the Single Audit Act of 1984 and OMB Circulars A-128 or A-133; or conduct an audit of only the SJI funds in accordance with generally accepted auditing standards. (See Guideline Section XI.J.) A copy of the above noted circulars may be obtained by calling OMB at (202) 395-7250. Does SJI have a CFDA number? Auditors often request that a grantee provide the Institute’s Catalog of Federal Domestic Assistance (CFDA) number for guidance in conducting an audit in accordance with Government Accounting Standards. Because SJI is not a Federal agency, it has not been issued such a number, and there are no additional compliance tests to satisfy under the Institute’s audit requirements beyond those of a standard governmental audit.

Moreover, because SJI is not a Federal agency, SJI funds should not be aggregated with Federal funds to determine if the applicability threshold of Circular A-133 has been reached. For example, if in fiscal year 1996 grantee “X” received $10,000 in Federal funds from a Department of Justice (DOJ) grant program and $20,000 in grant funds from SJI, the minimum A-133 threshold would not be met. The same distinction would preclude an auditor from considering the additional SJI funds in determining what Federal requirements apply to the DOJ funds.

Grantees that are required to satisfy either the Single Audit Act, OMB Circulars A-128, or A-133 and who include SJI grant funds in those audits, need to remember that because of its status as a private non-profit corporation, SJI is not on the list of cognizant Federal agencies. Therefore, the grantee needs to submit a copy of the audit report prepared for such a cognizant Federal agency directly to SJI. The Institute’s audit requirements may be found in Section XI.J. of the Grant Guideline.

The following Grant Guideline is proposed by the State Justice Institute for FY 1997: State Justice Institute Grant Guideline

Table of Contents

Summary
I. Background
II. Scope of the Program
III. Definitions
IV. Eligibility for Award
V. Types of Projects and Grants; Size of Awards
VI. Concept Paper Submission Requirements for New Projects
VII. Application Requirements for New Projects
VIII. Application Review Procedures
IX. Renewal Funding Procedures and Requirements
X. Compliance Requirements
XI. Financial Requirements
XII. Grant Adjustments
Appendix I: List of State Contacts Regarding Administration of Institute Grants to State and Local Courts
Appendix II: SJI Libraries: Designated Sites and Contacts
Appendix III: Illustrative List of Model Curricula

Appendix IV: Illustrative List of Replicable Projects
Appendix V: Judicial Education Scholarship Application Forms
Appendix VI: Preliminary Budget Form (Form E)
Appendix VII: Certificate of State Approval Form (Form B)
Appendix VIII: Application Package (Forms A, C, C-1, D, and Disclosure of Lobbying Activities)

Summary

This Guideline sets forth the programmatic, financial, and administrative requirements of grants, cooperative agreements, and contracts awarded by the State Justice Institute. The Institute, a private, nonprofit corporation established by an Act of Congress, is authorized to award grants, cooperative agreements, and contracts to improve the administration and quality of justice in the State courts. Grants may be awarded to State and local courts and their agencies; national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branch of State governments; and national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments. The Institute may also award grants to other nonprofit organizations with expertise in judicial administration; institutions of higher education; individuals, partnerships, firms, or corporations; and private agencies with expertise in judicial administration if the objectives of the funded program can be better served by such an entity. Funds may be awarded, as well, to Federal, State or local agencies and institutions other than courts for services that cannot be provided adequately through nongovernmental arrangements. In addition, the Institute may provide financial assistance in the form of interagency agreements with other grantees.

The Institute will consider applications for funding support that address any of the areas specified in its enabling legislation, as amended. However, the Board of Directors of the Institute has designated certain program categories as being of special interest. See section II.B.

The Institute has established one round of competition for FY 1997 funds. The concept paper submission deadline is November 27, 1996. It is anticipated that between $7 million and $9 million will be available for award. This Guideline applies to all concept papers and applications submitted, as well as grants awarded in FY 1997.
The awards made by the State Justice Institute are governed by the requirements of this Guideline and the authority conferred by Pub. L. 98–620, Title II, 42 U.S.C. 10701, et seq., as amended.

I. Background

The Institute was established by Pub. L. 98–620 to improve the administration of justice in the State courts in the United States. Incorporated in the State of Virginia as a private, nonprofit corporation, the Institute is charged, by statute, with the responsibility to:

A. Direct a national program of financial assistance designed to assure that each citizen of the United States is provided ready access to a fair and effective system of justice;

B. Foster coordination and cooperation with the Federal judiciary;

C. Promote recognition of the importance of the separation of powers doctrine to an independent judiciary; and

D. Encourage education for judges and support personnel of State court systems through national and State organizations, including universities.

To accomplish these broad objectives, the Institute is authorized to provide funds to State courts, national organizations which support and are supported by State courts, national judicial education organizations, and other organizations that can assist in improving the quality of justice in the State courts.

The Institute is supervised by an 11-member Board of Directors appointed by the President, by and with the consent of the Senate. The Board is statutorily composed of six judges, a State court administrator, and four members of the public, no more than two of whom can be of the same political party.

Through the award of grants, contracts, and cooperative agreements, the Institute is authorized to perform the following activities:

A. Support research, demonstrations, special projects, technical assistance, and training to improve the administration of justice in the State courts;

B. Provide for the preparation, publication, and dissemination of information regarding State judicial systems;

C. Participate in joint projects with Federal agencies and other private grantors;

D. Evaluate or provide for the evaluation of programs and projects funded by the Institute to determine their impact upon the quality of criminal, civil, and juvenile justice and the extent to which they have contributed to improving the quality of justice in the State courts;

E. Encourage and assist in furthering judicial education;

F. Encourage, assist, and serve in a consulting capacity to State and local justice system agencies in the development, maintenance, and coordination of criminal, civil, and juvenile justice programs and services; and

G. Be responsible for the certification of national programs that are intended to aid and improve State judicial systems.

II. Scope of the Program

During FY 1997, the Institute will consider applications for funding support that address any of the areas specified in its enabling legislation. The Board, however, has designated ten program categories as being of “special interest.” See section II.B.

A. Authorized Program Areas

The Institute is authorized to fund projects addressing one or more of the following program areas listed in the State Justice Institute Act, the Battered Women's Testimony Act, the Judicial Training and Research for Child Custody Litigation Act, and the International Parental Kidnapping Crime Act.

1. Assistance to State and local court systems in establishing appropriate procedures for the selection and removal of judges and other court personnel and in determining appropriate levels of compensation;

2. Education and training programs for judges and other court personnel for the performance of their general duties and for specialized functions, and national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques;

3. Research on alternative means for using judicial and nonjudicial personnel in court decisionmaking activities, implementation of demonstration programs to test such innovative approaches, and evaluations of their effectiveness;

4. Studies of the appropriateness and efficacy of court organizations and financing structures in particular States, and support to States to implement plans for improved court organization and financing;

5. Support for State court planning and budgeting staffs and the provision of technical assistance in resource allocation and service forecasting techniques;

6. Studies of the adequacy of court management systems in State and local courts, and implementation and evaluation of innovative responses to records management, data processing, court personnel management, reporting and transcription of court proceedings, and juror utilization and management;

7. Collection and compilation of statistical data and other information on the work of the courts and on the work of other agencies which relate to and affect the work of courts;

8. Studies of the causes of trial and appellate court delay in resolving cases, and establishing and evaluating experimental programs for reducing case processing time;

9. Development and testing of methods for measuring the performance of judges and courts and experiments in the use of such measures to improve the functioning of judges and the courts;

10. Studies of court rules and procedures, discovery devices, and evidentiary standards to identify problems with the operation of such rules, procedures, devices, and standards, and the development of alternative approaches to better reconcile the requirements of due process with the need for swift and certain justice, and testing of the utility of those alternative approaches;

11. Studies of the outcomes of cases in selected areas to identify instances in which the substance of justice meted out by the courts diverges from public expectations of fairness, consistency, or equity, and the development, testing and evaluation of alternative approaches to resolving cases in such problem areas;

12. Support for programs to increase court responsiveness to the needs of citizens through citizen education, improvement of court treatment of witnesses, victims, and jurors, and development of procedures for obtaining and using measures of public satisfaction with court processes to improve court performance;

13. Testing and evaluating experimental approaches to provide increased citizen access to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens;

14. Collection and analysis of information regarding the admissibility and quality of expert testimony on the experiences of battered women offered as part of the defense in criminal cases under State law, as well as sources of and methods to obtain funds to pay costs incurred to provide such testimony, particularly in cases involving indigent women defendants;
15. Development of training materials to assist battered women, operators of domestic violence shelters, battered women's advocates, and attorneys to use expert testimony on the experiences of battered women in appropriate cases, and individuals with expertise in the experiences of battered women to develop skills appropriate to providing such testimony;

16. Research regarding State judicial decisions relating to child custody litigation involving domestic violence;

17. Development of training curricula to assist State courts to develop an understanding of, and appropriate responses to child custody litigation involving domestic violence;

18. Dissemination of information and training materials and provision of technical assistance regarding the issues listed in paragraphs 14–17 above;

19. Development of national, regional, and in-State training and educational programs dealing with criminal and civil aspects of interstate and international parental child abduction;

20. Other programs, consistent with the purposes of the State Justice Institute Act, as may be deemed appropriate by the Institute, including projects dealing with the relationship between Federal and State court systems in areas where there is concurrent State-Federal jurisdiction and where Federal courts, directly or indirectly, review State court proceedings.

Funds will not be made available for the ordinary, routine operation of court systems or programs in any of these areas.

B. Special Interest Program Categories

1. General Description

The Institute is interested in funding both innovative programs and programs of proven merit that can be replicated in other jurisdictions. Although applications in any of the statutory program areas are eligible for funding in FY 1997, the Institute is especially interested in funding those projects that:

a. Formulate new procedures and techniques, or creatively enhance existing arrangements to improve the courts;

b. Address aspects of the State judicial systems that are in special need of serious attention;

c. Have national significance in terms of their impact or replicability in that they develop products, services, and techniques that may be used in other States; and

d. Disseminate products that effectively transfer the information and ideas developed to relevant audiences in State and local judicial systems or provide technical assistance to facilitate the adaptation of effective programs and procedures in other State and local jurisdictions.

A project will be identified as a "Special Interest" project if it meets the four criteria set forth above and (1) it falls within the scope of the "special interest" program areas designated below, or (2) information coming to the attention of the Institute from the State courts, their affiliated organizations, the research literature, or other sources demonstrates that the project responds to another special need or interest of the State courts.

Concept papers and applications which address a "Special Interest" category will be accorded a preference in the rating process. (See the selection criteria listed in sections VI.B., "Concept Paper Submission Requirements for New Projects," and VIII.B., "Application Review Procedures.")

2. Specific Categories

The Board has designated the areas set forth below as "Special Interest" program categories. The order of listing does not imply any ordering of priorities among the categories.

a. Improving Public Confidence in the Courts.

This category includes demonstration, evaluation, research, and education projects designed to improve the responsiveness of courts to public concerns regarding the fairness, accessibility, timeliness, and comprehensibility of the court process, and test innovative methods for increasing the public's confidence in the State courts.

The Institute is particularly interested in supporting innovative projects that examine, develop, and test methods that trial or appellate courts may use to:

• Improve service to individual litigants and trial participants, including innovative methods for handling cases involving unrepresented litigants fairly and effectively and for dealing with litigants unwilling to follow administrative and legal procedures;

• Test methods for more clearly and effectively communicating information about judicial decisions, the trial and appellate court process, and court operations to litigants and the public;

• Develop policies, protocols, and procedures designed to prevent harassment, threats, and incidents endangering the lives and property of judges, court employees, jurors, litigants, witnesses, and members of the public;

• Eliminate race, ethnic, and gender bias in the courts;

• Address court-community problems resulting from the influx of legal and illegal immigrants, including projects to address immigration on State courts; design and assess procedures for use in custody, visitation, and other domestic relations cases when key family members or property are outside the United States; and develop protocols to facilitate service of process, the enforcement of orders of judgment, and the disposition of criminal and juvenile cases when a non-U.S. citizen or corporation is involved; and

• Demonstrate and evaluate methods for involving the community in the sentencing process, such as community impact statements, community oversight of compliance with community service and probation conditions, or other innovative court-community links focused on the sentencing process;

• Foster positive attitudes toward jury service and enhance the attractiveness of juror service through, e.g., incentives to participate, modifications of terms of service, and/or juror orientation and education programs.

• Demonstrate and evaluate the impact of methods for improving juror comprehension in criminal and civil cases, such as access to technology in the jury room to permit review of computerized exhibits of evidence presented in the case, use of specially qualified juries in complex cases, delivery of instructions throughout the trial, and testimony by court-appointed neutral experts;

• Examine the impact of the grand jury process on due process requirements, caseflow management, court operations, and the public's perception of the fairness of court proceedings, and develop appropriate recommendations for improving the management of the process; and

• Assess the impact of live television coverage of trials on court proceedings, public understanding, and fairness to litigants.

Institute funds may not be used to directly or indirectly support legal representation of individuals in specific cases.

Previous SJI-supported projects that address these issues include: a National Town Hall Meeting Videoconference, a National Conference on Eliminating Race and Ethnic Bias in the Courts, and projects to implement the action plans developed at the conferences; a guidebook for developing effective court-based programs for assisting pro se litigants, as well as development of a self-service center and touchscreen computer kiosks, videotapes, and written materials to assist unrepresented
litigants; educational materials for court employees on serving the public; a manual and other materials for managing and coordinating court interpretation services, and materials for training and certifying court interpreters; a colloquium on the adversary system; a demonstration of the use of community volunteers to monitor adult probationers and to monitor guardianships; evaluation of community-based court programs in New York City; studies of effective and efficient methods for providing legal representation to indigent parties in criminal and family cases and the applicability of various dispute resolution procedures to different cultural groups; guidelines for court-annexed day care systems; development of a manual for implementing innovations in jury selection, use, and management; development of a guide for making juries accessible to persons with disabilities; and an assessment of the effect of allowing jurors to discuss the evidence prior to the deliberations on the verdict.

b. Education and Training for Judges and Other Key Court Personnel. The Institute continues to be interested in supporting an array of projects to strengthen and broaden the availability of court education programs at the State, regional, and national levels. Accordingly, this category is divided into subsections: (i) Development of Innovative Educational Programs; (ii) Curriculum Adaptation Projects; and (iii) Scholarships.

1. Development of Innovative Educational Programs. This category includes support for the development and testing of educational programs for judges or court personnel that address key substantive and administrative issues of concern to the nation’s courts, or assist local courts or State court systems to develop or enhance their capacity to deliver quality continuing education. Programs may be designed for presentation at the local, State, regional, or national level. Ordinarily, court education programs should be based on some form of assessment of the needs of the target audience; include clearly stated learning objectives that delineate the new knowledge or skills that participants will acquire; incorporate adult education principles and varying teaching/learning methods; and result in the development of a curriculum as defined in section III.J.

(a) The Institute is particularly interested in the development of education programs that:

- Incorporate adult education principles and varying teaching/learning methods, and result in the development of a systematic program of continuing education, training, and career development for judges and court personnel as an integral part of court operations;
- Include self-directed learning packages such as those using interactive computer-programs, videos, or other audio and visual media supported by written materials or manuals, or distance-learning approaches to assist those who do not have ready access to classroom-centered programs;
- Test the use of the Internet as a means of delivering educational programs for judges and court personnel, or for facilitating and organizing the exchange of information on trends, problems, and issues affecting the courts;
- Familiarize faculty with the effective use of instructional technology including methods for effectively presenting information through videos and satellite teleconferences;
- Involve collaboration between the judicial, executive, and legislative branches of government such as programs to explore what are ethically proper and improper interactions between judges and legislators;
- Enhance communication and cooperation among courts within a metropolitan area or multi-State region;
- (b) The Institute also is interested in supporting the development and testing of curricula on critical issues such as:

  - The development of judicial leadership abilities;
  - The need for effective approaches to screening and sentencing adult and juvenile sexual offenders;
  - The appropriate use and management of specialized calendars or court divisions (e.g., for substance abuse, domestic violence, or commercial cases) as well as the necessary substantive expertise to preside over such cases;
  - The appropriate and effective methods for preventing harassment, threats or incidents endangering the lives and property of judges, court personnel, jurors, litigants, witnesses and the public in court facilities, and managing cases involving groups or individuals unwilling to cooperate with legal or administrative procedures;
  - The application of the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc. governing the admissibility of scientific and technical evidence, and the application of the recently released National Academy of Sciences report on forensic DNA evidence;
  - The problems resulting from Strategic Lawsuits Against Public Participation (SLAPP suits); and
  - Other topics addressed by SJI-supported demonstration, evaluation, or research projects.

(ii) Curriculum Adaptation Projects.

(a) Description of the Program. The Board is reserving up to $175,000 to provide support for projects that adapt and implement model curricula previously developed with SJI support. The goal of the Curriculum Adaptation program is to provide State and local courts with sufficient support to prepare and test these model curricula, course module, national or regional conference program, or other model education program developed with SJI funds and modified to meet a State’s or local jurisdiction’s educational needs. Generally, it is anticipated that the adapted curriculum would become part of the grantee’s ongoing educational offerings, and that local instructors would receive the training needed to enable them to make future presentations of the curriculum. An illustrative list of the curriculum that may be appropriate for the adaptation is contained in Appendix III.

- Only State or local courts may apply for Curriculum Adaptation funding. Grants to support adaptation of educational programs previously developed with SJI funds are limited to no more than $20,000 each. As with other awards to State or local courts, cash or in-kind match must be provided equal to at least 50% of the grant amount requested.

(b) Review Criteria. Curriculum Adaptation grants will be awarded on the basis of criteria including: the goals and objectives of the proposed project; the need for outside funding to support the program; the likelihood of effective implementation; the appropriateness of the educational approach in achieving the project’s educational objectives; the likelihood of effective implementation and integration into the State’s or local jurisdiction’s ongoing educational programming; and expressions of interest by the judges and/or court personnel who would be directly involved in or affected by the project. In making curriculum adaptation awards, the Institute will also consider factors such as the reasonableness of the amount requested, compliance with the statutory match requirements, diversity of subject matter, geographic diversity, the level of appropriations available in the current year, and the amount expected to be available in succeeding fiscal years.

(c) Application Procedures. In lieu of concept papers and formal applications, applicants for grants may submit a detailed letter and three photocopies. Although there is no prescribed form for
the letter, nor a minimum or maximum page limit, letters of application should include the following information to assure that each of the criteria for evaluating applications is addressed:

- Project Description. What are the project's goals and learning objectives? What is the title of the model curriculum to be tried and who developed it? What program components would be implemented, and what benefits would be derived from this test? Why is this education program needed at the present time? Who will be responsible for adapting the model curriculum, and what types of modifications, if any, in length, format, and content are anticipated? Who will the participants be, how will they be recruited, and from where will they come (e.g., from across the State, from a single local jurisdiction, from a multi-State region)? How many participants are anticipated?
- Need for Funding. Why are sufficient State or local resources unavailable to support the modification and presentation of the model curriculum? What is the potential for replicating or integrating the program in the future using State or local funds, once it has been successfully adapted and tested?
- Likelihood of Implementation. What is the proposed timeline for modifying and presenting the program? Who would serve as faculty and how were they selected? Will the presentation of the program be evaluated and, if so, by whom? (Ordinary independent evaluation is not necessary; however, the results of any evaluation should be included in the final report.) What measures will be taken to facilitate subsequent presentations of the adapted program?
- Expressions of Interest By Judges and/or Court Personnel. Does the proposed program have the support of the court system leadership, and of judges, court managers, and judicial education personnel who are expected to attend? (This may be demonstrated by attaching letters of support.)
- Budget and Matching State Contribution. Applicants should attach a copy of budget Form E (see Appendix V) and a budget narrative (see Section VII.B.) that describes the basis for the computation of all project-related costs and the source of the match offered.
- Local courts should attach a concurrence signed by the Chief Justice of the State or his or her designee. (See Form B, Appendix VI.)

Letters of application may be submitted at any time. However, applicants should allow at least 90 days between the date of submission and the date of the proposed program to allow sufficient time for needed planning.

The Board of Directors has delegated its authority to approve Curriculum Adaptation grants to its Judicial Education Committee. The committee anticipates acting upon applications within 45 days after receipt. Grant funds will be available only after committee approval and negotiation of the final terms of the grant.

(d) Grantee Responsibilities. A recipient of a Curriculum Adaptation grant must:

1. Comply with the same quarterly reporting requirements as other Institute grantees (see Section X.L., infra);
2. Include in each grant product a prominent acknowledgment that support was received from the Institute, along with the "SJI" logo and a disclaimer paragraph (See section X.Q. of the Guideline); and
3. Submit two copies of the manuals, handbooks, or conference packets developed under the grant at the conclusion of the grant period, along with a final report that includes any evaluation results and explains how the grantee intends to replicate the program in the future.

Applicants seeking other types of funding for developing and testing educational programs must comply with the requirements for concept papers and applications set forth in Sections VI and VII or the requirements for renewal applications set forth in Section IX, iii. Scholarships for Judges and Court Personnel. The Institute is reserving up to $200,000 to support a scholarship program for State court judges and court managers.

Program Description/Scholarship Amounts. The purposes of the Institute scholarship program are to: enhance the knowledge, skills, and abilities of judges and court managers; enable State court judges and court managers to attend out-of-State educational programs sponsored by national and State providers that they could not otherwise attend because of limited State, local and personal budgets; and provide States, judicial educators, and the Institute with evaluative information on a range of judicial and court-related education programs.

Scholarships will be granted to individuals only for the purpose of attending an out-of-State educational program within the United States. The annual or midyear meeting of a State or national organization of which the applicant is a member does not qualify as an out-of-State educational program for scholarship purposes, even though it may include workshops or other training sessions.

A scholarship may cover the cost of tuition and transportation up to a maximum total of $1,500 per scholarship. (Transportation expenses include round-trip coach airfare or train fare. Recipients who drive to the site of the program may receive $.31/mile up to the amount of the advanced purchase round-trip airfare between their home and the program site.) Funds to pay tuition and transportation expenses in excess of $1,500, and other costs of attending the program such as lodging, meals, materials, and local transportation (including rental cars) at the site of the education program, must be obtained from other sources or borne by the scholarship recipient.

Scholarship applicants are encouraged to check other sources of financial assistance and to combine aid from various sources whenever possible. Scholarship recipients are encouraged to check with their tax advisor to determine whether the scholarship constitutes taxable income under Federal and State law.

(b) Eligibility Requirements. Because of the limited amount of funds available, scholarships can be awarded only to full-time judges of State or local trial and appellate courts; full-time professional, State or local court personnel with management responsibilities; and supervisory and management probation personnel in judicial branch probation offices. Senior judges, part-time judges, quasi-judicial hearing officers including referees and commissioners, State administrative law judges, staff attorneys, law clerks, line staff, law enforcement officers, and other executive branch personnel are not eligible to receive a scholarship.

(c) Application Procedures. Judges and court managers interested in receiving a scholarship must submit the Institute's Judicial Education Scholarship Application Form (Form S1, see Appendix V). An applicant may apply for a scholarship for only one educational program during any one application cycle. Applications must be submitted by:

- October 1, 1996, for programs beginning between January 1, and March 31, 1997;
- January 7, 1997, for programs beginning between April 1 and June 30, 1997;
- April 1, 1997, for programs beginning between July 1 and September 30, 1997; and
- July 1, 1997, for programs beginning between October 1, and December 31, 1997.

No exceptions or extensions will be granted. Applicants are encouraged not to wait for the decision on the...
scholarship to register for the educational program they wish to attend.

(d) Concurrency Requirement. All scholarship applicants must obtain the written concurrence of the Chief Justice of his or her State's Supreme Court (or the Chief Justice's designee) on the Institute's Judicial Education Scholarship Concurrence form (Form S2, see Appendix V). Court managers, other than elected clerks of court, also should submit a letter of support from their supervisor. The Concurrence form (Form S2) may accompany the application or be sent separately. However, the original signed Concurrence form must be received by the Institute within two weeks after the appropriate application mailing deadline (i.e. by October 8, 1996, or January 14, April 8, or July 8, 1997). No application will be reviewed if a signed Concurrence form has not been received by the required date.

(e) Review Procedures/Selection Criteria. The Board of Directors has delegated the authority to approve or deny scholarships to its Judicial Education Committee. The Institute intends to notify each applicant whose scholarship has been approved within 60 days after the relevant application deadline. The Committee will reserve sufficient funds each quarter to assure the availability of scholarships throughout the year.

The factors that the Institute will consider in selecting scholarship recipients are:

- The applicant's need for education in the particular course subject and how the applicant would apply the information/skills gained;
- The benefits to the applicant's court or the State's court system that would be derived from the applicant's participation in the specific educational program, including a description of current legal, procedural, administrative, or other problems affecting the State's courts, related to topics to be addressed at the educational program (in addition to submission of a signed Form S2);
- The absence of educational programs in the applicant's State addressing the particular topic;
- How the applicant will disseminate the knowledge gained (e.g., by developing/teaching a course or providing in-service training for judges or court personnel at the State or local level);
- The length of time that the applicant intends to serve as a judge or court manager, assuming reelection or reappointment, where applicable;
- The likelihood that the applicant would be able to attend the program without a scholarship;
- The unavailability of State or local funds to cover the costs of attending the program;
- The quality of the educational program to be attended as demonstrated by the sponsoring organization's experience in judicial education, evaluations by participants or other professionals in the field, or prior SJIA support for this or other programs sponsored by the organization;
- Geographic balance;
- The balance of scholarships among types of applicants and courts;
- The balance of scholarships among educational programs; and
- The level of appropriations available to the Institute in the current year and the amount expected to be available in succeeding fiscal years.

(f) Non-transferability. Scholarships are not transferable to another individual. They may be used only for the course specified in the application unless the recipient submits a letter requesting to attend a different course. The letter must explain the reasons for the change; the need for the information or skills to be provided by the new course; how the information or skills will be used to benefit the individual, his or her court, and/or the courts of the State; and how the knowledge or skills gained will be disseminated. Requests to use a scholarship for a different course must be approved by the Judicial Education Committee of the Institute's Board of Directors. Ordinarily, decisions on such requests will be made within 30 days after the receipt of the request letter.

(g) Responsibilities of Scholarship Recipients. In order to receive the funds authorized by a scholarship award, recipients must submit a Scholarship Payment Voucher (Form S3) together with a tuition statement from the program sponsor, and a transportation fare receipt or statement of the driving mileage to and from the recipient's home to the site of the educational program). Recipients also must submit to the Institute a certificate of attendance at the program, an evaluation of the educational program they attended, and a copy of the notice of any scholarship funds received from other sources. A copy of the evaluation must be sent to the Chief Justice of their State.

A State or a local jurisdiction may impose additional requirements on scholarship recipients that are consistent with SJIA's criteria and requirements, e.g., a requirement to serve as faculty on the subject at a State- or locally-sponsored judicial education program.

c. Dispute Resolution and the Courts. This category includes education, research, evaluation, and demonstration projects to evaluate or enhance the effectiveness of court-connected dispute resolution programs. The Institute is interested in projects that facilitate comparison among research studies by using similar measures and definitions; address the nature and operation of ADR programs within the context of the court system as a whole; and compare dispute resolution processes to attorney settlement as well as trial. Specific topics of interest include:

- The appropriate timing for referrals to dispute resolution services and the effects of implementing such referrals at various stages during litigation;
- The effect of different referral methods including any differences in outcome between voluntary and mandatory referrals;
- The special procedures or approaches incorporated into court-connected dispute resolution programs to take into account the differences in the various cultural communities' attitudes toward conflict and authority;
- The assessment of innovative approaches that provide rural courts and other under-served areas with adequate court-connected dispute resolution services; and
- The development and evaluation of innovative court-connected dispute resolution programs for resolving complex and multi-party cases.

Applicants should be aware that the Institute will not provide operational support for on-going ADR programs or start-up costs of non-innovative ADR programs. Courts also should be advised that it is preferable for the applicant to use its funds to support the operational costs of an innovative program and request Institute funds to support related technical assistance, training, and evaluation elements of the program.

In previous funding cycles, grants have been awarded to support evaluation of the use of mediation in civil, domestic relations, juvenile, probate, medical malpractice, appellate, and minor criminal cases. SJIA grants also have supported assessments of the impact of private judging on State courts; multi-door courthouse programs; arbitration of civil cases; screening and intake procedures for mediation; the relationship between mediator training and qualifications, and case outcome and party satisfaction; and trial and appellate level civil settlement programs. In addition, SJIA has supported the creation of a national ADR resource.
In previous funding cycles, grants have been awarded to support: demonstration and evaluation of communications technology including the availability of electronic forms and information on the Internet to assist pro se litigants; access to case data via the Internet; guidelines for electronic transfer of court documents; the development of an electronic document management system; and a court management information display system; the integration of bar-coding technology with an existing automated case management system; demonstration of an on-bench automated system for generating and processing court orders and development of an automated judicial education management system; a document management system for small courts using imaging technology; evaluation of the use of automated teller machines for paying jurors; creation of a court technology laboratory to provide judges and court managers an opportunity to test automated court-related hardware and software; and establishment of a technical information service to respond to specific inquiries concerning court-related technologies.

Grants also provided support for national court technology conferences; the development of model rules on the use of computer-generated demonstrative evidence and electronic documentary evidence; preparation of guidelines on privacy and public access to electronic court information and on court access to the information superhighway; the testing of a computerized citizen intake and referral service; development of an "analytic judicial desktop system" to assist judges in making sentencing decisions; implementation and evaluation of a Statewide automated integrated case docketing and record-keeping system; a prototype computerized benchbook using hypertext technology; and computer simulation models to assist State courts in evaluating potential strategies for improving civil caseflow, e.g., Court Planning, Management, and Financing. The Institute is interested in supporting projects that explore emerging issues that will affect the State courts as they enter the 21st Century, as well as projects that develop and test innovative approaches for managing the courts, securing and managing the resources required to fully meet the responsibilities of the judicial branch, and institutionalizing long-range planning processes. In particular the Institute is interested in:

- Develop, implement, and assess innovative case management techniques for cases involving juveniles;
- Facilitate communication, information sharing, and coordination between the juvenile and criminal courts;
- Assess the effects of innovative management approaches designed to assure quality services to court users;
- Institutionalize long-range planning approaches in individual States and local jurisdictions, including development of an ongoing internal capacity to conduct environmental scanning, trends analysis, and benchmarking; and
- Develop and test mechanisms for linking assessments of effectiveness such as the Trial Court Performance Standards to fiscal planning and budgeting, including service efforts and accomplishments approaches (SEA), performance audits, and performance budgeting and the testing of innovative programs and procedures for providing clear and open communications between the judicial and legislative branches of government.

The Institute is interested in:

- The preparation of essays exploring possible changes in the court process or judicial administration and their implications for judges, court managers, policymakers, and the public. Grants supporting such "think pieces" are limited to no more than $10,000. The resulting essay should be directed to the court community and of publishable quality.

Possible topics include, but are not limited to: the ramifications of "virtual trials" (i.e. proceedings in which several of the trial participants including the parties, counsel, witnesses, the judge, and the jury may not be physically in the courtroom); the implications of the greater use of technology-enhanced courtroom presentations, especially when there is an imbalance of resources among the parties; the appropriateness of modifying methods of selecting, qualifying, and using juries; and the uses of technology to better inform and prepare jurors.

The Institute has funded planning, futures, and innovative management projects including: national and Statewide "future and the courts" conferences and training; development of curricula, guidebooks and a video on visioning, and a long-range planning guide for trial courts; the provision of technical assistance to courts conducting futures and long-range planning activities, including development of a court futures network on the Internet; a National Interbranch Conference on Funding the State Courts; a test of the feasibility of implementing
the Trial Court Performance Standards in four States; the development of Appellate Court Performance Standards and Measures; the application of total quality management principles to court operations, as well as the development of a TQM guidebook and training materials for trial courts; revision of the Standards on Judicial Administration; projects identifying the causes of delay in trial and appellate courts; and the preparation of a national agenda for reducing litigation cost and delay.

F. Resolution of Current Evidentiary Issues. This category includes educational programs and other projects to assist judges in deciding questions regarding:

- The admissibility of new forms of demonstrative evidence, including computer simulations, and providing appropriate jury instructions regarding such evidence;
- The appropriate use of expert testimony in criminal cases concerning the possible mitigating impact of the prior victimization of the defendant;
- The admissibility and weight of complex scientific or technical evidence and applying the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc. governing the admissibility of scientific and technical evidence;
- The admissibility of genetic evidence generally, and the findings of the recently released National Academy of Sciences report evaluating forensic DNA evidence, in particular;
- The admissibility of testimony based on recovered memory, and the admissibility of expert testimony about memory recovery; and
- The application of rape shield laws and other limits on the introduction of evidence or the cross-examination of witnesses.

In previous funding cycles, the Institute has supported the analysis of issues related to the use of expert testimony in criminal cases involving domestic violence; development of a computer-assisted training program on evidentiary problems for juvenile and family court judges; training on medical/legal and scientific evidence issues; a national conference on mass tort litigation; regional seminars on evidentiary questions; production of a videotape and other materials on scientific evidence; presentation of a workshop on the use of DNA evidence in criminal proceedings; and preparation of a benchbook for judges on the credibility, competence, and courtroom treatment of child witnesses as well as protocols for questioning child victims of crime.

g. Substance Abuse. This category includes projects to develop and evaluate innovative techniques that courts may use to handle a large volume of substance abuse-related criminal, civil, juvenile, and domestic relations cases fairly and expeditiously. In particular, the Institute is interested in projects to:

- Prepare and test measures, forms, and other tools for self-evaluation of a court-enforced substance abuse treatment program;
- Develop and test innovative management information systems to facilitate the sharing of information among courts, and the agencies and service providers involved in the operation of a court-enforced substance abuse treatment program;
- Assess the effect of managed healthcare plans on the availability and cost of drug treatment services for court-enforced treatment programs, and assist courts in shaping managed care plans to enhance the availability of necessary services at a reasonable cost;
- Develop and test educational programs for judges and court personnel concerning the management of “drug courts” (i.e., specialized calendars for substance abuse cases combined with court-enforced treatment programs), developing collaborative efforts with community service agencies to support the work of drug courts, or the ethical issues that may be involved in operating a drug court; and
- Assess the applicability of the drug court model to substance abuse-related cases involving juveniles and cases requiring other treatment or services in addition to substance abuse treatment (e.g., child abuse, or mental health cases).

The Institute has supported the presentation of the 1995 National Symposium on the Implementation and Operation of Court-Enforced Drug Treatment Programs as well as the 1991 National Conference on Substance Abuse and the Courts, and efforts to implement the State and local plans developed at these Conferences. It has also supported projects to evaluate: court-enforced treatment programs; special court-ordered programs for women offenders; and other court-based alcohol and drug assessment programs; replicate the Dade County program in non-urban sites; involve community groups and families in drug court programs; assess the impact of legislation and court decisions involving drug-addicted infants, and strategies for coping with increasing caseload pressures; develop a benchbook and other educational materials to assist judges in child abuse and neglect cases involving parental substance abuse and in developing appropriate sentences for pregnant substance abusers; test the use of a dual diagnostic treatment model for domestic violence cases in which substance abuse was a factor; and present local and regional educational programs for judges and other court personnel on substance abuse and its treatment.

h. Children and Families. This category includes education, demonstration, evaluation, technical assistance, and research projects to identify and inform judges of innovative, appropriate, and effective approaches for handling cases involving children and families. The Institute is particularly interested in projects that:

i. Assist courts in addressing the special needs of children in cases involving family violence including the development and testing of innovative protocols, procedures, educational programs, and other measures for improving the capacity of courts to:

- Adjudicate child custody cases in which family violence may be involved;
- Determine and address the service needs of children exposed to family violence and the methods for mitigating those effects when issuing protection, custody, visitation, or other orders;
- Adjudicate and monitor child abuse and neglect litigation and reconcile the need to protect the child with the requirement to make reasonable efforts to maintain or reunite the family.

ii. Enhance the fairness and effectiveness of juvenile delinquency proceedings, including projects that:

- Prepare curricula and materials on how to manage cases involving gang members fairly, safely, and effectively, including the use of appropriate procedures for determining pre-adjudication release, protecting witnesses, and developing effective dispositions;
- Prepare curricula and materials for judges and court staff on accurately identifying those juvenile offenders who are likely to pursue criminal careers and to intervene more effectively when such a youth is identified;
- Develop and test effective approaches for the detention, adjudication, and disposition of juveniles under age 13 who are accused of involvement in a violent offense;

iii. Improve the fairness and effectiveness of proceedings to determine custody, visitation, and support issues, including projects that:

- Develop and test guidelines, curricula, and other materials to assist trial judges in determining the best interest of a child, particularly when an adoption is contested, or when a parent
who has been awarded custody seeks to relocate;

- Develop and test guidelines, curricula, and other materials to assist trial judges in establishing and enforcing custody, visitation, and support orders in cases in which a child's parents were never married to each other.

4. Improve the effectiveness and operating efficiency of juvenile and family courts, including projects to:

- Improve the capacity of courts, regardless of structure, to expeditiously coordinate and share appropriate information for multiple cases involving members of the same family;
- Develop and test innovative techniques for improving communication, sharing information, and coordination between juvenile and criminal courts and divisions; and
- Improve the handling of the criminal and civil aspects of interstate and international parental child abductions.

In previous funding cycles, the Institute supported a national and State conferences on courts, children, and the family; a review of juvenile courts in light of the upcoming 100th anniversary of the founding of the first juvenile court; a symposium on the resolution of interstate child welfare issues; the preparation of educational materials on the questioning of child witnesses, making reasonable efforts to preserve families, adjudicating allegations of child sexual abuse when custody is in dispute, child victimization, handling child abuse and neglect cases when parental substance abuse is involved, and on children as the silent victims of spousal abuse. Other Institute grants have supported the examination of supervised visitation programs, effective court responses when domestic violence and custody disputes coincide, and foster care review procedures.

In addition, the Institute has supported projects to enhance coordination of cases involving the same family that are being heard in different courts; assistance to States considering establishment of a family court; development of national and State-based training materials for guardians ad litem; examinations of the authority of the juvenile court to enforce treatment orders and the role of juvenile court judges; and development of innovative approaches for coordinating services for children and youth.

1. Improving the Courts' Response to Domestic Violence and Gender-Related Crimes of Violence. This category includes education, demonstration, technical assistance, evaluation, and research projects to improve the fair and effective processing, consideration, and disposition of cases concerning domestic violence and gender-related violent crimes, including projects on:

- The effective use and enforcement of intra- and inter-State protective orders and the implications for the courts of the full faith and credit provisions of the Violence Against Women Act;
- The effective use of electronic databases of protection orders;
- The effective use of specialized calendars or divisions for considering domestic violence cases and related matters, including their impact on victims, offenders, and court operations;
- The most effective procedures for conducting "fatality reviews," and the impact of such reviews on the courts, criminal justice agencies, and the public;
- An appropriate consideration of cultural issues in adjudicating and developing effective dispositions in cases involving violence;
- Effective methods that courts can use to monitor and respond to stalking;
- Determining when it may be appropriate to refer a case involving family violence for mediation and what procedures and safeguards should be employed;
- Effective programs, procedures, and strategies to coordinate the response to domestic violence and gender-related crimes of violence among courts, criminal justice agencies, and social services programs, and to assure that courts are fully accessible to victims of domestic violence and other gender-related violent crimes; and
- Effective sentencing approaches in cases involving domestic violence and other gender-related crimes, including methods for accurately identifying potentially lethal batters.

Institute funds may not be used to provide operational support to programs offering direct services or compensation to victims of crimes.

In previous funding cycles, the Institute supported national and State conferences on family violence and the courts as well as projects to implement the action plans developed at these conferences; development of curricula for judges on handling family violence, rape, and sexual assault cases; preparation of descriptions of innovative court practices in family violence cases; evaluation of the effectiveness of court-ordered treatment for family violence offenders and of the use of alternatives to adjudication in child abuse cases; development of ways to improve the effectiveness of civil protection orders for family violence victims; an examination of state-of-the-art court practices for handling family violence cases; recommendations on how to improve access to rural courts for victims of family violence; exploration of the policy issues related to and the development of curricula on the use of mediation in domestic relations cases involving allegations of violence; testing of videotapes and other educational programs for the parties in divorce actions and their children; and preparation of an analysis of the issues related to the use of expert testimony in criminal cases involving domestic violence.

j. The Relationship Between State and Federal Courts. This category includes education, research, demonstration, and evaluation projects designed to facilitate appropriate and effective communication, cooperation, and coordination between State and Federal courts. The Institute is particularly interested in innovative projects that:

i. Develop and test curricula and other educational materials to illustrate effective methods being used at the trial court, State, and Circuit levels to coordinate cases and administrative activities, and share facilities; and

ii. Develop and test new approaches to:

- Implement the habeas corpus provisions of the Anti-Terrorism Act of 1996;
- Handle capital habeas corpus cases fairly and efficiently;
- Coordinate and process mass tort cases fairly and efficiently at the trial and appellate levels;
- Coordinate the adjudication of related State and Federal criminal cases;
- Coordinate related State and Federal cases that may be brought under the Violence Against Women Act;
- Exchange information and coordinate calendars among State and Federal courts; and
- Share jury pools, alternative dispute resolution programs, and court services.

In previous funding cycles, the Institute has supported national and regional conferences on State-Federal judicial relationships, a national conferenc on mass tort litigation, and the Chief Justices' Special Committee on Mass Tort Litigation. In addition, the Institute has supported projects developing judicial impact statement procedures for national legislation affecting State courts, and projects examining methods of State and Federal trial and appellate court cooperation; procedures for facilitating certification of questions of law; the impact on the State courts of diversity cases and cases brought under 1983; the procedures used in Federal habeas corpus review of State court criminal
cases; the factors that motivate litigants to select Federal or State courts; and the mechanisms for transferring cases between Federal and State courts, as well as the methods for effectively consolidating, deciding, and managing complex litigation. The Institute has also supported a test of assigning specialized law clerks to trial courts hearing capital cases in order to improve the fairness and efficiency of death penalty litigation at the trial level, a clearinghouse of information on State constitutional law decisions, educational programs for State judges on coordination of Federal bankruptcy cases with State litigation, and a seminar examining the implications of the “Federalization” of crime.

C. Single Jurisdiction Projects

The Board will consider supporting a limited number of projects submitted by State or local courts that address the needs of only the applicant State or local jurisdiction. It has established two categories of Single Jurisdiction Projects:

1. Projects Addressing a Critical Need of a Single State or Local Jurisdiction
   a. Description of the Program. The Board will set aside up to $300,000 to support projects submitted by State or local courts to address the needs of only the applicant State or local jurisdiction. A project under this section may address any of the topics included in the Special Interest Categories or Statutory Program Areas. In particular, the Institute is interested in proposals to replicate programs, procedures, or strategies that have been developed, demonstrated, or evaluated by SJI-supported projects. (A list of examples of such projects is contained in Appendix IV.) Replication grants are limited to no more than $30,000 each. Ordinarily, the Institute will not provide support solely for the purchase of equipment or software.
   b. Application Procedures. Concept papers for single jurisdiction projects may be submitted by a State court system, an appellate court, or a limited or general jurisdiction trial court. All awards under this category are subject to the matching requirements set forth in section X.B.1.
   c. Need for Funding. The need cannot be met solely with State and local resources within the foreseeable future.
   d. Application Procedures. In lieu of formal applications, applicants for Technical Assistance grants may submit, at any time, an original and three copies of a detailed letter describing the proposed project and addressing the issues listed below. Letters from an individual trial or appellate court must be signed by the presiding judge or manager of that court. Letters from the State court system must be signed by the Chief Justice or State Court Administrator.

Although there is no prescribed form for the letter nor a minimum or maximum page limit, letters of application should include the following information to assure that each of the criteria is addressed:
   i. Need for Funding. What is the critical need facing the court? How will the proposed technical assistance help the court to meet this critical need? Why cannot State or local resources fully support the costs of the required consultant services?
   ii. Project Description. What tasks would the consultant be expected to perform and how would they be accomplished? Who (organization or individual) would be hired to provide the assistance and how was this consultant selected? If a consultant has not yet been identified, what procedures and criteria would be used to select the consultant? (Applicants are expected to follow their jurisdiction’s normal procedures for procuring consultant services.) What is the time frame for completion of the technical assistance? How would the court oversee the project and provide guidance to the consultant, and who at the court would be responsible for coordinating all project tasks and submitting quarterly progress and financial status reports?

   If the consultant has been identified, a letter from that individual or organization documenting interest and availability for the project, as well as the consultant’s ability to complete the assignment within the proposed time period and for the proposed cost, should accompany the applicant’s letter. The consultant must agree to submit a detailed written report to the court and the Institute upon completion of the technical assistance.

   iii. Likelihood of Implementation. What steps have been/will be taken to facilitate implementation of the consultant’s recommendations upon completion of the technical assistance? For example, if the support or cooperation of specific court officials or committees, other agencies, funding bodies, organizations, or a court other than the applicant will be needed to adopt the changes recommended by the consultant and approved by the court, how will they be involved in the review
of the recommendations and development of the implementation plan?

iv. Budget and Matching State Contribution. A completed Form E, “Preliminary Budget” (see Appendix V to the Grant Guideline), must be included with the applicant’s letter requesting technical assistance. Please note that the estimated cost of the technical assistance services should be broken down into the categories listed on the budget form rather than aggregated under the Consultant/Contractual category.

The budget narrative should provide the basis for all project-related costs, including the basis for determining the estimated consultant costs (e.g., number of days per task times the requested daily consultant rate). Applicants should be aware that consultant rates above $300 per day must be approved in advance by the Institute, and that no consultant will be paid at a rate in excess of $500 per day. In addition, the budget should provide for submission of two copies of the consultant's final report to the Institute.

Recipients of technical assistance grants do not have to submit an audit, but must maintain appropriate documentation to support expenditures. (See section X.M.)

v. Support for the Project from the State Supreme Court or its Designated Agency or Council. Written concurrence on the need for the technical assistance must be submitted. This concurrence may be a copy of SJI Form B (see Appendix VI) signed by the Chief Justice of the State Supreme Court or the Chief Justice's designee, or a letter from the State Chief Justice or designee. The concurrence may be submitted with the applicant’s letter or under separate cover prior to consideration of the application. The concurrence also must specify whether the State Supreme Court would receive, administer, and account for the grant funds, if awarded, or would designate the local court or a specified agency or council to receive the funds directly.

Letters of application may be submitted at any time; however, all of the letters received during a calendar quarter will be considered at one time. Applicants submitting letters between June 18, and September 30, 1996 will be notified of the Board’s decision by December 9, 1996; those submitting letters between October 1, 1996 and January 10, 1997 will be notified by March 28, 1997. Notification of the Board’s decisions concerning letters mailed between January 11 and March 14, 1997, will be made by May 27, 1997. Notice of decisions regarding letters submitted between March 15 and June 13, 1997 will be made by August 31, 1997. Subject to the availability of sufficient appropriations for fiscal year 1998, applicants submitting letters between June 14 and September 30, 1997, will be notified by December 19, 1997.

If the support or cooperation of agencies, funding bodies, organizations, or courts other than the applicant, would be needed in order for the consultant to perform the required tasks, written assurances of such support or cooperation must accompany the application letter. Support letters also may be submitted under separate cover; however, to ensure that there is sufficient time to bring them to the attention of the Board’s Technical Assistance Committee, letters sent under separate cover must be received not less than two weeks prior to the Board meeting at which the technical assistance requests will be considered (i.e., by November 1, 1996, and February 13, April 17, and July 11, 1997).

vi. Grantee Responsibilities. Technical Assistance grant recipients are subject to the same quarterly reporting requirements as other Institute grantees. At the conclusion of the grant period, a Technical Assistance grant recipient must complete a Technical Assistance Evaluation Form. The grantee also must submit to the Institute two copies of a final report that explains how it intends to act on the consultant’s recommendations as well as two copies of the consultant’s written report.

III. Definitions
The following definitions apply for the purposes of this guideline:

A. Institute
The State Justice Institute.

B. State Supreme Court
The highest appellate court in a State, or, for the purposes of the Institute program, a constitutionally or legislatively established judicial council that acts in place of that court. In States having more than one court with final appellate authority, State Supreme Court shall mean that court which also has administrative responsibility for the State’s judicial system. State Supreme Court also includes the office of the court or council, if any, it designates to perform the functions described in this Guideline.

C. Designated Agency or Council
The office or judicial body which is authorized under State law or by delegation from the State Supreme Court to approve applications for funds and to receive, administer, and be accountable for those funds.

D. Grantee
The organization, entity, or individual to which an award of Institute funds is made. For a grant based on an application from a State or local court, grantee refers to the State Supreme Court or its designee.

E. Subgrantee
A State or local court which receives Institute funds through the State Supreme Court.

F. Match
The portion of project costs not borne by the Institute. Match includes both in-kind and cash contributions. Cash match is the direct outlay of funds by the grantee to support the project. In-kind match consists of contributions of time, services, space, supplies, etc., made to the project by the grantee or others (e.g., advisory board members) working directly on the project. Under normal circumstances, allowable match may be incurred only during the project period. When appropriate, and with the prior written permission of the Institute, match may be incurred from the date of the Board of Directors’ approval of an award. Match does not include project-related income such as tuition or revenue from the sale of grant products, or the time of participants attending an education program. Amounts contributed as cash or in-kind match may not be recovered through the sale of grant products during or following the grant period.

G. Continuation Grant
A grant of no more than 24 months to permit completion of activities initiated under an existing Institute grant or enhancement of the products or services produced during the prior grant period.

H. On-going Support Grant
A grant of up to 36 months to support a project that is national in scope and that provides the State courts with services, programs or products for which there is a continuing important need.

I. Human Subjects
Individuals who are participants in an experimental procedure or who are asked to provide information about themselves, their attitudes, feelings, opinions and/or experiences through an interview, questionnaire, or other data collection technique.

J. Curriculum
The materials needed to replicate an education or training program.
developed with grant funds including, but not limited to: the learning objectives; the presentation methods; a sample agenda or schedule; an outline of presentations and other instructors’ notes; copies of overhead transparencies or other visual aids; exercises, case studies, hypotheticals, quizzes and other materials for involving the participants; background materials for participants; evaluation forms; and suggestions for replicating the program including possible faculty or the preferred qualifications or experience of those selected as faculty.

K. Products

Tangible materials resulting from funded projects including, but not limited to: curricula; monographs; reports; books; articles; manuals; handbooks; benchmark; guidelines; videotapes; audiotapes; computer software; and CD-ROM disks.

IV. Eligibility for Award

In awarding funds to accomplish these objectives and purposes, the Institute has been authorized by Congress to award grants, cooperative agreements, and contracts to State and local governments (42 U.S.C. 10705(b)(1)(A)); national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branches of State governments (42 U.S.C. 10705(b)(1)(B)); and national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments (42 U.S.C. 10705(b)(1)(C)).

An applicant will be considered a national education and training applicant under section 10705(b)(1)(C) if: (1) the principal purpose or activity of the applicant is to provide education and training to State and local judges and court personnel; and (2) the applicant demonstrates a record of substantial experience in the field of judicial education and training.

The Institute also is authorized to make awards to other nonprofit organizations with expertise in judicial administration, institutions of higher education, individuals, partnerships, firms, corporations, and private agencies with expertise in judicial administration, provided that the objectives of the relevant program area(s) can be served better. In making this judgment, the Institute will consider the likely replicability of the projects’ methodology and results in other jurisdictions. For-profit organizations are also eligible for grants and cooperative agreements; however, they must waive their fees.

The Institute may also make awards to Federal, State or local agencies and institutions other than courts for services that cannot be adequately provided through nongovernmental arrangements.

In addition, the Institute may enter into inter-agency agreements with other public or private funders to support projects consistent with the purpose of the State Justice Institute Act.

Each application for funding from a State or local court must be approved, consistent with State law, by the State’s Supreme Court or its designated agency or council. The latter shall receive all Institute funds awarded to such courts and be responsible for assuring proper administration of Institute funds, in accordance with section XI.B.2. of this Guideline. A list of persons to contact in each State regarding approval of applications from State and local courts and administration of Institute grants to those courts is contained in Appendix I.

V. Types of Projects and Grants; Size of Awards

A. Types of Projects

Except as expressly provided in section II.B.2.b. and II.C. above, the Institute has placed no limitation on the overall number of awards or the number of awards in each special interest category. The general types of projects are:

1. Education and training;
2. Research and evaluation;
3. Demonstration; and
4. Technical assistance.

B. Types of Grants

The Institute has established the following types of grants:

1. Project grants (See sections II.B., and C.I., VI., and VII.).
2. Continuation grants (See sections III.H. and IX.A.).
3. On-going Support grants (See sections III.I. and IX.B.).
4. Technical Assistance grants (See section II.C.2.).
5. Curriculum Adaptation grants (See section II.B.2.b.i.i.).
6. Scholarships (See section II.B.2.b.iii).

C. Maximum Size of Awards

1. Except as specified below, applications for new project grants and applications for continuation grants may request funding in amounts up to $200,000, although new and continuation awards in excess of $150,000 are likely to be rare and to be made, if at all, only for highly promising proposals that will have a significant impact nationally.

2. Applications for on-going support grants may request funding in amounts up to $600,000. At the discretion of the Board, the funds for on-going support grants may be awarded either entirely from the Institute’s appropriations for the fiscal year of the award or from the Institute’s appropriations for successive fiscal years beginning with the fiscal year of the award. When funds to support the full amount of an on-going support grant are not awarded from the appropriations for the fiscal year of award, funds to support any subsequent years of the grant will be made available upon (1) the satisfactory performance of the project as reflected in the Quarterly Progress Reports required to be filed and grant monitoring, and (2) the availability of appropriations for that fiscal year.

3. Applications for technical assistance grants may request funding in amounts up to $30,000.

4. Applications for curriculum adaptation grants may request funding in amounts up to $20,000.

5. Applications for scholarships may request funding in amounts up to $1,500.

D. Length of Grant Periods

1. Grant periods for all new and continuation projects ordinarily will not exceed 15 months.

2. Grant periods for on-going support grants ordinarily will not exceed 36 months.

3. Grant periods for technical assistance grants and curriculum adaptation grants ordinarily will not exceed 12 months.

VI. Concept Paper Submission Requirements for New Projects

Concept papers are an extremely important part of the application process because they enable the Institute to learn the program areas of primary interest to the courts and to explore innovative ideas, without imposing heavy burdens on prospective applicants. The use of concept papers also permits the Institute to better project the nature and amount of grant awards. This requirement and the submission deadlines for concept papers and applications may be waived by the Executive Director for good cause (e.g., the proposed project could provide a significant benefit to the State courts or the opportunity to conduct the project did not arise until after the deadline).

A. Format and Content

All concept papers must include a cover sheet, a program narrative, and a preliminary budget, regardless of whether the applicant is proposing a
conducting the project as fully as space allows, and include a detailed task schedule as an attachment to the concept paper.

(c) How will the effects and quality of the project be determined? Applicants should include a summary description of how the project will be evaluated, including the evaluation criteria.

(d) How will others find out about the project and be able to use the results? Applicants should describe the products that will result, the degree to which they will be applicable to courts across the nation, and the manner in which the products and results of the project will be disseminated.

3. The Budget

(a) Preliminary Budget. A preliminary budget must be attached to the narrative that includes the information specified on Form E included in Appendix VI of this Guideline. Applicants should be aware that prior written Institute approval is required for any consultant rate in excess of $300 per day, and that Institute funds may not be used to pay a consultant in excess of $900 per day.

(b) Concept Papers Requesting Accelerated Award of a Grant of Less than $40,000. Applicants requesting a waiver of the application requirement and approval of a grant based on a concept paper under section VI.C. must attach to Form E (see Appendix VI) a budget narrative explaining the basis for each of the items listed, and whether the costs would be paid from grant funds or through a matching contribution or other sources.

4. Letters of Cooperation or Support

The Institute encourages concept paper applicants to attach letters of cooperation and support from the courts and related agencies that will be involved in or directly affected by the proposed project. Letters of support may also be sent under separate cover. However, in order to ensure that there is sufficient time to bring them to the Board's attention, support letters sent under separate cover must be received no later than January 13, 1997.

5. Page Limits

(a) The Institute will not accept concept papers with program narratives exceeding the limits set in sections VI.A.2. The page limit does not include the cover page, budget form, the budget narrative if required under section VI.A.3.b., the task schedule if required under section VI.A.2.b., and any letters of cooperation or endorsements. Additional material should not be attached unless it is essential to impart a clear understanding of the project.

(b) Applicants submitting more than one concept paper may include material that would be identical in each concept paper in a cover letter, and incorporate that material by reference in each paper. The incorporated material will be counted against the eight-page limit for each paper. A copy of the cover letter should be attached to each copy of each concept paper.

6. Sample Concept Papers

Sample concept papers from previous funding cycles are available from the Institute upon request.

B. Selection Criteria

1. All concept papers will be evaluated on the basis of the following criteria:

(a) The demonstration of need for the project;

(b) The soundness and innovativeness of the approach described;

(c) The benefits to be derived from the project;

(d) The reasonableness of the proposed budget;

(e) The proposed project's relationship to one of the "Special Interest" categories set forth in section II.B.; and

(f) The degree to which the findings, procedures, training, technology, or other results of the project can be transferred to other jurisdictions.

"Single jurisdiction" concept papers submitted pursuant to section II.C. will be rated on the proposed project's relation to one of the "Special Interest" categories set forth in section II.B., and on the special requirements listed in section II.C.1.

2. In determining which concept papers will be approved for award or selected for development into full applications, the Institute will also consider the availability of financial assistance from other sources for the project: the amount and nature (cash or in-kind) of the applicant's anticipated match; whether the applicant is a State court, a national court support or education organization, a non-court unit of government, or another type of entity eligible to receive grants under the Institute's enabling legislation (see 42 U.S.C. 10705(b) (as amended) and section IV above); the extent to which the proposed project would also benefit the Federal courts or help the State courts enforce Federal constitutional and legislative requirements, and the level of appropriations available to the Institute in the current year and the amount expected to be available in succeeding fiscal years.
C. Review Process

Concept papers will be reviewed competitively by the Board of Directors. Institute staff will prepare a narrative summary and a rating sheet assigning points for each relevant selection criterion for those concept papers which fall within the scope of the Institute’s funding program and merit serious consideration by the Board. Staff will also prepare a list of those papers that, in the judgment of the Executive Director, propose projects that lie outside the scope of the Institute’s funding program or are not likely to merit serious consideration by the Board. The narrative summaries, rating sheets, and list of non-reviewed papers will be presented to the Board for their review. Committees of the Board will review concept paper summaries within assigned program areas and prepare recommendations for the full Board. The full Board of Directors will then decide which concept paper applicants should be invited to submit formal applications for funding. The decision to invite an application is solely that of the Board of Directors.

The Board may waive the application requirement and approve a grant based on a concept paper for a project requiring less than $40,000, when the need for and benefits of the project are clear, and the methodology and budget require little additional explanation. Because the Institute’s experience has been that projects to conduct empirical research or program evaluation ordinarily require a more thorough explanation of the methodology to be used than can be provided within the space limitations of a concept paper, the Board is unlikely to waive the application requirement for such projects.

D. Submission Requirements

An original and three copies of all concept papers submitted for consideration in Fiscal Year 1997 must be sent by first class or overnight mail or by courier no later than November 27, 1996. A postmark or courier receipt will constitute evidence of the submission date. All envelopes containing concept papers should be marked CONCEPT PAPER and should be sent to: State Justice Institute, 1650 King Street, Suite 600, Alexandria, Virginia 22314.

The Institute will send written notice to all persons submitting concept papers of the Board’s decisions regarding their papers and of the key issues and questions that arose during the review process. A decision by the Board not to invite an application may not be appealed, but does not prohibit resubmission of the concept paper or a revision thereof in a subsequent round of funding. The Institute will also notify the designated State contact listed in Appendix I when the Board invites applications that are based on concept papers which are submitted by courts within their State or which specify a participating site within their State.

Receipt of each concept paper will be acknowledged in writing. Extensions of the deadline for submission of concept papers will not be granted.

VII. Application Requirements for New Projects

An application for Institute funding support must include an application form; budget forms (with appropriate documentation); a project abstract and program narrative; a disclosure of lobbying form, when applicable; and certain certifications and assurances. These required application forms are described below and are included in Appendix VII. They also may be requested via E-mail (SIJ@clark.net) or by calling the Institute and requesting a copy (703-684-6100). Applicants may photocopy the forms to make completion easier.

A. Forms

1. Application Form (FORM A)

The application form requests basic information regarding the proposed project, the applicant, and the total amount of funding support requested from the Institute. It also requires the signature of an individual authorized to certify on behalf of the applicant that the information contained in the application is true and complete, that the project has been approved by the State’s highest designee will receive, administer, and be accountable for the awarded funds.

2. Certificate of State Approval (FORM B)

An application from a State or local court must include a copy of FORM B signed by the State's Chief Justice or Chief Judge, the director of the designated agency, or the head of the designated council. The signature denotes that the proposed project has been approved by the State’s highest court or the agency or council it has designated. It denotes further that if funding for the project is approved by the Institute, the court or the specified designee will receive, administer, and be accountable for the awarded funds.

3. Budget Forms (FORM C or C1)

Applicants may submit the proposed project budget either in the tabular format of FORM C or in the spreadsheet format of FORM C1. Applicants requesting $100,000 or more are strongly encouraged to use the spreadsheet format. If the proposed project period is for more than a year, a separate form should be submitted for each year or portion of a year for which grant support is requested.

In addition to FORM C or C1, applicants must provide a detailed budget narrative providing an explanation of the basis for the estimates in each budget category. (See section VII.D.)

If funds from other sources are required to conduct the project, either as match or to support other aspects of the project, the source, current status of the request, and anticipated decision date must be provided.

4. Assurances (FORM D)

This form lists the statutory, regulatory, and policy requirements and conditions with which recipients of Institute funds must comply.

5. Disclosure of Lobbying Activities

This form requires applicants other than units of State or local government to disclose whether they, or another entity that is part of the same organization as the applicant, have advocated a position before Congress on any issue, and to identify the specific subjects of their lobbying efforts. (See section X.D.)

B. Project Abstract

The abstract should highlight the purposes, goals, methods and anticipated benefits of the proposed project. It should not exceed one single-spaced page on 8½ by 11 inch paper.

C. Program Narrative

The program narrative for an application should not exceed 25 double-spaced pages on 8½ by 11 inch paper. Margins must be at least 1 inch, and type size must be of least 12-point and 12 cpi. The page limit does not include the forms, the abstract, the budget narrative, and any appendices containing resumes and letters of cooperation or endorsement. Additional background material should be attached only if it is essential to impart a clear understanding of the proposed project. Numerous and lengthy appendices are strongly discouraged.

The program narrative should address the following topics:
1. Project Objectives

The applicant should include a clear, concise statement of what the proposed project is intended to accomplish. In stating the objectives of the project, applicants should focus on the overall programmatic objective (e.g., to enhance understanding and skills regarding a specific subject, or to determine how a certain procedure affects the court and litigants) rather than on operational objectives (e.g., providing training for 32 judges and court managers, or review data from 300 cases).

2. Program Areas to be Covered

The applicant should list the Special Interest Category or Categories that are addressed by the proposed project (see section II.B.). If the proposed project does not fall within one of the Institute’s Special Interest Categories, the applicant should list the Statutory Program Area or Areas that are addressed by the proposed project. (See section II.A.)

3. Need for the Project

If the project is to be conducted in a specific location(s), the applicant should discuss the particular needs of the project site(s) to be addressed by the project and why those needs are not being met through the use of existing materials, programs, procedures, services, or other resources.

If the project is not site-specific, the applicant should discuss the problems that the proposed project would address, and why existing materials, programs, procedures, services, or other resources do not adequately resolve those problems. The discussion should include specific references to the relevant literature and to the experience in the field.

4. Tasks, Methods and Evaluation

a. Tasks and Methods. The applicant should delineate the tasks to be performed in achieving the project objectives and the methods to be used for accomplishing each task. For example:

i. For research and evaluation projects, the applicant should include the data sources, data collection strategies, variables to be examined, and analytic procedures to be used for conducting the research or evaluation and ensuring the validity and general applicability of the results. For projects involving human subjects, the discussion of methods should address the procedures for obtaining respondents’ informed consent, ensuring respondents’ privacy and freedom from risk or harm, and the protection of others who are not the subjects of research but would be affected by the research. If the potential exists for risk or harm to the human subjects, a discussion should be included that explains the value of the proposed research and the methods to be used to minimize or eliminate such risk.

ii. For education and training projects, the applicant should include the adult education techniques to be used in designing and presenting the program, including the teaching/learning objectives of the educational design, the teaching methods to be used, and the opportunities for structured interaction among the participants; how faculty will be recruited, selected, and trained; the proposed number and length of the conferences, courses, seminars, or workshops to be conducted and the estimated number of persons who will attend them; the materials to be provided and how they will be developed; and the cost to participants.

iii. For demonstration projects, the applicant should include the demonstration sites and the reasons they were selected, or if the sites have not been chosen, how they will be identified and their cooperation obtained; and how the program or procedures will be implemented and monitored.

iv. For technical assistance projects, the applicant should explain the types of assistance that will be provided; the particular issues and problems for which assistance will be provided; how requests will be obtained and the type of assistance determined; how suitable providers will be selected and briefed; how reports will be reviewed; and the cost to recipients.

b. Evaluation. Every project design must include an evaluation plan to determine whether the project met its objectives. The evaluation should be designed to provide an objective and independent assessment of the effectiveness or usefulness of the training or services provided; the impact of the procedures, technology or services tested; or the validity and applicability of the research conducted. In addition, where appropriate, the evaluation process should be designed to provide on-going or periodic feedback on the effectiveness or utility of particular programs, educational offerings, or achievements which can then be further refined as a result of the evaluation process. The plan should present the qualifications of the evaluator(s); describe the criteria, related to the project’s programmatic objective that will be used to evaluate the project’s effectiveness; explain how the evaluation will be conducted, including the specific data collection and analysis techniques to be used; discuss why this approach is appropriate; and present a schedule for completion of the evaluation within the proposed project period.

The evaluation plan should be appropriate to the type of project proposed. For example:

i. Research. An evaluation approach suited to many research projects is a review by an advisory panel of the research methodology, data collection instruments, preliminary analyses, and products as they are drafted. The panel should be comprised of independent researchers and practitioners representing the perspectives affected by the proposed project.

ii. Education and Training. The most valuable approaches to evaluating educational or training programs will serve to reinforce the participants’ learning experience while providing useful feedback on the impact of the program and possible areas for improvement. One appropriate evaluation approach is to assess the acquisition of new knowledge, skills, attitudes or understanding through participant feedback on the seminar or training event. Such feedback might include a self-assessment on what was learned along with the participant’s response to the quality and effectiveness of faculty presentations, the format of sessions, the value or usefulness of the material presented, and other relevant factors. Another appropriate approach would be to use an independent observer who might request both verbal and written responses from participants in the program. When an education project involves the development of curricular materials, an advisory panel of relevant experts can be coupled with a test of the curriculum to obtain the reactions of participants and faculty as indicated above.

iii. Demonstration. The evaluation plan for a demonstration project should encompass an assessment of program effectiveness (e.g., how well did it work?); user satisfaction, if appropriate; the cost-effectiveness of the program; a process analysis of the program (e.g., was the program implemented as designed? did it provide the services intended to the targeted population?); the impact of the program (e.g., what effect did the program have on the court? what benefits resulted from the program?); and the replicability of the program or components of the program.

iv. Technical Assistance. For technical assistance projects, applicants should explain how the timeliness, and impact of the assistance provided will be determined, and
should develop a mechanism for feedback from both the users and providers of the technical assistance.

v. Evaluation plans involving human subjects should include a discussion of the procedures for obtaining respondents’ informed consent, ensuring the respondents’ privacy and freedom from risk or harm, and the protection of others who are not the subjects of evaluation but would be affected by it. Other than the provision of confidentiality to respondents, human subject protection issues ordinarily are not applicable to participants evaluating an education program.

5. Project Management

The applicant should present a detailed management plan including the starting and completion date for each task; the time commitments to the project of key staff and their responsibilities regarding each project task; and the procedures that will be used to ensure that all tasks are performed on time, within budget, and at the highest level of quality. In preparing the project time line, Gantt Chart, or schedule, applicants should make certain that all project activities, including publication or reproduction of project products and their initial dissemination will occur within the proposed project period. The management plan must also provide for the submission of Quarterly Progress and Financial Reports within 30 days after the close of each calendar quarter (i.e., no later than January 30, April 30, July 30, and October 30).

Applicants should be aware that the Institute is unlikely to approve more than one limited extension of the grant period. Therefore, the management plan should be as realistic as possible and fully reflect the time commitments of the proposed project staff and consultants.

6. Products

The application should contain a description of the products to be developed by the project (e.g., training curriculum and materials, videotapes, articles, manuals, or handbooks), including when they will be submitted to the Institute.

a. Dissemination Plan. The application must explain how and to whom the products will be disseminated; describe how they will benefit the State courts, including how they can be used by judges and court personnel; identify development, production, and dissemination costs covered by the project budget; and present the basis on which products and services developed or provided under the grant will be offered to the courts community and the public at large (i.e., whether products will be distributed at no cost to recipients, or if costs are involved, the reason for charging recipients and the estimated price of the product). (See section X.V.) Ordinarily, applicants should schedule all product preparation and distribution activities within the project period. Applicants also must submit a diskette containing a one-page abstract summarizing the products resulting from a project in Word, WordPerfect or ASCII. The abstract should include the grant number and the name of a contact person together with that individual’s address, telephone number, and e-mail address (if applicable).

A copy of each product must be sent to the library established in each State to collect the materials developed with Institute support. (A list of these libraries is contained in Appendix II.) To facilitate their use, all videotaped products should be distributed in VHS format.

Twenty copies of all project products must be submitted to the Institute. A master copy of each videotape, in addition to 20 copies of each videotape product, must also be provided to the Institute.

b. Types of Products. The type of products to be prepared depend on the nature of the project. For example, in most instances, the products of a research, evaluation, or demonstration project should include an article summarizing the project findings that is publishable in a journal serving the courts community nationally, an executive summary that will be disseminated to the project’s primary audience, or both. Applicants proposing to conduct empirical research or evaluation projects with national import should describe how they will make their data available for secondary analysis after the grant period. (See section X.W.)

The curricula and other products developed by education and training projects should be designed for use outside the classroom so that they may be used again by original participants and others in the course of their duties.

c. Institute Review. Applicants must provide for submitting a final draft of all written grant products to the Institute for review and approval at least 30 days before the products are submitted for publication or reproduction. For products in a videotape or CD-ROM format, applicants must provide for incremental Institute review of the product at the treatment, script, roughcut, and final stages of development, or their equivalents. No grant funds may be obligated for publication or reproduction of a final grant product without the written approval of the Institute.

d. Acknowledgment, Disclaimer, and Logo. Applicants must also provide for including in all project products a prominent acknowledgment that support was received from the Institute and a disclaimer paragraph based on the example provided in section X.Q. of the Guideline. The “SJI” logo must appear on the front cover of a written product, or in the opening frames of a video product, unless the Institute approves another placement.

7. Applicant Status

An applicant that is not a State or local court and has not received a grant from the Institute within the past two years should state whether it is either a national non-profit organization controlled by, operating in conjunction with, and serving the judicial branches of State governments; or a national non-profit organization for the education and training of State court judges and support personnel. See section IV. If the applicant is a nonjudicial unit of Federal, State, or local government, it must explain whether the proposed services could be adequately provided by non-governmental entities.

8. Staff Capability

The applicant should include a summary of the training and experience of the key staff members and consultants that qualify them for conducting and managing the proposed project. Resumes of identified staff should be attached to the application. If one or more key staff members and consultants are not known at the time of the application, a description of the criteria that will be used to select persons for these positions should be included.

9. Organizational Capacity

Applicants that have not received a grant from the Institute within the past two years should include a statement describing the capacity of the applicant to administer grant funds including the financial systems used to monitor project expenditures (and income, if any), and a summary of the applicant’s past experience in administering grants, as well as any resources or capabilities that the applicant has that will particularly assist in the successful completion of the project.

Unless requested otherwise, an applicant that has received a grant from the Institute within the past two years should describe only the changes in its
organizational capacity, tax status, or financial capability that may affect its capacity to administer a grant.

If the applicant is a non-profit organization (other than a university), it must also provide documentation of its 501(c) tax exempt status as determined by the Internal Revenue Service and a copy of a current certified audit report. For purposes of this requirement, "current" means no earlier than two years prior to the current calendar year. If a current audit report is not available, the Institute will require the organization to complete a financial capability questionnaire which must be signed by a Certified Public Accountant. Other applicants may be required to provide a current audit report, a financial capability questionnaire, or both, if specifically requested to do so by the Institute.

10. Statement of Lobbying Activities

Non-governmental applicants must submit the Institute's Disclosure of Lobbying Activities Form that requires them to state whether they, or another entity that is a part of the same organization as the applicant, have advocated a position before Congress on any issue, and identifies the specific subjects of their lobbying efforts.

11. Letters of Cooperation or Support

If the cooperation of courts, organizations, agencies, or individuals other than the applicant is required to conduct the project, the applicant should attach written assurances of cooperation and availability to the application, or send them under separate cover. In order to ensure that there is sufficient time to bring them to the Board's attention, letters of support sent under separate cover must be received at least four weeks before the meeting of the Board of Directors at which the application will be considered (i.e., no later than January 24, 1997, April 3, 1997, or June 27, 1997, respectively).

D. Budget Narrative

The budget narrative should provide the basis for the computation of all project-related costs. Additional background or schedules may be attached if they are essential to obtaining a clear understanding of the proposed budget. Numerous and lengthy appendices are strongly discouraged.

The budget narrative should cover the costs of all components of the project and clearly identify costs attributable to the project. Evaluation Under OMB and clearly identify costs attributable to the project evaluation. Under OMB and clearly identify costs attributable to the project evaluation. Under OMB

1. Justification of Personnel Compensation

The applicant should set forth the percentages of time to be devoted by the individuals who will serve as the staff of the proposed project, the annual salary of each of those persons, and the number of work days per year used for calculating the percentages of time or daily rate of those individuals. The applicant should explain any deviations from current rates or established written organization policies. If grant funds are requested to pay the salary and related costs for a current employee of a court or other unit of government, the applicant should explain why this would not constitute a supplantation of State or local funds in violation of 42 U.S.C. 10706 (d)(1). An acceptable explanation may be that the position to be filled is a new one established in conjunction with the project or that the grant funds will be supporting only the portion of the employee's time that will be dedicated to new or additional duties related to the project.

2. Fringe Benefit Computation

The applicant should provide a description of the fringe benefits provided to employees. If percentages are used, the authority for such use should be presented as well as a description of the elements included in the determination of the percentage rate.

3. Consultant/Contractual Services and Honoraria

The applicant should describe the tasks each consultant will perform, the estimated total amount to be paid to each consultant, the basis for compensation rates (e.g., number of days x the daily consultant rates), and the method for selection. Rates for consultant services must be set in accordance with section XI.H.2.c. Honorarium payments must be justified in the same manner as other consultant payments. Prior written Institute approval is required for any consultant rate in excess of $300 per day; Institute funds may not be used to pay a consultant at a rate in excess of $900 per day.

4. Travel

Transportation costs and per diem rates must comply with the policies of the applicant organization. If the applicant does not have an established travel policy, then travel rates shall be consistent with those established by the Institute or the Federal Government. (A copy of the Institute's travel policy is available upon request.) The budget narrative should include an explanation of the rate used, including the components of the per diem rate and the basis for the estimated transportation expenses. The purpose for travel should also be included in the narrative.

5. Equipment

Grant funds many be used to purchase only the equipment that is necessary to demonstrate a new technological application in a court, or that is otherwise essential to accomplishing the objectives of the project. Equipment purchases to support basic court operations ordinarily will not be approved. The applicant should describe the equipment to be purchased or leased and explain why the acquisition of that equipment is essential to accomplish the project's goals and objectives. The narrative should clearly identify which equipment is to be leased and which is to be purchased. The method of procurement should also be described. Purchases for automatic data processing equipment must comply with section XI.H.2.b.

6. Supplies

The applicant should provide a general description of the supplies necessary to accomplish the goals and objectives of the grant. In addition, the applicant should provide the basis for the amount requested for this expenditure category.

7. Construction

Construction expenses are prohibited except for the limited purposes set forth in section X.H.2. Any allowable construction or renovation expense should be described in detail in the budget narrative.

8. Telephone

Applicants should include anticipated telephone charges, distinguishing between monthly charges and long distance charges in the budget narrative. Also, applicants should provide the basis used in developing the monthly and long distance estimates.

9. Postage

Anticipated postage costs for project-related mailings should be described in the budget narrative. The cost of special mailings, such as for a survey or for announcing a workshop, should be distinguished from routine operational mailing costs. The bases for all postage estimates should be included in the justification material.
10. Printing/Photocopying

Anticipated costs for printing or photocopying should be included in the budget narrative. Applicants should provide the details underlying these estimates in support of the request.

11. Indirect Costs

 Applicants should describe the indirect cost rates applicable to the grant in detail. If costs often included within an indirect cost rate are charged directly (e.g., a percentage of the time of senior managers to supervise product activities), the applicant should specify that these costs are not included within their approved indirect cost rate. These rates must be established in accordance with section XI.H.4. If the applicant has an indirect cost rate or allocation plan approved by any Federal granting agency, a copy of the approved rate agreement should be attached to the application.

12. Match

The applicant should describe the source of any matching contribution and the nature of the match provided. Any additional contributions to the project should be described in this section of the budget narrative as well. If in-kind match is to be provided, the applicant should describe how the amount and value of the time, services or materials actually contributed will be documented sufficiently clearly to permit them to be included in an audit of the grant. Applicants should be aware that the time spent by participants in education courses does not qualify as in-kind match.

Applicants that do not contemplate making matching contributions continuously throughout the course of the project or on a task-by-task basis must provide a schedule within 30 days after the beginning of the project period indicating at what points during the project period the matching contributions will be made. (See sections III.F., VIII.B., X.B. and XI.D.1.)

E. Submission Requirements

1. An application package containing the application, an original signature on FORM A (and on FORM B, if the application is from a State or local court, or on the Disclosure of Lobbying Form if the applicant is not a unit of State or local government), and four photocopies of the application package must be sent by first class or overnight mail, or by courier no later than May 9, 1997. A postmark or courier receipt will constitute evidence of the submission date. Please mark APPLICATION on all application package envelopes and send to: State Justice Institute, 1650 King Street, Suite 600, Alexandria, Virginia 22314.

Receipt of each proposal will be acknowledged in writing. Extensions of the deadline for receipt of applications will not be granted. See section VII.C.11. for receipt deadlines for letters of support.

2. Applicants submitting more than one application may include material that would be identical in each application in a cover letter, and incorporate that material by reference in each application. The incorporated material will be counted against the 25-page limit for the program narrative. A copy of the cover letter should be attached to each copy of each application.

VIII. Application Review Procedures

A. Preliminary Inquiries

The Institute staff will answer inquiries concerning application procedures. The staff contact will be named in the Institute's letter acknowledging receipt of the application.

B. Selection Criteria

1. All applications will be rated on the basis of the criteria set forth below. The Institute will accord the greatest weight to the following criteria:
   a. The soundness of the methodology;
   b. The demonstration of need for the project;
   c. The appropriateness of the proposed evaluation design;
   d. The applicant's management plan and organizational capabilities;
   e. The qualifications of the project's staff;
   f. The products and benefits resulting from the project including the extent to which the project will have long-term benefits for State courts across the nation;
   g. The degree to which the findings, procedures, training, technology, or other results of the project can be transferred to other jurisdictions;
   h. The reasonableness of the proposed budget;
   i. The demonstration of cooperation and support of other agencies that may be affected by the project; and
   j. The proposed project's relationship to one of the "Special Interest" categories set forth in section II.B.

2. In determining which applicants to fund, the Institute will also consider whether the applicant is a State court, a national court support or education organization, a non-court unit of government, or other type of entity eligible to receive grants under the Institute's enabling legislation (see 42 U.S.C. 10705(6) (as amended) and Section IV above); the availability of financial assistance from other sources for the project; the amount and nature (cash or in-kind) of the applicant's match; the extent to which the proposed project would also benefit the Federal courts or help State courts enforce Federal constitutional and legislative requirements; and the level of appropriations available to the Institute in the current year and the amount expected to be available in succeeding fiscal years.

C. Review and Approval Process

Applications will be reviewed competitively by the Board of Directors. The Institute staff will prepare a narrative summary of each application, and a rating sheet assigning points for each relevant selection criterion. When necessary, applications may also be reviewed by outside experts. Committees of the Board will review applications within assigned program categories and prepare recommendations to the full Board. The full Board of Directors will then decide which applications to approve for a grant. The decision to award a grant is solely that of the Board of Directors. Awards approved by the Board will be signed by the Chairman of the Board on behalf of the Institute.

D. Return Policy

Unless a specific request is made, unsuccessful applications will not be returned. Applicants are advised that Institute records are subject to the provisions of the Federal Freedom of Information Act, 5 U.S.C. 552.

E. Notification of Board Decision

The Institute will send written notice to applicants concerning all Board decisions to approve, defer, or deny their respective applications and the key issues and questions that arose during the review process. A decision by the Board to deny an application may not be appealed, but does not prohibit resubmission of a proposal based on that application in a subsequent round of funding. The Institute will also notify the designated State contact listed in Appendix I when grants are approved by the Board to support projects that will be conducted by or involve courts in their State.

F. Response to Notification of Approval

Applicants have 30 days from the date of the letter notifying them that the Board has approved their application to respond to any revisions requested by the Board. If the requested revisions (or a reasonable schedule for submitting
such revisions) have not been submitted to the Institute within 30 days after notification, the approval will be automatically rescinded and the application presented to the Board for reconsideration.

IX. Renewal Funding Procedures and Requirements

The Institute recognizes two types of renewal funding as described below—"continuation grants" and "on-going support grants." The award of an initial grant to support a project does not constitute a commitment by the Institute to renew funding. The Board of Directors anticipates allocating no more than $2 million of available FY 1997 grant funds for renewal grants.

A. Continuation Grants

1. Purpose and Scope

Continuation grants are intended to support projects with a limited duration that involve the same type of activities as the previous project. They are intended to enhance the specific program or service produced or established during the prior grant period. They may be used, for example, when a project is divided into two or more sequential phases, for secondary analysis of data obtained in an Institute-supported research project, or for more extensive testing of an innovative technology, procedure, or program developed with SJI grant support.

In order for a project to be considered for continuation funding, the grantee must have completed the project tasks and met all grant requirements and conditions in a timely manner, absent extenuating circumstances or prior Institute approval of changes to the project design. Continuation grants are not intended to provide support for a project for which the grantee has underestimated the amount of time or funds needed to accomplish the project tasks.

2. Application Procedures—Letters of Intent

In lieu of a concept paper, a grantee seeking a continuation grant must inform the Institute, by letter, of its intent to submit an application for such funding as soon as the need for renewal funding becomes apparent but no less than 120 days before the end of the current grant period.

a. A letter of intent must be no more than 3 single-spaced pages on 8½ by 11 inch paper and must contain a concise but thorough explanation of the need for continuation; an estimate of the funds to be requested; and a brief description of anticipated changes in the scope, focus or audience of the project.

b. Within 30 days of receiving a letter of intent, Institute staff will review the proposed activities for the next project period and inform the grantee of specific issues to be addressed in the continuation application and the date by which the application for a continuation grant must be submitted.

3. Application Format

An application for a continuation grant must include an application form, budget forms (with appropriate documentation), a project abstract conforming to the format set forth in section VII.B., a program narrative, a budget narrative, a disclosure of lobbying form (from applicants other than units of State or local government), and certain certifications and assurances.

The program narrative should conform to the length and format requirements set forth in section VII.C. However, rather than the topics listed in section VII.C., the program narrative of an application for a continuation grant should include:

a. Project Objectives. The applicant should clearly and concisely state what the continuation project is intended to accomplish.

b. Need for Continuation. The applicant should explain why continuation of the project is necessary to achieve the goals of the project, and how the continuation will benefit the participating courts or the courts community generally. That is, to what extent will the original goals and objectives of the project be unfulfilled if the project is not continued, and conversely, how will the findings or results of the project be enhanced by continuing the project?

A continuation application requesting a package grant to support more than one project should explain, in addition, how the proposed projects are related; how their operation and administration would be enhanced by the grant; the advantages of funding the projects as a package rather than individually; and the disadvantages, if any, that would accrue by considering or funding them separately.

c. Report of Current Project Activities. The applicant should discuss the status of all activities conducted during the previous project period. Applicants should identify any activities that were not completed, and explain why. A continuation application requesting a package grant must describe separately the activities undertaken in each of the projects included within the proposed package.

d. Evaluation Findings. The applicant should present the key findings, impact, or recommendations resulting from the evaluation of the project, if they are available, and how they will be addressed during the proposed continuation. If the findings are not yet available, applicants should provide the date by which they will be submitted to the Institute. Ordinarily, the Board will not consider an application for continuation funding until the Institute has received the evaluator's report.

e. Tasks, Methods, Staff and Grantee Capability. The applicant should fully describe any changes in the tasks to be performed, the methods to be used, the products of the project, and how and to whom those products will be disseminated, as well as any changes in the assigned staff or the grantee's organizational capacity. Applicants should include, in addition, the criteria and methods by which the proposed continuation project would be evaluated.

A continuation application for a package grant must address these issues separately for each project included in the proposed package, using the same alphabetic identifiers and project titles as in the original application.

f. Task Schedule. The applicant should present a detailed task schedule and timeline for the next project period.

g. Other Sources of Support. The applicant should indicate why other sources of support are inadequate, inappropriate or unavailable.

4. Budget and Budget Narrative

The applicant should provide a complete budget and budget narrative conforming to the requirements set forth in paragraph VII.D. Changes in the funding level requested should be discussed in terms of corresponding increases or decreases in the scope of activities or services to be rendered.

5. References to Previously Submitted Material

An application for a continuation grant should not repeat information contained in a previously approved application or other previously submitted materials, but should provide specific references to such materials where appropriate.

6. Submission Requirements, Review and Approval Process, and Notification of Decision

The submission requirements set forth in section VII.E., other than the deadline for mailing, apply to applications for a continuation grant. Such applications will be rated on the selection criteria set forth in section VII.E. The key findings and recommendations resulting from an evaluation of the project and the
proposed response to those findings and recommendations will also be considered. The review and approval process, return policy, and notification procedures are the same as those for new projects set forth in sections VIII.C.-VIII.E.

B. On-going Support Grants

1. Purpose and Scope

On-going support grants are intended to support projects that are national in scope and that provide the State courts with services, programs or products for which there is a continuing important need. An on-going support grant may also be used to fund longitudinal research that directly benefits the State courts. On-going support grants are subject to the limits on size and duration set forth in V.C.2. and V.D.2. The Board will consider awarding an on-going support grant for a period of up to 36 months. The total amount of the grant will be fixed at the time of the initial award. Funds ordinarily will be made available in annual increments as specified in section V.C.2.

A project is eligible for consideration for an on-going support grant if:

a. The project is supported by and has been evaluated under a grant from the Institute;

b. The project is national in scope and provides a significant benefit to the State courts;

c. There is a continuing important need for the services, programs or products provided by the project as indicated by the level of use and support by members of the court community;

d. The project is accomplishing its objectives in an effective and efficient manner; and

e. It is likely that the service or program provided by the project would be curtailed or significantly reduced without Institute support.

Each project supported by an on-going support grant must include an evaluation component assessing its effectiveness and operation throughout the grant period. The evaluation should be independent, but may be designed collaboratively by the evaluator and the grantee. The design should call for regular feedback from the evaluator to the grantee throughout the project period concerning recommendations for mid-course corrections or improvement of the project, as well as periodic reports to the Institute at relevant points in the project.

An interim evaluation report must be submitted 18 months into the grant period. The decision to obligate Institute funds to support the third year of the project will be based on the interim evaluation findings and the applicant’s response to any deficiencies noted in the report.

A final evaluation assessing the effectiveness, operation of, and continuing need for the project must be submitted 90 days before the end of the 3-year project period.

In addition, a detailed annual task schedule must be submitted not later than 45 days before the end of the first and second years of the grant period, along with an explanation of any necessary revisions in the projected costs for the remainder of the project period. (See also section IX.B.3.h.)

2. Letters of Intent

In lieu of a concept paper, a grantee seeking an on-going support grant must inform the Institute, by letter, of its intent to submit an application for such funding as soon as the need for renewal funding becomes apparent but no less than 120 days before the end of the current grant period. The letter of intent should be in the same format as that prescribed for continuation grants in section IX.A.2.a.

3. Format

An application for an on-going support grant must include an application form, budget forms (with appropriate documentation), a project abstract conforming to the format set forth in section VII.B., a program narrative, a budget narrative, and certain certifications and assurances.

The program narrative should conform to the length and format requirements set forth in section VII.C. However, rather than the topics listed in section VII.C., the program narrative of applications for on-going support grants should address:

a. Description of Need for and Benefits of the Project. The applicant should provide a detailed discussion of the benefits provided by the project to the State courts around the country, including the degree to which State courts, State court judges, or State court managers and personnel are using the services or programs provided by the project.

b. Demonstration of Court Support. The applicant should demonstrate support for the continuation of the project from the courts community.

c. Report on Current Project Activities. The applicant should discuss the extent to which the project has met its goals and objectives, identify any activities that have not been completed, and explain any delays.

d. Evaluation Findings. The applicant should attach a copy of the final evaluation report regarding the effectiveness, impact, and operation of the project, specify the key findings or recommendations resulting from the evaluation, and explain how they will be addressed during the proposed renewal period. Ordinarily, the Board will not consider an application for ongoing support until the Institute has received the evaluator’s report.

e. Objectives, Tasks, Methods, Staff and Grantee Capability. The applicant should describe fully any changes in the objectives; tasks to be performed; the methods to be used; the products of the project; and how and to whom those products will be disseminated; the assigned staff; and the grantee’s organizational capacity.

f. Task Schedule. The applicant should present a general schedule for the full proposed project period and a detailed task schedule for the first year of the proposed new project period.

g. Other Sources of Support. The applicant should indicate why other sources of support are inadequate, inappropriate or unavailable.

4. Budget and Budget Narrative

The applicant should provide a complete three-year budget and budget narrative conforming to the requirements set forth in paragraph VII.D. Changes in the funding level requested should be discussed in terms of corresponding increases or decreases in the scope of activities or services to be rendered. A complete budget narrative should be provided for each year, or portion of a year, for which grant support is requested. Changes in the funding level requested should be discussed in terms of corresponding increases or decreases in the scope of activities or services to be rendered. The budget should provide for realistic cost-of-living and staff salary increases over the course of the requested project period. Applicants should be aware that the Institute is unlikely to approve a supplemental budget increase for an on-going support grant in the absence of well-documented, unanticipated factors that clearly justify the requested increase.

5. References to Previously Submitted Material

An application for an on-going support grant should not repeat information contained in a previously approved application or other previously submitted materials, but should provide specific references to such materials where appropriate.
6. Submission Requirements, Review and Approval Process, and Notification of Decision

The submission requirements set forth in section VII.E., other than the deadline for mailing, apply to applications for an ongoing support grant. Such applications will be rated on the selection criteria set forth in section VIII.B. The key findings and recommendations resulting from an evaluation of the project and the proposed response to those findings and recommendations will also be considered. The review and approval process, return policy, and notification procedures are the same as those for new projects set forth in sections VIII.C.-VIII.E.

X. Compliance Requirements

The State Justice Institute Act contains limitations and conditions on grants, contracts and cooperative agreements of which applicants and recipients should be aware. In addition to eligibility requirements which must be met to be considered for an award from the Institute, all applicants should be aware of and all recipients will be responsible for ensuring compliance with the following:

A. State and Local Court Systems

Each application for funding from a State or local court must be approved, consistent with State law, by the State's Supreme Court, or its designated agency or council. The Supreme Court or its designee shall receive, administer, and be accountable for all funds awarded on the basis of such an application. 42 U.S.C. 10705(b)(4). Appendix I to this Guideline lists the person to contact in each State regarding the administration of Institute grants to State and local courts.

B. Matching Requirements

1. All awards to courts or other units of State or local government (not including publicly supported institutions of higher education) require a match from public or private sources of not less than 50% of the total amount of the Institute's award. For example, if the total cost of a project is anticipated to be $150,000, a State court or executive branch agency may request up to $100,000 from the Institute to implement the project. The remaining $50,000 (50% of the $100,000 requested from SJI) must be provided as a match. A cash match, non-cash match, or both may be provided, but the Institute will give preference to those applicants that provide a cash match to the Institute's award. (For a further definition of match, see section III.F.)

The requirement to provide match may be waived in exceptionally rare circumstances upon approval of the Chief Justice of the highest court in the State and the Board of Directors. 42 U.S.C. 10705(d).

2. Other eligible recipients of Institute funds are not required to provide a match, but are encouraged to contribute to meeting the costs of the project. In instances where match is proposed, the grantee is responsible for ensuring that the total amount proposed is actually contributed. If a proposed contribution is not fully met, the Institute may reduce the award amount accordingly, in order to maintain the ratio originally provided for in the award agreement (see sections VIII.B. above and XI.D).

C. Conflict of Interest

Personnel and other officials connected with Institute-funded programs shall adhere to the following requirements:

1. No official or employee of a recipient court or organization shall participate personally through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise in any proceeding, application, request for a ruling or other determination, contract, grant, cooperative agreement, claim, controversy, or other particular matter in which Institute funds are used, where to his/her knowledge he/she or his/her immediate family, partners, organization other than a public agency in which he/she is serving as officer, director, trustee, partner, or employee or any person or organization with whom he/she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

2. In the use of Institute project funds, an official or employee of a recipient court or organization shall avoid any action which might result in or create the appearance of:

   a. Using an official position for private gain; or

   b. Affecting adversely the confidence of the public in the integrity of the Institute program.

3. Requests for proposals or invitations for bids issued by a recipient of Institute funds or a subgrantee or subcontractor will provide notice to prospective bidders that the contractors who develop or draft specifications, requirements, statements of work and/or requests for proposals for a proposed procurement will be excluded from bidding, or will be not issued a proposal to compete for the award of such procurement.

D. Lobbying

Funds awarded to recipients by the Institute shall not be used, indirectly or directly, to influence Executive orders or similar promulgations by Federal, State, or local agencies, or to influence the passage or defeat of any legislation by Federal, State or local legislative bodies. 42 U.S.C. 10706(a).

It is the policy of the Board of Directors to award funds only to support applications submitted by organizations that would carry out the objectives of their applications in an unbiased manner. Consistent with this policy and the provisions of 42 U.S.C. 10706, the Institute will not knowingly award a grant to an applicant that has, directly or through an entity that is part of the same organization as the applicant, advocated a position before Congress on the specific subject matter of the application.

E. Political Activities

No recipient shall contribute or make available Institute funds, program personnel, or equipment to any political party or association, or the campaign of any candidate for public or party office. Recipients are also prohibited from using funds in advocating or opposing any ballot measure, initiative, or referendum. Officers and employees of recipients shall not intentionally identify the Institute or recipients with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office. 42 U.S.C. 10706(a).

F. Advocacy

No funds made available by the Institute may be used directly or indirectly to support legal assistance to parties in litigation, including cases involving capital punishment.

G. Prohibition Against Litigation Support

No funds made available by the Institute may be used directly or indirectly to support legal assistance to parties in litigation, including cases involving capital punishment.

H. Supplantation and Construction

To ensure that funds are used to supplement and improve the operation of State courts, rather than to support basic court services, funds shall not be used for the following purposes:

1. To supplant State or local funds supporting a program or activity (such as paying the salary of court employees who would be performing their normal...
Reports within 30 days of the close of
Quarterly Progress and Financial
section II.B.2.b.v., shall submit
than scholarships awarded under
L. Reporting Requirements
measures necessary to effectuate this
funds must immediately take any
Institute funds. Recipients of Institute
subjected to discrimination under any
sex, national origin, disability, color, or
denied the benefits of, or otherwise
affected by it, unless such procedures
impractical. In such instances, the
and safeguards would make the research
impractical. In such instances, the
Institute must approve procedures
impacted by it, unless such procedures
subjects of the research but would be
protection of persons who are not
consent of those subjects and in a
manner that will ensure their privacy
and freedom from risk or harm and the
protection of persons who are not
subjects of the research but would be
affected by it, unless such procedures
and safeguards would make the research
impractical. In such instances, the
Institute must approve procedures
designed by the grantee to provide
human subjects with relevant
information about the research after
their involvement and to minimize or
eliminate risk or harm to those subjects
due to their participation.

K. Nondiscrimination

No person may, on the basis of race, sex, national origin, disability, color, or creed be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity supported by Institute funds. Recipients of Institute funds must immediately take any measures necessary to effectuate this provision.

L. Reporting Requirements

Recipients of Institute funds, other than scholarships awarded under section II.B.2.b.v., shall submit Quarterly Progress and Financial Reports within 30 days of the close of each calendar quarter (that is, no later than January 30, April 30, July 30, and October 30). Two copies of each report must be sent. The Quarterly Progress Reports shall include a narrative description of project activities during the calendar quarter, the relationship between those activities and the task schedule and objectives set forth in the approved application or an approved adjustment thereto, any significant problem areas that have developed and how they will be resolved, and the activities scheduled during the next reporting period.

The quarterly financial status report shall be submitted in accordance with section XI.G.2. of this Guideline. A final project progress report and financial status report shall be submitted within 90 days after the end of the grant period in accordance with section XI.K.2. of this Guideline.

M. Audit

Recipients, other than those noted below, must provide for an annual financial audit which shall include an opinion on whether the financial statements of the grantee present fairly its financial position and financial operations in accordance with generally accepted accounting principles. (See section XI.J. of the Guideline for the requirements of such audits.) Recipients of a scholarship, curriculum adaptation, or technical assistance grant are not required to submit an audit, but must maintain appropriate documentation to support all expenditures.

N. Suspension of Funding

After providing a recipient reasonable notice and opportunity to submit written documentation demonstrating why fund termination or suspension should not occur, the Institute may terminate or suspend funding of a project that fails to comply substantially with the Act, the Guideline, or the terms and conditions of the award. 42 U.S.C. 10708(a).

O. Title to Property

At the conclusion of the project, title to all expendable and nonexpendable personal property purchased with Institute funds shall vest in the grantee, whether the property is in Institute control or not. Property shall continue to be used for the purposes for which it was purchased, and the Institute, which will direct the disposition of the property.

P. Original Material

All products prepared as the result of Institute-supported projects must be originated or developed material unless otherwise specified in the award documents. Material not originally developed that is included in such products must be properly identified, whether the material is in a verbatim or extensive paraphrase format.

Q. Acknowledgment and Disclaimer

Recipients of Institute funds shall acknowledge prominently on all products developed with grant funds that support was received from the Institute. The "SJI" logo must appear on the front cover of a written product, or in the opening frames of a video product, unless another placement is approved in writing by the Institute. This includes final products printed or otherwise reproduced during the grant period, as well as reprints or reproductions of those materials following the end of the grant period. A camera-ready logo sheet is available from the Institute upon request.

Recipients also shall display the following disclaimer on all grant products:

"This [document, film, videotape, etc.] was developed under [grant/cooperative agreement, number SJI-[insert number]] from the State Justice Institute. The points of view expressed are those of the [author(s), filmmaker(s), etc.] and do not necessarily represent the official position or policies of the State Justice Institute."

R. Institute Approval of Grant Products

No grant funds may be obligated for publication or reproduction of a final product developed with grant funds without the written approval of the Institute. Grantees shall submit a final draft of each written product to the Institute for review and approval. These drafts shall be submitted at least 30 days before the product is scheduled to be sent for publication or reproduction to permit Institute review and incorporation of any appropriate changes agreed upon by the grantee and the Institute. Grantees shall provide for timely reviews by the Institute of videotape or CD-ROM products at the treatment, script, rough cut, and final stages of development or their equivalents, prior to initiating the next stage of product development.
S. Distribution of Grant Products

In addition to the distribution specified in the grant application, grantees shall send:

1. Twenty copies of each final product developed with grant funds to the Institute, unless the product was developed under either a curriculum adaptation or a technical assistance grant, in which case submission of 2 copies is required.
2. A mastercopy of each videotape produced with grant funds to the Institute.
3. A one-page abstract to the Institute summarizing the products developed during the project for posting on the Internet together with a diskette containing the abstract in Word, WordPerfect, or ASCII. The abstract should include the grant number, a contact name, address, telephone numbers, and e-mail address (if applicable).
4. One copy of each final product developed with grant funds to the library established in each State to collect materials prepared with Institute support. (A list of these libraries is contained in Appendix II. Labels for these libraries are available from the Institute upon request.) Recipients of curriculum adaptation and technical assistance grants are not required to submit final products to State libraries.

T. Copyrights

Except as otherwise provided in the terms and conditions of an Institute award, a recipient is free to copyright any books, publications, or other copyrightable materials developed in the course of an Institute-supported project, but the Institute shall reserve the copyright to the extent that those costs were not covered by Institute funds or grantee matching contributions.

V. Charges for Grant-Related Products/Recovery of Costs

When Institute funds fully cover the cost of developing, producing, and disseminating a product (e.g., a report, curriculum, videotape or software), the product should be distributed to the field without charge. When Institute funds only partially cover the development, production, or dissemination costs, the grantees may, with the Institute's prior written approval, recover its costs for developing, producing, and disseminating the material to those requesting it, to the extent that those costs were not covered by Institute funds or grantee matching contributions.

Applicants should disclose their intent to sell grant-related products in both the concept paper and the application. Grantees must obtain the written, prior approval of the Institute of their plans to recover project costs through the sale of grant products.

Written requests to recover costs ordinarily should be received during the grant period and should specify the nature and extent of the costs to be recovered, the reason that those costs were not budgeted (if the rationale was not disclosed in the approved application), the number of copies to be sold, the intended audience for the product to be sold, and the proposed sale price. If the product is to be sold for more than $25.00, the written request also should include a detailed itemization of costs that will be recovered and a certification that the costs were not supported by either Institute grant funds or grantee matching contributions.

In the event that the sale of grant products results in revenues that exceed the costs to develop, produce, and disseminate the product, the revenue must continue to be used for the authorized purposes of the Institute-funded project or other purposes consistent with the State Justice Institute Act.

U. Inventions and Patents

If any patentable items, patent rights, processes, or inventions are produced in the course of Institute-sponsored work, such fact shall be promptly and fully reported to the Institute. Unless there is a prior agreement between the grantee and the Institute on disposition of such items, the Institute shall determine whether protection of the invention or discovery shall be sought. The Institute will also determine how the rights in the invention or discovery, including rights under any patent issued thereon, shall be allocated and administered in order to protect the public interest consistent with "Government Patent Policy" (President's Memorandum for Heads of Executive Departments and Agencies, February 18, 1983, and statement of Government Patent Policy).

V. Charges for Grant-Related Products/Recovery of Costs

When Institute funds fully cover the cost of developing, producing, and disseminating a product (e.g., a report, curriculum, videotape or software), the product should be distributed to the field without charge. When Institute funds only partially cover the development, production, or dissemination costs, the grantees may, with the Institute's prior written approval, recover its costs for developing, producing, and disseminating the material to those requesting it, to the extent that those costs were not covered by Institute funds or grantee matching contributions.

Applicants should disclose their intent to sell grant-related products in both the concept paper and the application. Grantees must obtain the written, prior approval of the Institute of their plans to recover project costs through the sale of grant products.

Written requests to recover costs ordinarily should be received during the grant period and should specify the nature and extent of the costs to be recovered, the reason that those costs were not budgeted (if the rationale was not disclosed in the approved application), the number of copies to be sold, the intended audience for the product to be sold, and the proposed sale price. If the product is to be sold for more than $25.00, the written request also should include a detailed itemization of costs that will be recovered and a certification that the costs were not supported by either Institute grant funds or grantee matching contributions.

In the event that the sale of grant products results in revenues that exceed the costs to develop, produce, and disseminate the product, the revenue must continue to be used for the authorized purposes of the Institute-funded project or other purposes consistent with the State Justice Institute Act that have been approved by the Institute. See sections III.F. and XI.F. for requirements regarding project-related income realized during the project period.

W. Availability of Research Data for Secondary Analysis

Upon request, grantees must make available for secondary analysis a diskette(s) or data tape(s) containing research and evaluation data collected under an Institute grant and the accompanying code manual. Grantees may recover the actual cost of duplicating and mailing or otherwise transmitting the data set and manual from the person or organization requesting the data. Grantees may provide the requested data set in the format in which it was created and analyzed.

X. Approval of Key Staff

If the qualifications of an employee or consultant assigned to a key project staff position are not described in the application or if there is a change of a person assigned to such a position, a recipient shall submit a description of the qualifications of the newly assigned person to the Institute. Prior written approval of the qualifications of the new person assigned to a key staff position must be received from the Institute before the salary or consulting fee of that person and associated costs may be paid or reimbursed from grant funds.

XI. Financial Requirements

A. Accounting Systems and Financial Records

All grantees, subgrantees, contractors, and other organizations directly or indirectly receiving Institute funds are required to establish and maintain accounting systems and financial records to accurately account for funds they receive. These records shall include total program costs, including Institute funds, State and local matching shares, and any other fund sources included in the approved project budget.

1. Purpose

The purpose of this section is to establish accounting system requirements and to offer guidance on procedures which will assist all grantees/subgrantees in:

a. Complying with the statutory requirements for the awarding, disbursement, and accounting of funds;

b. Complying with regulatory requirements of the Institute for the financial management and disposition of funds;

c. Generating financial data which can be used in the planning, management and control of programs; and

d. Facilitating an effective audit of funded programs and projects.

2. References

Except where inconsistent with specific provisions of this Guideline, the following regulations, directives and reports are applicable to Institute grants and cooperative agreements under the same terms and conditions that apply to
Federal grantees. These materials supplement the requirements of this section for accounting systems and financial recordkeeping and provide additional guidance on how these requirements may be satisfied. (Circulars may be obtained from OMB by calling 202-395-7250.)


B. Supervision and Monitoring Responsibilities

1. Grantee Responsibilities

All grantees receiving direct awards from the Institute are responsible for the management and fiscal control of all funds. Responsibilities include accounting for receipts and expenditures, maintaining adequate financial records, and refunding expenditures disallowed by audits.

2. Responsibilities of State Supreme Court

Each application for funding from a State or local court must be approved, consistent with State law, by the State's Supreme Court, or its designated agency or council.

The State Supreme Court or its designee shall receive all Institute funds awarded to such courts; shall be responsible for ensuring proper administration of Institute funds; and shall be responsible for all aspects of the project, including proper accounting and financial recordkeeping by the subgrantee. These responsibilities include:

a. Reviewing Financial Operations. The State Supreme Court or its designee should be familiar with, and periodically monitor, its subgrantees’ financial operations, records system and procedures. Particular attention should be directed to the maintenance of current financial data.

b. Recording Financial Activities. The subgrantee’s grant award or contract obligation, as well as cash advances and other financial activities, should be recorded in the financial records of the State Supreme Court or its designee in summary form. Subgrantee expenditures should be recorded on the books of the State Supreme Court or evidence by report forms duly filed by the subgrantee.

c. Budgeting and Budget Review. The State Supreme Court or its designee should ensure that each subgrantee prepares an adequate budget as the basis for its award commitment. The detail of each project budget should be maintained on file by the State Supreme Court.

d. Accounting for Non-Institute Contributions. The State Supreme Court or its designee will ensure, in those instances where subgrantees are required to furnish non-Institute matching funds, that the requirements and limitations of the Guideline are applied to such funds.

e. Audit Requirement. The State Supreme Court or its designee is required to ensure that subgrantees have met the necessary audit requirements as set forth by the Institute (see sections X.M. and XI.J.).

f. Reporting Irregularities. The State Supreme Court, its designee, and its subgrantees are required to promptly report to the Institute the nature and circumstances surrounding any financial irregularities discovered.

g. Accounting System

The grantees are responsible for establishing and maintaining an adequate system of accounting and internal controls for itself and for ensuring that an adequate system exists for each of its subgrantees and contractors. An acceptable and adequate accounting system is considered to be one which:

1. Properly accounts for receipt of funds under each grant awarded and the expenditure of funds for each grant by category of expenditure (including matching contributions and project income);

2. Assures that expended funds are applied to the appropriate budget category included within the approved grant;

3. Presents and classifies historical costs of the grant as required for budgetary and evaluation purposes;

4. Provides cost and property controls to assure optimal use of grant funds;

5. Is integrated with a system of internal controls adequate to safeguard the funds and assets covered, check the accuracy and reliability of the accounting data, promote operational efficiency, and assure conformance with any general or special conditions of the grant;

6. Meets the prescribed requirements for periodic financial reporting of operations; and

7. Provides financial data for planning, control, measurement and evaluation of direct and indirect costs.

D. Total Cost Budgeting and Accounting

Accounting for all funds awarded by the Institute shall be structured and executed on a “total project cost” basis. That is, total project costs, including Institute funds, State and local matching shares, and any other fund sources included in the approved project budget shall be the basis for fiscal administration and accounting. Grant applications and financial reports require budget and cost estimates on the basis of total costs.

1. Timing of Matching Contributions

Matching contributions need not be applied at the exact time of the obligation of Institute funds. However, the full matching share must be obligated during the award period, except that with the prior written permission of the Institute, contributions made following approval of the grant by the Institute’s Board but before the beginning of the grant may be counted as match. Grantees that do not contemplate making matching contributions continuously throughout the course of a project, or on a task-by-task basis, are required to submit a schedule within 30 days after the beginning of the project period indicating at what points during the project period the matching contributions will be made. In instances where a proposed cash match is not fully met, the Institute may reduce the award amount accordingly, in order to maintain the ratio originally provided for in the award agreement.

2. Records for Match

All grantees must maintain records which clearly show the source, amount, and timing of all matching
contributions. In addition, if a project has included, within its approved budget, contributions which exceed the required matching portion, the grantee must maintain records of those contributions in the same manner as it does the Institute funds and required matching shares. For all grants made to State and local courts, the State Supreme Court has primary responsibility for grantee/subgrantee compliance with the requirements of this section. (See section XII.B.2.)

E. Maintenance and Retention of Records

All financial records, supporting documents, statistical records and all other records pertinent to grants, subgrants, cooperative agreements or contracts under grants shall be retained by each organization participating in a project for at least three years for purposes of examination and audit. State Supreme Courts may impose record retention and maintenance requirements in addition to those prescribed in this chapter.

1. Coverage

The retention requirement extends to books of original entry, source documents supporting accounting transactions, the general ledger, subsidiary ledgers, personnel and payroll records, canceled checks, and related documents and records. Source documents include copies of all grant and subgrant awards, applications, and required grantee/subgrantee financial and narrative reports. Personnel and payroll records shall include the time and attendance reports for all individuals reimbursed under a grant, subgrant or contract, whether they are employed full-time or part-time. Time and effort reports will be required for consultants.

2. Retention Period

The three-year retention period starts from the date of the submission of the final expenditure report and from the date of submission of the annual expenditure report.

3. Maintenance

Grantees and subgrantees are expected to see that records of different fiscal years are separately identified and maintained so that requested information can be readily located. Grantees and subgrantees are also obligated to protect records adequately against fire or other damage. When records are stored away from the grantee/subgrantee’s principal office, a written index of the location of stored records should be on hand, and ready access should be assured.

4. Access

Grantees and subgrantees must give any authorized representative of the Institute access to and the right to examine all records, books, papers, and documents related to an Institute grant.

F. Project-Related Income

Records of the receipt and disposition of project-related income must be maintained by the grantee in the same manner as required for the project funds that gave rise to the income. The policies governing the disposition of the various types of project-related income are listed below.

1. Interest

A State and any agency or instrumentality of a State including State institutions of higher education and State hospitals, shall not be held accountable for interest earned on advances of project funds. When funds are awarded to subgrantees through a State, the subgrantees are not held accountable for interest earned on advances of project funds. Local units of government and nonprofit organizations that are direct grantees must refund any interest earned. Grantees shall order their affairs so as to ensure minimum balances in their respective grant cash accounts.

2. Royalties

The grantee/subgrantee may retain all royalties received from copyrights or other works developed under projects or from patents and inventions, unless the terms and conditions of the project provide otherwise.

3. Registration and Tuition Fees

Registration and tuition fees shall be used to pay project-related costs not covered by the grant, or to reduce the amount of grant funds needed to support the project. Registration and tuition fees may be used for other purposes only with the prior written approval of the Institute. Estimates of registration and tuition fees, and any expenses to be offset by the fees, should be included in the application budget forms and narrative.

4. Income from the Sale of Grant Products

When grant funds fully cover the cost of producing and disseminating a limited number of copies of a product, the grantee may, with the written prior approval of the Institute, sell additional copies reproduced at its expense only at a price intended to recover actual reproduction and distribution costs that were not covered by Institute grant funds or grantee matching contributions to the project. When grant funds only partially cover the costs of developing, producing and disseminating a product, the grantee may, with the written prior approval of the Institute, recover costs for developing, reproducing, and disseminating the material to the extent that those costs were not covered by Institute grant funds or grantee matching contributions. If the grantee recovers its costs in this manner, then amounts expended by the grantee to develop, produce, and disseminate the material may not be considered match.

If the sale of products occurs during the project period, the costs and income generated by the sales must be reported on the Quarterly Financial Status Reports and documented in an auditable manner. Whenever possible, the intent to sell a product should be disclosed in the concept paper and application or reported to the Institute in writing once a decision to sell products has been made. The grantee must request approval to recover its product development, reproduction, and dissemination costs as specified in section XV.

5. Other

Other project income shall be treated in accordance with disbursement instructions set forth in the project’s terms and conditions.

G. Payments and Financial Reporting Requirements

1. Payment of Grant Funds

The procedures and regulations set forth below are applicable to all Institute grant funds and grantees.

a. Request for Advance or Reimbursement of Funds

Grantees will receive funds on a “Check-Issued” basis. Upon receipt, review, and approval of a Request for Advance or Reimbursement by the Institute, a check will be issued directly to the grantee or its designated fiscal agent. A request must be limited to the grantee’s immediate cash needs. The Request for Advance or Reimbursement, along with the instructions for its preparation, will be included in the official Institute award package.

b. Continuation and On-Going Support Awards

For purposes of submitting Requests for Advance or Reimbursement, recipients of continuation and on-going support grants should treat each grant as a new project and number their requests accordingly (i.e. on a grant rather than a project basis). For example, the first
request for payment from a continuation grant or each year of an on-going support would be number 1, the second number 2, etc. (See Recommendations to Grantees in the Introduction for further guidance.)

c. Termination of Advance and Reimbursement Funding. When a grantee organization receiving cash advances from the Institute:
1. Demonstrates an unwillingness or inability to attain program or project goals, or to establish procedures that will minimize the time elapsing between cash advances and disbursements, or cannot adhere to guideline requirements or special conditions;
   ii. Engages in the improper award and administration of subgrants or contracts; or
   iii. Is unable to submit reliable and/or timely reports;
the Institute may terminate advance financing and require the grantee organization to fund its operations with its own working capital. Payments to the grantee shall then be made by check to reimburse the grantee for actual cash disbursements. In the event the grantee continues to be deficient, the Institute may suspend reimbursement payments until the deficiencies are corrected.

d. Principle of Minimum Cash on Hand. Recipient organizations should request funds based upon immediate disbursement requirements. Grantees should time their requests to ensure that cash on hand is the minimum needed for disbursements to be made immediately or within a few days. Idle funds in the hands of subgrantees will impair the goals of good cash management.

2. Financial Reporting
   a. General Requirements. In order to obtain financial information concerning the use of funds, the Institute requires that grantees/subgrantees of these funds submit timely reports for review.

   Three copies of the Financial Status Report are required from all grantees, other than recipients of scholarships under section II.B.2.b.iii., for each active quarter on a calendar-quarter basis. This report is due within 30 days after the close of the calendar quarter. It is designed to provide financial information relating to Institute funds, State and local matching shares, and any other fund sources included in the approved project budget. The report contains information on obligations as well as outlays. A copy of the Financial Status Report, along with instructions for its preparation, will be included in the official Institute Award package. In circumstances where an organization requests substantial payments for a project prior to the completion of a given quarter, the Institute may request a brief summary of the amount requested, by object class, in support of the Request for Advance or Reimbursement.
   b. Additional Requirements for Renewal Grants. Grantees receiving a continuation or on-going support grant should number their quarterly Financial Status Reports on a grant rather than a project basis. For example, the first quarterly report for a continuation grant or each year of an on-going support award should be number 1, the second number 2, etc.

3. Consequences of Non-Compliance with Submission Requirements
   Failure of the grantee organization to submit required financial and program reports may result in a suspension or termination of grant payments.

H. Allowability of Costs
1. General
   Except as may be otherwise provided in the conditions of a particular grant, cost allowability shall be determined in accordance with the principles set forth in OMB Circulars A-87, Cost Principles for State and Local Governments; A-21, Cost Principles Applicable to Grants and Contracts with Educational Institutions; and A-122, Cost Principles for Non-Profit Organizations. No costs may be recovered to liquidate obligations which are incurred after the approved grant period. Copies of these circulars may be obtained from OMB by calling (202) 395-7250.

2. Costs Requiring Prior Approval
   a. Pre-agreement Costs. The written prior approval of the Institute is required for costs which are considered necessary to the project but occur prior to the award date of the grant.
   b. Equipment. Grant funds may be used to purchase or lease only that equipment which is essential to accomplishing the goals and objectives of the project. The written prior approval of the Institute is required when the amount of automated data processing (ADP) equipment to be purchased or leased exceeds $10,000 or the software to be purchased exceeds $3,000.
   c. Consultants. The written prior approval of the Institute is required when the rate of compensation to be paid a consultant exceeds $300 a day. Institute funds may not be used to pay a consultant at a rate in excess of $900 per day.

3. Travel Costs
   Transportation and per diem rates must comply with the policies of the applicant organization. If the applicant does not have an established written travel policy, then travel rates shall be consistent with those established by the Institute or the Federal Government. Institute funds may not be used to cover the transportation or per diem costs of a member of a national organization to attend an annual or other regular meeting of that organization.

4. Indirect Costs
   These are costs of an organization that are not readily assignable to a particular project, but are necessary to the operation of the organization and the performance of the project. The cost of operating and maintaining facilities, depreciation, and administrative salaries are examples of the types of costs that are usually treated as indirect costs. It is the policy of the Institute that all costs should be budgeted directly; however, if a recipient has an indirect cost rate approved by a Federal agency as set forth below, the Institute will accept that rate.
   a. Approved Plan Available.
      i. The Institute will accept an indirect cost rate or allocation plan approved for a grantee during the preceding two years by any Federal granting agency on the basis of allocation methods substantially in accord with those set forth in the applicable cost circulars. A copy of the approved rate agreement must be submitted to the Institute.
      ii. Where flat rates are accepted in lieu of actual indirect costs, grantees may not also charge expenses normally included in overhead pools, e.g., accounting services, legal services, building occupancy and maintenance, etc., as direct costs.
   iii. Organizations with an approved indirect cost rate, utilizing total direct costs as the base, usually exclude contracts under grants from any overhead recovery. The negotiated agreement will stipulate that contracts are excluded from the base for overhead recovery.

   b. Establishment of Indirect Cost Rates. In order to be reimbursed for indirect costs, a grantee or organization must first establish an appropriate indirect cost rate. To do this, the grantee must prepare an indirect cost rate proposal and submit it to the Institute. The proposal must be submitted within three months after the start of the grant period to assure recovery of the full amount of allowable indirect costs, and it must be developed in accordance with principles and procedures appropriate
to the type of grantee institution involved as specified in the applicable OMB Circular. Copies of OMB Circulars may be obtained directly from OMB by calling (202) 395-7250.

2. Resolution and Clearance of Audit Reports

Timely action on recommendations by responsible management officials is an integral part of the effectiveness of an audit. Each grant recipient shall have policies and procedures for acting on audit recommendations by designating officials responsible for: follow-up, maintaining a record of the actions taken on recommendations and time schedules, responding to and acting on audit recommendations, and submitting periodic reports to the Institute on recommendations and actions taken.

3. Consequences of Non-Resolution of Audit Issues

It is the general policy of the State Justice Institute not to make new grant awards to an applicant having an unresolved audit report involving Institute awards. Failure of the grantee organization to resolve audit questions may also result in the suspension or termination of payments for active Institute grants to that organization.

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K. Close-Out of Grants

1. Definition

Close-out is a process by which the Institute determines that all applicable administrative and financial actions and all required work of the grant have been completed by both the grantee and the Institute.

2. Grantee Close-Out Requirements

Within 90 days after the end date of the grant or any approved extension thereof (See section XI.K.3), the following documents must be submitted to the Institute by the grantee other than a recipient of a scholarship under section II.B.2.b.v. These reporting requirements apply at the conclusion of any non-scholarship grant, even when the project will receive renewal funding through a continuation or on-going support grant.

a. Financial Status Report. The final report of expenditures must have no unliquidated obligations and must indicate the exact balance of unobligated funds. Any unobligated/ unexpended funds will be deobligated from the award by the Institute. Final payment requests for obligations incurred during the award period must be submitted to the Institute prior to the end of the 90-day close-out period. Grantees on a check-issued basis, who have drawn down funds in excess of their obligations/expenditures, must return any unused funds as soon as it is determined that the funds are not required. In no case should any unused funds remain with the grantee beyond the submission date of the final financial status report.

b. Final Progress Report. This report should describe the project activities during the final calendar quarter of the project and the close-out period, including to whom project products have been disseminated; provide a summary of activities during the entire project; specify whether all the objectives set forth in the approved application or an approved adjustment thereto have been met and, if any of the objectives have not been met, explain the reasons therefor; and discuss what, if anything, could have been done differently that might have enhanced the impact of the project or improved its operation.

3. Extension of Close-Out Period

Upon the written request of the grantee, the Institute may extend the close-out period to assure completion of the Grantee’s closeout requirements. Requests for an extension must be submitted at least 14 days before the end of the close-out period and must explain why the extension is necessary and what steps will be taken to assure that all the grantee’s responsibilities will be met by the end of the extension period.

XII. Grant Adjustments

All requests for program or budget adjustments requiring Institute approval must be submitted in a timely manner by the project director. All requests for changes from the approved application will be carefully reviewed for both consistency with this Guideline and the enhancement of grant goals and objectives.

A. Grant Adjustments Requiring Prior Written Approval

There are several types of grant adjustments which require the prior written approval of the Institute. Examples of these adjustments include:

1. Budget revisions among direct cost categories which, individually or in the aggregate, exceed or are expected to exceed five percent of the approved original budget or the most recently approved revised budget. For the purposes of this section, the Institute will view budget revisions cumulatively.
For continuation and on-going support grants, funds from the original award may be used during the renewal grant period and funds awarded by a continuation or on-going support grant may be used to cover project-related expenditures incurred during the original award period, with the prior written approval of the Institute.

2. A change in the scope of work to be performed or the objectives of the project (see section XII.D.).

3. A change in the project site.

4. A change in the project period, such as an extension of the grant period and/or extension of the final financial or progress report deadline (see section XII.E.).

5. Satisfaction of special conditions, if required.

6. A change in or temporary absence of the project director (see sections XII.F. and G.).

7. The assignment of an employee or consultant to a key staff position whose qualifications were not described in the application, or a change of a person assigned to a key project staff position (see section X.X.).

8. A change in the name of the grantee organization.

9. A transfer or contracting out of grant-supported activities (see section XII.H.).

10. A transfer of the grant to another recipient.

11. Preagreement costs, the purchase of automated data processing equipment and software, and consultant rates, as specified in section XI.H.2.

12. A change in the nature or number of the products to be prepared or the manner in which a product would be distributed.

B. Request for Grant Adjustments

All grantees and subgrantees must promptly notify their SJI program manager, in writing, of events or proposed changes which may require an adjustment to the approved application. In requesting an adjustment, the grantee must set forth the reasons and basis for the proposed adjustment and any other information the program manager determines would help the Institute's review.

C. Notification of Approval/Disapproval

If the request is approved, the grantee will be sent a Grant Adjustment signed by the Executive Director or his designee. If the request is denied, the grantee will be sent a written explanation of the reasons for the denial.

D. Changes in the Scope of the Grant

A grantee/subgrantee may make minor changes in methodology, approach, or other aspects of the grant to expedite achievement of the grant's objectives with subsequent notification of the SJI program manager. Major changes in scope, duration, training methodology, or other significant areas must be approved in advance by the Institute.

E. Date Changes

A request to change or extend the grant period must be made at least 30 days in advance of the end date of the grant. A revised task plan should accompany requests for a no-cost extension of the grant period, along with a revised budget if shifts among budget categories will be needed. A request to change or extend the deadline for the final financial report or final progress report must be made at least 14 days in advance of the report deadline (see section XI.K.3.).

F. Temporary Absence of the Project Director

Whenever absence of the project director is expected to exceed a continuous period of one month, the plans for the conduct of the project director's duties during such absence must be approved in advance by the Institute. This information must be provided in a letter signed by an authorized representative of the grantee/subgrantee at least 30 days before the departure of the project director, or as soon as it is known that the project director will be absent. The grant may be terminated if arrangements are not approved in advance by the Institute.

G. Withdrawal of/Change in Project Director

If the project director relinquishes or expects to relinquish active direction of the project, the Institute must be notified immediately. In such cases, if the grantee/subgrantee wishes to terminate the project, the Institute will forward procedural instructions upon notification of such intent. If the grantee wishes to continue the project under the direction of another individual, a statement of the candidate's qualifications should be sent to the Institute for review and approval. The grant may be terminated if the qualifications of the proposed individual are not approved in advance by the Institute.

H. Transferring or Contracting Out of Grant-Supported Activities

A principal activity of the grant-supported project shall not be transferred or contracted out to another organization without specific prior approval by the Institute. All such arrangements should be formalized in a contract or other written agreement between the parties involved. Copies of the proposed contract or agreement must be submitted for prior approval at the earliest possible time. The contract or agreement must state, at a minimum, the activities to be performed, the time schedule, the policies and procedures to be followed, the dollar limitation of the agreement, and the cost principles to be followed in determining what costs, both direct and indirect, are to be allowed. The contract or other written agreement must not affect the grantee's overall responsibility for the direction of the project and accountability to the Institute.

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David I. Tevelin, Executive Director (ex officio)
David I. Tevelin, Executive Director.
Appendix II—SJII Libraries; Designated Sites and Contacts

State: Alabama.
Location: Supreme Court Library.
Contact: Mr. William C. Younger, State Law Librarian, Alabama State Library.

State: Alaska.
Location: Anchorage Law Library.
Contact: Ms. Mary C. McQueen, Administrator.

State: Arizona.
Location: State Law Library.

State: Arkansas.
Location: Administrative Office of the Courts.
Contact: Mr. James D. Gingerich, Director, Supreme Court of Arkansas, Administrative Office of the Courts, Justice Building, 625 Marshall, Little Rock, Arkansas 72201–1078, (501) 376–6655.

State: California.
Location: Administrative Office of the Courts.
Contact: Mr. William C. Vickrey, State Court Administrator, Administrative Office of the Courts, 303 Second Street, South Tower, San Francisco, California 94107, (415) 396–9100.

State: Colorado.
Location: Supreme Court Library.
Contact: Ms. Frances Campbell, Supreme Court Law Librarian, Colorado Supreme Judicial Court, 2 East 14th Avenue, Denver, Colorado 80203, (303) 837–3720.

State: Connecticut.
Location: State Library.
Contact: Mr. Richard Akeroyd, State Librarian, 231 Capital Avenue, Hartford, Connecticut 06106, (203) 566–4301.

State: Delaware.
Location: Administrative Office of the Courts.
Contact: Mr. Michael E. McLelland, Deputy Director, Administrative Office of the Courts, Carvel State Office Building, 820 North French Street, 11th Floor, P.O. Box 8911, Wilmington, Delaware 19801, (302) 739–2460.

State: District of Columbia.
Location: Executive Office, District of Columbia Courts.
Contact: Mr. Ulysses Hammond, Executive Officer, Courts of the District of Columbia, 500 Indiana Avenue, N.W., Washington, D.C. 20001, (202) 837–1700.

State: Florida.
Location: Administrative Office of the Courts.
Contact: Mr. Kenneth Palmer, State Court Administrator, Florida State Courts System, Supreme Court Building, Tallahassee, Florida 32399–1900, (904) 448–8621.

State: Georgia.
Location: Administrative Office of the Courts.
Contact: Mr. Robert Doss, Jr., Administrative Director, Administrative Office of the Courts, The Judicial Council of Georgia, 244 Washington St., Box 550, Atlanta, GA 30334–5900, (404) 656–5171.

State: Hawaii.
Location: Supreme Court Library.
Contact: Ms. Ann Koto, State Law Librarian, The Supreme Court Law Library, Judiciary Bldg., P.O. Box 2560, Honolulu, HI 96804, (808) 548–4605.

State: Idaho.
Location: AOC Judicial Education Library/State Law Library in Boise.
Contact: Ms. Laura Pershing, State Law Librarian, Idaho State Law Library, Supreme Court Building, 451 West State St., Boise, ID 83720, (208) 334–3316.

State: Illinois.
Location: Supreme Court Library.

State: Indiana.
Location: Supreme Court Library.
Contact: Ms. Constance Matts, Supreme Court Librarian, Supreme Court Library, State House, Indianapolis, Indiana 46204, (317) 232–2557.

State: Iowa.
Location: Administrative Office of the Court.
Contact: Mr. Jerry K. Beatty, Executive Director, Judicial Education & Planning, Administrative Office of the Courts, State Capital Building, Des Moines, Iowa 50319, (515) 281–8279.

State: Kansas.
Location: Supreme Court Library.
Contact: Ms. Carol Billsing, Director, Kansas Supreme Court Library, Kansas Supreme Court Library, 301 West 10th Street, Topeka, Kansas 66614, (913) 296–3257.

State: Kentucky.
Location: State Law Library.
Contact: Mr. Fred Knecht, Law Librarian, Kentucky State Law Library, 1501 W. Washington, Phoenix, AZ 85007, (602) 542–4033.

State: Louisiana.
Location: State Law Library.
Contact: Ms. Carol Billsing, Director, Louisiana Law Library, 301 Loyola Avenue, New Orleans, Louisiana 70112, (504) 722–5675.

State: Maine.
Location: State Law and Legislative Reference Library.
Contact: Ms. Lynn E. Randall, State Law Librarian, State House Station 43, Augusta, Maine 04333, (207) 289–1600.

State: Maryland.
Location: State Law Library.
Contact: Mr. Michael S. Miller, Director, Maryland State Law Library,
Court of Appeal Building, 361 Rowe Boulevard, Annapolis, Maryland 21401, (301) 974-3395.
State: Massachusetts.
Location: Middlesex Law Library.
Contact: Ms. Sandra Lindheimer, Librarian, Middlesex Law Library, Superior Court House, 40 Thromdike Street, Cambridge, Massachusetts 02141, (617) 494-4148.
State: Michigan.
Location: Michigan Judicial Institute.
Contact: Mr. Dennis W. Catlin, Executive Director, Michigan Judicial Institute, 222 Washington Square North, P.O. Box 30205, Lansing, Michigan 48909, (517) 334-7804.
State: Minnesota.
Location: State Law Library (Minnesota Judicial Center).
Contact: Mr. Marvin R. Anderson, State Law Librarian, Supreme Court of Minnesota, 25 Constitution Avenue, St. Paul, Minnesota 55155, (612) 297-2084.
State: Mississippi.
Location: Mississippi Judicial College.
Contact: Mr. Rick D. Patt, Staff Attorney, University of Mississippi, P.O. Box 8850, University, MS 38677, (601) 982-6590.
State: Montana.
Location: State Law Library.
State: Nebraska.
Location: Administrative Office of the Courts.
Contact: Mr. Joseph C. Steele, State Court Administrator, Supreme Court of Nebraska, Administrative Office of the Courts, P.O. Box 98910, Lincoln, Nebraska 68509-8910, (402) 471-3730.
State: Nevada.
Location: National Judicial College.
Contact: Dean V. Robert Payant, National Judicial College, Judicial College Building, University of Nevada, Reno, Nevada 89550, (702) 784-6747.
State: New Jersey.
Location: New Jersey State Library.
Contact: Mr. Robert L. Bland, Law Coordinator, State of New Jersey, Department of Education, State Library, 185 West State Street, CN520, Trenton, New Jersey 08625, (609) 292-6230.
State: New Mexico.
Location: Supreme Court Library.
Contact: Mr. Thaddeus Bejnar, Librarian, Supreme Court Library, Post Office Drawer L, Santa Fe, New Mexico 87504, (505) 827-4850.
State: New York.
Location: Supreme Court Library.
State: North Carolina.
Location: Supreme Court Library.
Contact: Ms. Louise Stafford, Librarian, North Carolina Supreme Court Library, P.O. Box 28006, (by courier) 500 Justice Building, 2nd East Morgan Street, Raleigh, North Carolina 27601, (919) 733-3425.
State: North Dakota.
Location: Supreme Court Library.
Contact: Ms. Marcella Kramer, Assistant Law Librarian, Supreme Court Law Library, 600 East Boulevard Avenue, 2nd Floor, Judicial Wing, Bismarck, North Dakota 58505-0530, (701) 224-2229.
State: Northern Mariana Islands.
Location: Supreme Court of the Northern Mariana Islands.
Contact: Honorable Jose S. Dela Cruz, Chief Justice, Supreme Court of the Northern Mariana Islands, P.O. Box 2165, Saipan, MP 96950, (670) 234-5275.
State: Ohio.
Location: Supreme Court Library.
Contact: Mr. Paul S. Fu, Law Librarian, Supreme Court Law Library, Supreme Court of Ohio, 30 East Broad Street, Columbus, Ohio 43266-0419, (614) 466-2044.
State: Oklahoma.
Location: Administrative Office of the Courts.
Contact: Mr. Howard W. Conyers, Director, Administrative Office of the Courts, 1913 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450.
State: Oregon.
Location: Administrative Office of the Courts.
Contact: Ms. Kingsley Click, State Court Administrator, Supreme Court of Oregon, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, (503) 378-6046.
State: Pennsylvania.
Location: State Library of Pennsylvania.
State: Puerto Rico.
Location: Office of Court Administration.
Contact: Mr. Alfredo Rivera-Mendoza, Esq., Director, Area of Planning and Management, Office of Court Administration, P.O. Box 917, Hato Rey, Puerto Rico 00919.
State: Rhode Island.
Location: Roger Williams Law School Library.
Contact: Mr. Kendall Sengvalis, Law Librarian, Licht Judicial Complex, 250 Benefit Street, Providence, Rhode Island, (401) 254-4546.
State: South Carolina.
Location: Coleman Karesh Law Library (University of South Carolina School of Law).
Contact: Mr. Bruce S. Johnson, Law Librarian, Associate Professor of Law, Coleman Karesh Law Library, U. S. C. Law Center, University of South Carolina, Columbia, South Carolina 29208, (803) 777-5944.
State: Tennessee.
Location: Tennessee State Law Library.
Contact: Ms. Donna C. Wair, Librarian, Tennessee State Law Library, Supreme Court Building, 401 Seventh Avenue N, Nashville, Tennessee 37243-0609, (615) 741-2016.
State: Texas.
Location: State Law Library.
Contact: Ms. Kay Schleuter, Director, State Law Library, P.O. Box 12367, Austin, Texas 78711, (512) 463-1722.
State: U.S. Virgin Islands.
Location: Library of the Territorial Court of the Virgin Islands (St. Thomas).
Contact: Librarian, The Library, Territorial Court of the Virgin Islands, Post Office Box 70, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00804.
State: Utah.
Location: Utah State Judicial Administration Library.
Contact: Ms. Debbie Christiansen, Utah State Judicial Administration Library, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102, (801) 533-6371.
State: Vermont.
Location: Supreme Court of Vermont.
Contact: Mr. Lee Suskin, Court Administrator, Supreme Court of Vermont, 109 State Street, c/o Pavilion Office Building, Montpelier, Vermont 05609, (802) 828-3278.
State: Virginia.
Location: Administrative Office of the Courts.
Contact: Mr. Robert N. Baldwin, Executive Secretary, Supreme Court of Virginia, Administrative Offices, 100 North Ninth Street, Third Floor, Richmond, Virginia 23219, (804) 786-6455.
State: Washington.
Location: Washington State Law Library.
Contact: Ms. Deborah Norwood, State Law Librarian, Washington State Law Library, Temple of Justice, P.O. Box 40751, Olympia, Washington 98504-0751, (206) 357-2146.
State: West Virginia.
Location: Administrative Office of the Courts.
Contact: Ms. Marcia Koslov, State Library, State Law Library, 310E State Capitol, P.O. Box 7881, Madison, Wisconsin 53707, (608) 266-1424.

State: Wisconsin.
Location: State Law Library.
Contact: Mr. Richard H. Rosswurm, Chief Deputy, West Virginia Supreme Court of Appeals, State Capitol, 1900 Kanawha, Charleston, West Virginia 25305, (304) 348-0145.

State: Wyoming.
Location: Wyoming State Law Library.


National: National Center for State Courts.
Contact: Ms. Peggy Rogers, Acquisitions/Serials Librarian, 300 Newport Avenue, Williamsburg, Virginia 23187-8798, (804) 253-2000.

National: Michigan State University.
Contact: Dr. John K. Hudzik, Project Director, Judicial Education, Reference, Information and Technical Transfer Project (JERITT), Michigan State University, 560 Baker Hall, East Lansing, Michigan 48824, (517) 353-8603.

Appendix III—Illustrative List of Model Curricula
The following list includes examples of curricula that have been developed with support from SJI, and that might be—or in some cases have been—successfully adapted for State-based education programs for judges and other court personnel. Please refer to Section II.B.2.ii for information on submitting a letter application for a Curriculum Adaptation Grant. A list of all SJI-supported education projects is available from the Institute. Please also check with the JERITT project (517/353-8603) and with your State SJI-designated library (see Appendix II) for information on other curricula that may be appropriate for your State's needs.

Alternative Dispute Resolution

“Improving the Quality of Dispute Resolution” (Ohio State University College of Law: SJL-93-277).


Court Management


“Managerial Budgeting in the Courts”; “Performance Appraisal in the Courts”; “Managing Change in the Courts”; all three from “Broadening Educational Opportunities for Judges and Other Key Court Personnel” (Institute for Court Management/National Center for State Courts: SJL-91-043).

“Strengthening Rural Courts of Limited Jurisdiction” and “Team Training for Judges and Clerks” from “Rural Limited Jurisdiction Court Curriculum Project (Rural Justice Center: SJL-90-014, SJL-91-082).”

“Interbranch Relations Workshop” (Ohio Judicial Conference: SJL92-079).


“Managing the Complex Case” (National Judicial College: SJL-94-142).


Courts and Communities


“Judicial Response to Stranger and Nonstranger Rape and Sexual Assault” (National Judicial Education Program to Promote Equality for Women and Men: SJL-92-003).

Family Violence
“Adjudication of Farm Credit Issues” (Rural Justice Center: 87-059).


“Adjudicating Allegations of Child Sexual Abuse When Custody Is In Dispute” (National Judicial Education Program: SJL 95-019).

Strategic and Futures Planning
“Minding the Courts into the Twentieth Century” (Michigan Judicial Institute: SJL-89-029).

“An Approach to Long-Range Strategic Planning in the Courts” (Center for Public Policy Studies: SJL-91-045).

Health and Science


Judicial Education For Appellate Court Judges

Judicial Orientation, Mentoring, and Continuing Education


“A Unified Orientation and Mentoring Program for New Judges of All Arizona Trial Courts” (Arizona Supreme Court; SJ–91–078).


“Faculty Development Instructional Program” from “Curriculum Review” (National Judicial College; SJ–91–039).


“Magistrates Correspondence Course” (Alaska Court System; SJ–92–156).


Juveniles and Families in Court

“Innovative Juvenile and Family Court Training” (Youth Law Center; SJ–87–060, SJ–89–039).


Substance Abuse


“Enhancing the Treatment-Based Courts in Florida: Training Component” (Office of the State Courts Administrators; SJ–94–291).


Diversity, Values, and Attitudes

“Troubled Families, Troubled Judges” (Brandeis University; SJ–89–071).


“Cultural Diversity Awareness in Nebraska Courts” from “Native American Alternatives to Incarceration Project” (Nebraska Urban Indian Health Coalition; SJ–93–028).


“Race Fairness and Cultural Awareness Faculty Development Workshop” (National Judicial College: 93–063).

“Multi-Cultural Training for Judges and Court Personnel” (St. Petersburg Junior College: 95–006).


Appendix IV—Illustrative List of Replicable Projects

The following list includes examples of projects undertaken with support from SJI that might be—or in some cases have been—successfully adapted and replicated in other jurisdictions. Please see Section II.C.1. for information on submitting a concept paper requesting a grant to replicate one of these or another SJI-supported project. A list of all SJI-supported projects is available from the Institute.

AARP Volunteers: A Resource for Strengthening Guardianship Services

Grantee: American Association of Retired Persons

Contact: Wayne Moore, 601 E Street, N.W., Washington, DC 20049, (202) 434–2165


Alabama Alcohol and Drug Abuse Court Referral Officer Program

Grantee: Alabama Administrative Office of the Courts

Contact: Angelo Trimble, 817 South Court Street, Montgomery, AL 36130–0101, (334) 834–7990


Substance Abuse Assessment and Intervention to Reduce Driving Under the Influence of Alcohol Recidivism

Grantee: California Administrative Office of the Courts c/o El Cajon Municipal Court

Contact: Fred Lear, 250 E. Main Street, El Cajon, CA 92020, (619) 441–4336

Grant No: SJ–88–029/SJ–90–008

Decision-Making in Authorizing and Withholding Life-Sustaining Medical Treatment: Guidelines for State Courts

Grantee: National Center for State Courts

Contact: Victor E. Flango, 300 Newport Avenue, Williamsburg, VA 23187–8798, (804) 253–2000

Grant Nos: SJ–88–051/SJ–91–048

Establishing a Consumer Research and Service Development Process Within the Judicial System

Grantee: Supreme Court of Virginia

Contact: Beatrice Monahan, Administrative Offices, Third Floor, 100 North Ninth Street, Richmond, VA 23219, (804) 786–6455

Grant No: SJ–89–062

Housing Court Video Project

Grantee: Association of the Bar of the City of New York

Contact: Marilyn Kneeland, 42 West 44th Street, New York, NY 10036–6690, (212) 382–6620

Grant No: SJ–90–041

Télé-Court: A Michigan Judicial System Public Information Program

Grantee: Michigan Supreme Court

Contact: Judy Bartell, State Court Administrative Office, 611 West Ottawa Street, P.O. Box 30048, Lansing, MI 48909, (517) 373–0130

Grant No: SJ–91–015

Measurement of Trial Court Performance

Grantee: Washington Administrative Office for the Courts

Contact: Yvonne Pettus, 1206 S. Quince Street, Olympia, WA 98504, (360) 786–7990

Grant No: SJ–91–017; SJ–91–017–P92–1

Measurement of Trial Court Performance
Grantee: New Jersey Administrative Office of the Courts
Contact: Robert D. Lipscher, CN-037, RJH Justice Complex, Trenton, NJ 08625
Grant No: SJI–91–023; SJI–91–023–P93–1

Measurement of Trial Court Performance
Grantee: Ohio Supreme Court
Contact: Stephan W. Stover, State Office Tower, 30 East Broad Street, Columbus, OH 43266–0419,
Grant No: SJI–91–024; SJI–91–024–P93–1

Court Probation Enhancement Through Community Involvement
Grantee: Supreme Court of Virginia
Contact: Beatrice Monahan, 100 North Ninth Street, Third Floor, Richmond, VA 23219, (804) 786–6455
Grant No: SJI–91–042; SJI–91–042–P93–1

Probate Casework Management Project
Grantee: Ohio Supreme Court/Trumbull County Probate Court
Contact: Susan Lightbody, 160 High Street, N.W., Warren, OH 44481, (216) 675–2566,
Grant No: SJI–92–081; SJI–92–081–P94–1; SJI–92–081–P95–1

Managing Documents with Imaging Technology
Grantee: Alaska Judicial Council
Contact: William T. Cotton, 1029 W. Third Avenue, Suite 201, Anchorage, AK 99501–1917, (907) 279–2526
Grant No: SJI–92–083

Automated Teller Machines for Juror Payment
Grantee: District of Columbia Courts
Contact: Philip W. Wright, 500 Indiana Avenue, N.W., Washington, DC 20001, (202) 879–1700
Grant No: SJI–92–139

Court Referral Officer Program
Grantee: New Hampshire Supreme Court
Contact: Jim Kelley, Supreme Court Building, Concord, NH 03301, (603) 271–2521
Grant No: SJI–92–142

Using Judges and Court Personnel to Facilitate Access to Courts by Limited English Speakers
Grantee: Washington Office of the Administrator for the Courts
Contact: Joanne Moore, 1206 South Quince Street, P.O. Box 41170, Olympia, WA 98504–1170, (206) 753–3365
Grant No: SJI–92–147

Becoming Receptive to Challenge and Change: Applying TQM Concepts to Systemwide Problems of the Maine Judicial Branch
Grantee: Maine Supreme Judicial Court
Contact: Mary Kamin-Crane, 95 State Street, Augusta, ME 04330, (207) 822–4285
Grant No: SJI–93–072

Family Court Networking and Imaging Project
Grantee: Colorado Judicial Department
Contact: Mary McNell, 1301 Pennsylvania Street, Suite 300, Denver, CO 80203–2416, (719) 630–2846
Grant No: SJI–93–124

Arizona/Sonora Judicial Relations Project
Grantee: Arizona Supreme Court
Contact: Dennis Metrick, 1501 West Jefferson, 4th floor CCB, Phoenix, AZ 85003, (602) 560–2913
Grant No: SJI–93–325

Appendix V—State Justice Institute Scholarship Application

This application does not serve as a registration for the course. Please contact the education provider.

APPLICANT INFORMATION:
1. Applicant Name:
   (Last)     (First)     (M)
2. Position:
3. Name of Court:
4. Address:
   Street/P.O. Box
5. Telephone No.
6. Congressional District:
7. Course Name:
8. Course Dates:
9. Course Provider:
10. Location Offered:

ESTIMATED EXPENSES: (Please note, scholarships are limited to tuition and transportation expenses to and from the site of the course up to a maximum of $1,500.)

Tuition: $
Transportation: $
(Airfare, trainfare, or if you plan to drive, an amount equal to the approximate distance and mileage rate.)
Amount Requested: $

ADDITIONAL INFORMATION: Please attach a current resume or professional summary, and answer the following questions. (You may attach additional pages if necessary.)
1. How will taking this course benefit you, your court, and the State's courts generally?
2. Is there any education or training currently available through your State on this topic?
3. How will you apply what you have learned? Please include any plans you may
have to develop/teach a course on this topic in your jurisdiction/State, provide in-service training, or otherwise disseminate what you have learned to colleagues.

4. Are State or local funds available to support your attendance at the proposed course? If so, what amount(s) will be provided?

5. How long have you served as a judge or court manager?

6. How long do you anticipate serving as a judge or court manager, assuming reelection or reappointment?

7. What continuing professional education programs have you attended in the past year? Please indicate which were mandatory (M) and which were nonmandatory (V).

STATEMENT OF APPLICANT’S COMMITMENT

If a scholarship is awarded, I will submit an evaluation of the educational program to the State Justice Institute and to the Chief Justice of my State.

Signature

Date

Please return this form and Form S-2 to: State Justice Institute, 1650 King Street, Suite 600, Alexandria Virginia 22314.

State Justice Institute

Scholarship Application

Concurrence

I, ______________________, Name of Chief Justice (or Chief Justice’s Designee)

have reviewed the application for a scholarship to attend the program entitled

______________________, prepared by ________________,

Name of Applicant

and concur in its submission to the State Justice Institute. The applicant’s participation in the program would benefit the State; the applicant’s absence to attend the program would not present an undue hardship to the court; and receipt of a scholarship would not diminish the amount of funds made available by the State for judicial education.

Signature

Date

Appendix VI—Curriculum Adaptation Grant & Technical Assistance Grant Budget Form

<table>
<thead>
<tr>
<th>Category</th>
<th>SJF funds</th>
<th>Cash match</th>
<th>In-kind match</th>
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<tbody>
<tr>
<td>Personnel</td>
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<td>Audit</td>
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<tr>
<td>Other</td>
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<td>$</td>
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<tr>
<td>Total</td>
<td>$</td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

PROJECT TOTAL

$______________________

Financial assistance has been or will be sought for this project from the following other sources:

*Curriculum Adaptation grant requests, and Technical Assistance grant requests should be accompanied by a budget narrative explaining the basis for each line-item listed in the proposed budget.

Appendix VII—State Justice Institute

Certificate of State Approval

The Name of State Supreme Court or Designated Agency or Council has reviewed the application entitled

prepared by ______________________, Name of Applicant

approves its submission to the State Justice Institute, and

[ ] agrees to receive and administer and be accountable for all funds awarded by the Institute pursuant to the application.

[ ] designates ______________________, Name of Trial or Appellate Court or Agency as the entity to receive, administer, and be accountable for all funds awarded by the Institute pursuant to the application.

Signature

Date

Title ______________________

Appendix VIII—State Justice Institute Application

1. APPLICANT

   a. Applicant Name ______________________

   b. Organizational Unit ______________________

   c. Street/P.O. Box ______________________

   d. City ______________________

   e. State ______________________

   f. Zip Code ______________________

   g. Name and Telephone Number of Contact Person ______________________

2. TYPE OF APPLICANT (Circle appropriate letter)

   a. State court

   b. National State court support organization

   c. National state court education/training organization

   d. College or university

   e. Other non-profit organization or agency

   f. Individual

   g. Corporation or partnership

   h. Other unit of government

   i. Other

3. EMPLOYER IDENTIFICATION

   NO ______________________

4. ENTITY TO RECEIVE FUNDS (if different from applicant)

   a. Name of Responsible Entity ______________________

   b. Street/P.O. Box ______________________

   c. City ______________________

   d. State ______________________

   e. Zip Code ______________________

   g. Name and Telephone Number of Contact Person ______________________

5. TYPE OF PROJECT (Circle appropriate letter)

   a. Education/Training

   b. Research/Evaluation

   c. Demonstration

   d. Technical Assistance

   e. Other

6. APPLICATION TYPE
   ______________________
### State Justice Institute Project Budget—(Tabular Format)

Applicant: 
Project Title: 
For Project Activity from 
Total Amount Requested for Project from SJI $ 

<table>
<thead>
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<th>Item</th>
<th>SJI funds</th>
<th>State funds</th>
<th>Federal funds</th>
<th>Applicant funds</th>
<th>Other funds</th>
<th>In-kind support</th>
<th>Total</th>
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</table>

### State Justice Institute Project Budget—(Tabular Format)

Applicant: 
Project Title: 
For Project Activity from 
Total Amount Requested for Project from SJI $ 

(See instruction regarding column headings)
State Justice Institute

Assurances

The applicant hereby assures and certifies that it possesses legal authority to apply for the award, and that if funds are awarded by the State Justice Institute pursuant to this application, it will comply with all applicable provisions of law and the regulations, policies, guidelines and requirements of the Institute as they relate to the acceptance and use of Institute funds pursuant to this application. The applicant further assures and certifies with respect to this application, that:

1. No person will, on the basis of race, sex, national origin, disability, color, or creed be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity supported by Institute funds, and that the applicant will immediately take any measures necessary to effectuate this assurance.

2. In accordance with 42 U.S.C. 10706 (a), funds awarded to the applicant by the Institute will not be used, directly or indirectly, to influence the issuance, amendment, or revocation of any Executive order or similar promulgation by Federal, State or local agencies, or to influence the passage or defeat of any legislation or constitutional amendment by any Federal, State or local legislative body.

3. In accordance with 42 U.S.C. 10706 (a) and 10707 (c):
   a. It will not contribute or make available Institute funds, project personnel, or equipment to any political party or association, to the campaign of any candidate for public or party office, or to influence the passage of defeat of any ballot measure, initiative, or referendum;
   b. No officer or employee of the applicant will intentionally identify the Institute or the applicant with any partisan or nonpartisan political activity or the campaign of any candidate for public or party office; and,
   c. No officer or employee of the applicant will engage in partisan political activity while engaged in work supported in whole or in part by the Institute;

4. In accordance with 42 U.S.C. 10706 (b), no funds awarded by the Institute will be used to support or conduct training programs for the purpose of advocating particular nonjudicial public policies or encouraging nonjudicial political activities.

5. In accordance with 42 U.S.C. 10706 (d), no funds awarded by the Institute will be used to supplant State or local funds supporting a program or activity; to construct court facilities or structures, except to remodel existing facilities or to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program; or to solely purchase equipment for a court system.

6. It will provide for an annual fiscal audit of the project.

7. It will give the Institute, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award.

8. In accordance with 42 U.S.C. 10708 (b) (as amended), research or statistical information that is furnished during the course of the project and that is identifiable to any specific individual, shall not be used or revealed for any purpose other than the purpose for which it was obtained. Such information and copies thereof shall be immune from legal process, and shall not be offered as evidence or used for any purpose in any action suit, or other judicial, legislative, or administrative proceeding without the consent of the person who furnished the information.

9. All research involving human subjects will be conducted with the informed consent of those subjects and in a manner that will ensure their privacy and freedom from risk or harm and the protection of persons who are not subjects of the research but would be affected by it, unless such procedures and safeguards would make the research impractical. In such instances, the Institute must approve procedures designed by the grantee to provide human subjects with relevant information about the research after their involvement and to minimize or eliminate risk of harm to those subjects due to their participation.

10. All products prepared as the result of the project will be original developed material unless otherwise specifically provided for in the award documents, and that material not originally developed that is included in such projects must be properly identified, whether the material is in a verbatim or extensive paraphrase format.

11. No funds will be obligated for publication or reproduction of a final product developed with Institute funds without the written approval of the Institute. The recipient will submit a final draft of each such product to the Institute for review and approval prior to submitting that product for publication or reproduction.

12. The following statement will be prominently displayed on all products prepared as a result of the project: This [document, film, videotape, etc.] was developed under a [grant, cooperative agreement, contract] from the State Justice Institute. Points of view expressed herein are those of the [author(s), filmmaker(s), etc.] and do not necessarily represent the official position or policies of the State Justice Institute.

13. The “SJI” logo will appear on the front cover of a written product or in the opening frames of a video production produced with SJI funds, unless another placement is approved by the Institute.

14. Except as otherwise provided in the terms and conditions of an Institute award, the recipient is free to copyright any books, publications, or other copyrightable materials developed in the course of an Institute-supported project, but the Institute shall retain a royalty-free, non-exclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the materials for purposes consistent with the State Justice Institute Act.

15. It will submit quarterly progress and financial reports within 30 days of the close of each calendar quarter during the funding period (that is, no later than January 30, April 30, July 30, and October 30); that progress reports will include a narrative description of project activities during the calendar quarter, the relationship between those activities and the task schedule and objectives set forth in the approved application or an approved adjustment thereto, any significant problems areas that have developed and how they will be resolved, and the activities scheduled during the next reporting period; and that financial reports will contain the information requested on the financial report form included in the award documents.
16. At the conclusion of the project, title to all expendable and nonexpendable personal property purchased with Institute funds shall vest in the court, organization or individual that purchased the property if certification is made to the Institute that the property will continue to be used for the authorized purposes of Institute-funded project or other purposes consistent with the State Justice Institute Act, as approved by the Institute. If such certification is not made or the Institute disapproves such certification, title to all such property with an aggregate or individual value of $1,000 or more shall vest in the Institute, which will direct the disposition of the property.

17. The person signing the application is authorized to do so on behalf of the applicant and to obligate the applicant to comply with the assurances enumerated above.

Disclosure of Lobbying Activities

The State Justice Institute Act prohibits grantees from using funds awarded by the Institute to directly or indirectly influence the passage or defeat of any legislation by Federal, State or local legislative bodies. 42 U.S.C. 10706(a). It also is the policy of the Institute to award funds only to support applications submitted by organizations that would carry out the objectives of their applications in an unbiased manner.

Consistent with this policy and the provisions of 42 U.S.C. 10706(a), the Institute will not knowingly award a grant to an applicant that has, directly or through an entity that is part of the same organization as the applicant, advocated a position before Congress on any issue, and to any non-profit organization that is part of the same organization as the applicant, or through an entity that is part of your organization, has, directly or indirectly advocated a position before Congress within the past five years. If necessary, you may continue on the back of this form or on an attached sheet.

<table>
<thead>
<tr>
<th>Subject</th>
<th>Year</th>
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<tbody>
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</table>

Statement of Verification

I declare under penalty of perjury that the information contained in this disclosure statement is correct and that I am authorized to make this verification on behalf of the applicant.

Signature

Title

Name (Typed)

Date

Instructions—Form A

1. (a)–(g) Legal Name of Applicant court, entity or individual; Name of The Organizational Unit, if any, that will conduct the project; Complete Address of applicant; Name and telephone number of a Contact Person who can provide further information about this application.

2. (a) State or Local Court includes all appellate, general jurisdiction, limited jurisdiction, and special jurisdiction courts. Agencies of State and local courts include all governmental offices that are supervised by or report for administrative purposes to the chief or presiding justice or judge, or his or her designee.

(b) National State Court Support Organization include national non-profit organizations controlled by, operating in conjunction with, and serving the State courts.

(c) National State Court Education/Training Organizations include national non-profit organizations for the education and training of judges and support personnel of the judicial branch of State government.

(d) College or University includes all institutions of higher education.

(e) Other Non-profit Organization or Agency includes those non-profit organizations and private agencies with expertise in judicial administration not included in subparagraphs (b)–(d).

(f) Individual means a person not applying in conjunction with or on behalf of an entity identified in one of the other categories.

(g) Corporation or Partnership includes for-profit and not-for-profit entities not falling within one of the other categories.

(h) Other Unit of Government includes any governmental agency, office, or organization that is not a State or local court.

3. Employer Identification Number as assigned by the Internal Revenue Service.

4. (a)–(f) Entity to Receive Funds is the court or organization that will receive, administer, and account for any moneys awarded. For example, if the applicant is a State or local court, the entity to receive funds would be the State's Supreme Court or its designated agency or council in accordance with 42 U.S.C. 10705(b)(4). If the applicant is a special university program, the responsible entity may be the university's structure. Applicants should complete this block only if the entity that will receive the funds is different from the applicant.

5. (a)–(e) Circle the letter of the Type of activities that best characterizes the project. If project funds will be substantially divided among two or more activities, circle the letters for each of those activities.

6. (a) New refers to the first award of State Justice Institute funds for a particular project, whether or not the applicant has received previous awards for different projects from the Institute.

(b) Supplement refers to the award of additional funds to permit an existing project to complete the task originally proposed or to augment the scope of the project within the current project period.

(c) Continuation refers to an extension for an additional funding period.

(d) Ongoing Support refers to an SJI-funded project for which there is a continuing important national need.

7. The Title of the Proposed Project should reflect the specific activities that will be conducted.

8. The Proposed Start Date of the project should be the earliest feasible date on which the applicant will be able to begin project activities following the date of award. An explanation should be provided in the Program Narrative if the proposed start date is more than 90 days after the estimated award date set forth in the Application Review Procedures section of the Grant Guideline.

9. Project Duration refers to the number of months the applicant estimates...
will be needed to complete all project tasks after the proposed start date.

10. (a) Insert the Amount Requested from the State Justice Institute to conduct the project.
(b) The Amount of Match is the amount, if any, to be contributed to the project by the applicant, by a unit of State or local government, by a Federal agency, or by private sources. See 42 U.S.C. 10705(d).

Cash Match refers to funds directly contributed by the applicant, a unit of State or local government, a Federal agency, or private sources to support the project.

Non-cash Match refers to in-kind contributions by the applicant, a unit of State or local government, or private sources to support the project. The applicant should describe in detail, both the value it assigns to in-kind contributions and the basis for determining that value.

Total Match refers to the sum of the cash and in-kind contributions to the project.

(c) Total Project Cost represents the sum of the amount requested from the Institute and all match contributions to the project.

11. If this application or an application requesting support for the same project or an essentially similar project has been previously submitted to another funding source (Federal or private), the name of the source, the date of the previous submission, the amount of funding sought, and the disposition (if any) should be entered.

12. Enter the number of the applicant’s Congressional district(s) in which most of the project activities will take place and the name(s) of the Representatives from those districts. If the project activities are not site-specific, for example a series of training workshops that will bring together participants from around the State, the country, or from a particular region, enter Statewide, National, or Regional, as appropriate, in the space provided.

Instructions—Form B

The State Justice Institute Act requires that:

Each application for funding by a State or local court shall be approved, consistent with State law, by the State’s Supreme Court, or its designated agency or council, which shall receive, administer, and be accountable for all funds awarded by the Institute to such courts. 42 U.S.C. 10705(b)(4).

FORM B should be signed by the Chief Judge or Chief Justice of the State Supreme Court, or by the director of the designated agency or council. If the designated agency or council differs from the designee listed in Appendix I to the State Justice Institute Grant Guideline, evidence of the new or additional designation should be attached.

The term “State Supreme Court” refers to the court of last resort of a State. “Designated agency or council” refers to the office or judicial body which is authorized under State law or by delegation from the State Supreme Court to approve applications for funds and to receive, administer and be accountable for those funds.

Instructions—Forms C and C1

Applicants may submit the proposed project budgets either in the tabular format of Form C or in a spreadsheet format similar to Form C1. Applicants requesting more than $100,000 are encouraged to use the spreadsheet format. If the proposed project period is for more than 12 months, separate totals should be submitted for each succeeding twelve-month period or portion thereof beyond 12.

In addition to Form C or C1, Applicants must provide a detailed budget narrative providing an explanation of the basis for the estimates in each budget category (See Guidelines section VII.D). If the applicant is requesting indirect costs and has an indirect cost rate that has been approved by a Federal agency, the basis for that rate together with a copy of the letter or other official document stating that it has been approved should be attached.

If funds from other sources have been requested either as match or to support other aspects of the project, the source, current status of the request, and anticipated decision date must be provided.

COLUMN HEADINGS: For Budget Form C1 columns should be labeled consecutively by tasks, e.g., TASK #1, TASK #2, etc. At the end of each twelve month period or portion thereof beyond month 12 the following four columns must be included: SJI FUNDS; MATCH; OTHER; TOTAL. Entries in these columns should include the line-item totals by source of funding per the column headings.

[FR Doc. 96-21625 Filed 8-28-96; 8:45 am] BILLING CODE 6820-SC-M
Loans in Areas Having Special Flood Hazards; Final Rule
DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 22
[Docket No. 96–20]
RIN 1557–AB47
FEDERAL RESERVE SYSTEM
12 CFR Part 208
[Regulation H, Docket No. R–0897]
FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 339
RIN 3064–AB66
DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
12 CFR Parts 563 and 572
[No. 96–82]
RIN 1550–AA82
FARM CREDIT ADMINISTRATION
12 CFR Part 614
RIN 3052–AB57
NATIONAL CREDIT UNION ADMINISTRATION
12 CFR Part 760
Loans in Areas Having Special Flood Hazards
AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Office of Thrift Supervision, Treasury; Farm Credit Administration; National Credit Union Administration.

FOR FURTHER INFORMATION CONTACT:
OCC: Carol Workman, Compliance Specialist (202/874–4858), Compliance Management; Margaret Hesse, Senior Attorney, Community and Consumer Law Division (202/874–5750), or Jacqueline Lussier, Senior Attorney, Legislative and Regulatory Activities Division (202/874–5900), Office of Chief Counsel, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

FDIC: Diane Jackins, Senior Review Examiner, (202/452–3946), Division of Consumer and Community Affairs; Lawranne Stewart, Senior Attorney (202/452–3513), or Rick Heyke, Attorney (202/452–3688), Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Earnestine Hill or Dorothea Thompson (202/452–3544).

FSLI: Mark Mellon, Counsel, Regulation and Legislation Section (202/898–3854), Legal Division, or Ken Baebel, Senior Review Examiner (202/942–3066), Division of Compliance and Consumer Affairs, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Larry Clark, Senior Manager, Compliance and Trust Programs (202/906–5628), or Ronald Dice, Program Analyst (202/906–5633), Compliance Policy; Catherine Shepard, Senior Attorney, Regulations and Legislation Division (202/906–7275), Office of Chief Counsel, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

FCA: Robert G. Magnuson, Policy Analyst, Regulation Development (703/883–4498), Office of Examination; or William L. Larsen, Senior Attorney, Legal Counsel Division (703/883–4020), Office of General Counsel, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090. For the hearing impaired only, TDD (703/883–4444).

NCUA: Kimberly Iverson, Program Officer (703/518–6375), Office of Examination and Insurance; or Jeffrey Mooney, Staff Attorney (703/518–6563), Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

SUPPLEMENTARY INFORMATION:
I. Background
The National Flood Insurance Program (NFIP) is administered primarily under two statutes: the National Flood Insurance Act of 1968 (1968 Act) and the Flood Disaster Protection Act of 1973 (1973 Act). The 1968 Act made Federally subsidized flood insurance available to owners of improved real estate or mobile homes located in special flood hazard areas if their community participates in the NFIP. A special flood hazard area (SFHA) is an area within a flood plain having a one percent or greater chance of flood occurrence in any given year. SFHAs are delineated on maps issued by FEMA for individual communities. A community establishes its eligibility to participate in the NFIP by adopting and enforcing floodplain management measures to regulate new construction and by making substantial improvements within its SFHAs to eliminate or minimize future flood damage.

The 1973 Act amended the NFIP by requiring the OCC, Board, FDIC, OTS, and NCUA to issue regulations governing the lending institutions they supervise (regulated lending institutions or regulated lenders). These agencies’ regulations directed lenders to require flood insurance on improved real estate or mobile homes serving as collateral for a loan (security property) if the security property was located, or was to be located, in a SFHA in a participating community. To implement statutory amendments enacted in 1974, the regulations required lenders to notify borrowers that their security property is located in a SFHA and of the availability of Federal disaster assistance with respect to the property in the event of a flood.

Title V of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act),
which is called the National Flood Insurance Reform Act of 1994 (Reform Act), comprehensively revised the Federal flood insurance statutes. The Reform Act is intended to increase compliance with flood insurance requirements and participation in the NFIP in order to provide additional income to the National Flood Insurance Fund and to decrease the financial burden of flooding on the Federal government, taxpayers, and flood victims. The Reform Act requires the OCC, Board, FDIC, OTS, and NCUA to review their current flood insurance regulations and requires the FCA to promulgate flood insurance regulations for the first time. In order to fulfill these statutory requirements, the six agencies published a joint NPRM in the fall of 1995. See 60 FR 53962 (October 18, 1995). The agencies now complete the rulemaking process by issuing this joint final rule.

Four of the agencies—the OCC, Board, FDIC, and OTS—are required by section 303 of the CDRI Act to review their regulations in order to streamline and modify the regulations to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability. This joint final rule satisfies the regulation review requirement that section 303 applies to those four agencies. The OCC’s portion of the joint final rule is part of its Regulation Review Program. Similarly, this joint final rule is part of the programs initiated by the Board, FDIC, OTS, NCUA, and FCA to reduce unnecessary regulatory burden and to simplify and clarify their regulations.

Section 303 also requires the OCC, Board, FDIC, and OTS to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. This joint final rule also satisfies this portion of section 303. All six of the agencies have reviewed their flood insurance regulations with these purposes in mind. The agencies believe that the joint final rule provides the institutions they regulate with significant flexibility, and minimize the regulatory burden imposed upon regulated lending institutions and loan servicers acting on their behalf, consistent with the requirements of the statute, thus reducing the costs of compliance to those entities and enabling them to operate more efficiently.

II. Overview of Comments Received

The agencies received 138 comment letters on the joint NPRM. The commenters included 12 national banks, two national bank subsidiaries, six state member banks, 15 state member banks, nine savings associations, four Farm Credit organizations, 20 credit unions, 22 financial services holding companies, three State and local government agencies, eight Federal Reserve Banks, 21 trade associations, three flood determination firms, and one insurance agency. In addition, the agencies received comments from five law firms, four mortgage companies, and two consulting services. FEMA also submitted comments.

Thirty-nine commenters expressed general support for the joint NPRM. The majority of these commenters provided specific suggestions for improvement and clarification of the proposal. Twenty-two commenters responded unfavorably to the proposal, characterizing it as overly burdensome or unnecessary. In addition, as discussed later, many commenters sought clarification on specific issues covering a wide spectrum of the proposal’s provisions.

The joint final rule is similar to the agencies’ proposal in many respects. The agencies, however, have carefully considered the comment letters and have made a number of changes in response to commenters’ suggestions and in order to reduce regulatory burden. The topic-by-topic discussion identifies and discusses the significant comments received, describes the provisions of the joint final rule, and highlights changes made by the agencies. Each agency’s portion of the joint final rule is substantively consistent, although the format of the regulatory text varies to accommodate the format used at each agency.

III. Description of the Joint Final Rule

A. Need for Supplemental Guidance

The purpose of the Reform Act is to strengthen and enhance the NFIP, and the primary focus of the agencies’ joint final rule implementing the Reform Act is to carry out the purpose of the Reform Act. Depending on the location and activities of a regulated lending institution, adequate flood insurance coverage may be important from a safety and soundness perspective as a component of prudent underwriting and as a means of protecting the lender’s ongoing interest in its collateral. Accordingly, the preamble to the proposal noted issues that could raise safety and soundness concerns in some circumstances and invited comment on these issues so that the agencies could consider whether to provide informal guidance, separate from the joint final rule, that addresses safe and sound banking concerns presented by regulated lenders’ flood insurance programs. In particular, the agencies requested comment on the need for guidance related to purchased loans and institutions with significant exposure to flood hazards.

Commenters sought guidance from the agencies on a wide range of topics including the applicability of the flood insurance rules with respect to condominiums, cooperatives, agricultural buildings, subordinate liens, manufactured homes, home equity lines of credit, flood determination forms, and regulatory burden. The topic-by-topic discussion identifies and discusses the significant comments received, describes the provisions of the joint final rule, and highlights changes made by the agencies. Each agency’s portion of the joint final rule is substantively consistent, although the format of the regulatory text varies to accommodate the format used at each agency.
appropriate. Consequently, the agencies intend to issue informal guidance to address these technical issues subsequent to the promulgation of the joint final rule.

B. Topic-by-Topic Discussion

Authority, Purpose, and Scope

The OCC, Board, FDIC, and OTS proposed in the joint NPRM to expand this section to add detailed statements of authority, purpose, and scope. The FCA proposed language similar to that of the other agencies. The NCUA proposed to replace the question and answer format of its flood insurance regulations with standard regulation text so that its flood insurance regulations are consistent with the other agencies. No comments were received on this section and the agencies adopt it as proposed.

Loan Servicers

The agencies proposed to apply their regulations implementing the escrow, forced placement, and flood hazard determination fee provisions of the Reform Act to regulated lending institutions and to loan servicers acting on behalf of regulated lending institutions. As indicated in the preamble to the proposal, the agencies do not interpret the NFIP to impose obligations on a loan servicer independent from the obligations it imposes on the owner of a loan. The agencies concluded that loan servicers were covered by certain provisions of the Reform Act primarily to ensure that they could perform for the lender the administrative tasks related to the forced placement of flood insurance—including providing the requisite notices to borrowers, arranging for the insurance, and collecting and transmitting insurance premiums—without fear of liability to the borrower for the imposition of unauthorized charges.7

The proposal indicated that a regulated lender could fulfill its responsibilities under the NFIP by ensuring that its loan servicing contracts obligated its servicers to perform the duties required by the Federal flood insurance statutes. The agencies also stated that, where there were deficiencies in existing arrangements, lenders should ensure that their loan servicing agreements were revised to provide for the loan servicer to fulfill Federal flood insurance requirements.

The agencies received 21 comments on this issue. Several commenters addressed the relationship between regulated lender and loan servicer with respect to fulfillment of Federal flood insurance requirements and requested detailed additions to the regulatory language to clarify how this relationship is intended to function. One commenter requested that the final rule provide that the lender may rely upon the servicer to fulfill such requirements as long as the servicer performs reasonable audits. Another requested that the final rule provide that an originating lender may transfer liability for flood insurance requirements to a servicer, but a third requested clarification that the lender’s responsibilities are non-delegable despite its relationship with its servicer. One commenter requested clarification of the responsibilities of a regulated lender acting as a servicer as opposed to a non-regulated servicer.

In response to these comments, the agencies emphasize that the obligation of a loan servicer to fulfill administrative duties with respect to Federal flood insurance requirements arises from the contractual relationship between the loan servicer and the lender or from other commonly accepted standards for performance of servicing obligations. The lender remains ultimately liable for fulfillment of those responsibilities, and must take adequate steps to ensure that the loan servicer will maintain compliance with the flood insurance requirements. The agencies also wish to emphasize that there is no distinction between a regulated lending institution as servicer and a non-regulated servicer with respect to flood insurance requirements, since either entity acting as servicer will be doing so under the terms of a loan servicing contract. The provisions in the joint final rule with respect to escrow requirements, forced placement, and flood hazard determination fees therefore provide—as in the proposal—that these requirements may be fulfilled either by a regulated lender or a servicer acting on its behalf.

Definitions

The proposal added or revised several definitions, including definitions of the terms building, designated loan, mobile home, servicer, and also added several other definitions to streamline the agencies’ flood insurance regulations, including definitions of the term Director, residential improved real estate, and special flood hazard area.

The agencies received 20 comments on these definitions. Ten commenters requested clarification on the definition of mobile home. For purposes of the appendix to 44 CFR part 61, which sets forth FEMA’s standard flood insurance policy, “mobile home” (the term used in the Federal flood insurance statutes) is defined to have the same meaning as “manufactured home.” The text of the proposal is modified to reflect that the two terms have the same meaning. In order to ensure consistency with the term as used in the Reform Act and avoid conflicting interpretations, the agencies believe it is appropriate to defer to FEMA’s interpretations with respect to what is a “properly secured” mobile home for flood insurance purposes.

Two commenters requested a definition of the phrase “making, increasing, extending, or renewing a loan.” The agencies believe that Congress intended the flood insurance purchase requirements to be applicable at origination, or at any time thereafter during the life of the loan when the institution determines that the security property is located in an area having special flood hazards. The specific issues that arise in connection with this phrase are discussed later in this preamble in “Loan Purchase as Equivalent to Making a Loan,” “Loan Acquisitions Involving Table Funding Arrangements,” and “Use of Standard Flood Hazard Determination Form.”

Two commenters suggested revisions of the definition of residential improved real estate. These comments are discussed later in this preamble in “Escrow of Flood Insurance Payments.”

Flood Insurance Requirement

The proposal did not amend substantively the existing regulatory provision that implements the statutory requirement that flood insurance must be purchased for the term of a loan when the security property is located in a SFHA in a community that participates in the NFIP. The proposal also did not amend substantively the existing regulatory provision with respect to the minimum amount of insurance required by statute for such

Footnotes:
1. See 44 CFR 59.1 (defining manufactured home), 44 CFR 61.13 and Appendix A to 44 CFR part 61 (FEMA’s standard flood insurance policy defining mobile home as meaning manufactured home); 58 FR 62420 (Nov. 26, 1993). FEMA recently amended 44 CFR part 65, which sets forth the procedures to be followed for the review by FEMA of a contested flood hazard determination, to substitute the term “manufactured home” for “mobile home.” FEMA explained that it made this change because the former term is now the preferred term in the industry. See 60 FR 62213 (Dec. 5, 1995).
2. Conference Report at 197.
property. The Reform Act made no changes to these statutory requirements.

The agencies received 28 comments on this issue. Five commenters requested that the final rule provide that the amount of flood insurance may be limited to the overall value of the property minus the value of the land. When flood insurance is required, the policy must cover the outstanding principal balance of the loan or the maximum amount available under the NFIP, whichever is less. The flood insurance statutes are intended to provide coverage to the improvements.

As suggested by the commenters who addressed this point, the joint final rule provides that, in addition to the statutorily prescribed dollar limits, flood insurance coverage under the NFIP is limited to the overall value of the property less than the value of the land.

Five commenters requested that the final rule provide that Federal flood insurance requirements do not apply to loans where security interest in improved real property is only taken "out of an abundance of caution." Section 102(b)(1) of the 1973 Act, as amended by the Reform Act, provides that a regulated lending institution may not make, increase, extend, or renew any loan secured by improved real property that is located in a special flood hazard area unless the improved real property is covered by the minimum amount of flood insurance required by statute. The requested exception is not available under the 1973 Act.

One commenter asked whether flood insurance coverage could be purchased for "developed lots," that is, land that secures a loan to improve the property by streets, sewers, and utilities (but no "above-ground" improvements such as buildings) so it may then be sold to homebuyers who may construct residential housing on the developed lots. As previously noted in this section, flood insurance generally is available only with respect to a structure or mobile home and to with respect to the land on which the structure or mobile home sits. Flood insurance therefore would not be available under the NFIP for property used to secure a development loan of the type described in this paragraph.

One commenter asked whether the requirement to maintain flood insurance coverage for the term of the loan continues if a regulated lender sells the loan to a non-regulated lender while retaining servicing rights. The commenter wanted to ascertain whether the servicer in such a situation would have the authority to force place insurance and whether the servicer would be subject to criticism upon examination if the non-regulated lender instructed the servicer not to force place.

As noted in the discussion on "Loan Servicers," the agencies believe that the obligation of a loan servicer to fulfill Federal flood insurance requirements arises from the contractual relationship between the loan servicer and the regulated lender or other commonly accepted standards for performance. The duties of a regulated lender with respect to Federal flood insurance requirements for a particular loan cease upon the sale of the loan unless the seller agrees to retain responsibility for such requirements under a loan servicing agreement with the transferee owner. When a loan servicer force places flood insurance, it does so on behalf of the lender in accordance with the loan servicing agreement. If a lender instructs a loan servicer not to force place flood insurance, the servicer has no duty to change the amount of coverage on a loan in instances other than the increase, extension, or renewal of a loan, such as when the amount of insurance available under the 1968 Act has been increased and the lender determines that the borrower does not have adequate coverage.

One commenter requested that the final rule state that a regulated lender has no duty to change the amount of insurance coverage on a loan unless the loan is increased, extended or renewed. The agencies note in response that a lender may have to increase the amount of coverage on a loan in instances other than the increase, extension, or renewal of a loan, such as when the amount of insurance available under the 1968 Act has been increased and the lender determines that the borrower does not have adequate coverage.

One commenter stated that the proposal did not address the requirements for "contents coverage" for loans secured by personal property within a structure located in a SFHA. The agencies agree with the commenter that contents coverage is not required unless, as specified in section 102(b) of the Reform Act, personal property secures the loan in addition to improved real property. The proposal included language requiring flood insurance for any personal property securing a loan that is also secured by real property.

The agencies believe that this language adequately addresses this point.

One commenter requested that the final rule state that a lender may refuse to make a loan in a SFHA when Federal flood insurance is not available, such as in communities that do not participate in the NFIP. The agencies' flood insurance regulations in effect before the effective date of this joint final rule state that the requirement to obtain flood insurance for security property applies only to those areas where flood insurance has been made available under the 1968 Act. The proposal stated that the requirement applies only to a designated loan, a term defined to mean a loan secured by a building or mobile home located or to be located in a SFHA where flood insurance is available under the 1968 Act. The effect of these two provisions is the same, namely, that a lender may exercise discretion and decline to make a loan in a SFHA where Federal flood insurance is not available.

The agencies therefore believe that the requested change is not necessary.

The same commenter requested that the final rule expressly state that a lender may require flood insurance on any loan, even when not required by the final rule. A requirement for flood insurance on security property that is not subject to the Federal flood insurance statutes is a matter of contract between the lender and the borrower.

Consistent with the agencies' view that the joint final rule should include only those provisions necessary to implement the flood insurance statutes, the agencies have not included this provision in the joint final rule.

**Loan Purchase as Equivalent to Making a Loan**

The proposal noted that the agencies' regulations in effect until the effective date of this joint final rule differ as to whether a loan purchase constitutes the "making" of a loan that would trigger an obligation to make a flood hazard determination. The OCC and the Board have taken the position that a loan purchase does not trigger such an obligation. The OTS has treated a loan purchase as the equivalent of "making" a loan, and the NCUA has taken the position that if flood insurance is required for a Federal credit union (FCU) to make a loan, then flood insurance is necessary for an FCU to purchase a loan. The FDIC has not previously taken a position.

The proposal highlighted the agencies' desire for regulatory uniformity. Accordingly, the OTS proposed to remove loan purchases from its flood insurance regulations; the FDIC proposed to adopt the position of the OCC and the Board; and the NCUA invited comment on whether it should maintain its position.

The agencies received 44 letters on this issue. The overwhelming majority agreed that a loan purchase should not require a flood hazard determination. Three commenters, including FEMA,
believed that a loan purchase should be considered the "making" of a loan.

As noted in the preamble to the proposal, the 1973 Act identifies the events that trigger a lender's obligation to review the adequacy of flood insurance coverage on an affected loan (e.g., the making, increasing, extending, or renewing of a loan). The Reform Act does not include a loan purchase in this list of specified tripwires. As a practical matter, a loan purchaser may always require, as a condition of purchase, that the seller determine whether the property securing the loan is located in a SFHA.

The preamble further noted that, with respect to loans sold in the secondary mortgage market, the inclusion of a loan purchase as a tripwire event may be unnecessary because of the expansion of the scope of the NFIP's coverage with regard to Freddie Mac and Fannie Mae (the largest volume purchasers of residential mortgage loans).12 Finally, the preamble to the proposal noted that including a purchase as a regulatory tripwire could result in the imposition of duplicative and potentially inconsistent requirements on the seller and the purchaser of a reseller mortgage loan sold in the secondary market.

For these reasons, and to promote consistent treatment for all regulated lending institutions, the OTS and FDIC are hereby adopting the position of the OCC and the Board that a loan purchase is not an event that triggers the obligation to make a flood hazard determination. While the authority of Farm Credit System institutions is limited with regard to loan purchases, the FCA also concurs with the position of the OCC and the Board on this issue.

The NCUA requested comment on its position that a borrower must obtain adequate flood insurance before an FCU can purchase the borrower's loan if flood insurance coverage would have been required for the FCU to have made the loan initially. Two commenters agreed with the NCUA and 14 commenters suggested that NCUA adopt the other agencies' position. Ten of the commenters that disagreed with the NCUA and 14 commenters suggested that the NCUA adopt the other agencies' position. Ten of the commenters that disagreed with the NCUA and stated that the agencies should be consistent on this issue. Seven commenters suggested that the NCUA's position treats loan purchases as a triggering event and requires credit unions to unnecessarily duplicate the original lenders' flood insurance determinations. Two commenters suggested that credit unions should be able to check the flood status of a loan before purchasing it.

The NCUA agrees that a loan purchase does not trigger a flood hazard determination and that requiring a determination when an FCU purchases a loan could be duplicative. However, the NCUA's regulation governing loan purchases provides additional requirements for FCUs. Section 701.23(b)(1)(i) only permits an FCU to purchase its members' loans if the FCU could grant the loan or if the FCU refinances the loan within 60 days. Accordingly, before an FCU purchases a member's loan to hold in its portfolio, the FCU must determine whether the improved real property securing the loan has adequate flood insurance coverage. This may be accomplished by reviewing the loan documentation or by making a new determination. The FCU avoids these additional requirements when the FCU originates real-estate-secured loans on an ongoing basis and purchases the loans as they are made and sell in the secondary mortgage market.13 Finally, the NCUA notes that while the agency's flood insurance regulations, 12 CFR part 760, apply to all Federally-insured credit unions, § 701.23 applies only to FCUs. A Federally-insured State-chartered credit union should follow the loan purchasing guidelines of its state regulator.

Loan Acquisitions Involving Table Funding Arrangements

The agencies invited comment on whether a regulated lender provides table funding to close a loan originated by a mortgage broker or mobile home dealer should be deemed to be "making" or "purchasing" the loan for purposes of the flood insurance requirements. In the typical table funding situation, the party providing the funding reviews and approves the credit standing of the borrower and issues a commitment to the broker or dealer to purchase the loan at the time the loan is originated. Frequently, all loan documentation and other statutorily mandated notices are supplied by the party providing the funding, rather than the broker or dealer. The funding party provides the original funding "at the table" when the broker or dealer and the borrower close the loan. Concurrent with the loan closing, the funding party acquires the loan from the broker or dealer. While the transaction is, in substance, a loan made by the funding party, it is structured as the purchase of a loan. The preamble to the proposal indicated that the agencies were inclined to treat table funded loans like loans made, rather than purchased, by the funding party.

The preamble to the proposal outlined guidance provided by the regulations of the Department of Housing and Urban Development (HUD) implementing the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601-2616, and the Financial Accounting Standards Board (FASB)14 for distinguishing between making and purchasing loans.

The agencies invited comment on: (1) their position that a table funded transaction is more like the making of a loan by the provider of funds than a purchase of a loan in the secondary market; and (2) whether the RESPA or FASB standard is a more appropriate guideline for defining a table funded transaction as either the making or the purchase of a loan.

The agencies received 40 letters on this issue. Twenty commenters agreed with the agencies' position that a table funded transaction is more like making a loan, eight believed the transaction is more like a loan purchase, and seven expressed some other view. Some commenters addressed only whether the RESPA or FASB standards provided more appropriate guidance. Fourteen commenters supported the RESPA standard while thirteen supported the FASB standard.

The commenters who favored the RESPA standard asserted that RESPA provides a better model for determining the appropriate treatment of table funded transactions because it reflects the realities of the market place and focuses on the structure of the transaction. Some commenters also noted that it would be less confusing and burdensome for lenders, and less likely to result in errors by lenders, to treat the same transaction in a consistent manner for purposes of both RESPA and the Reform Act.

The commenters who supported the FASB standard asserted that it is clearer and more workable. Some stated that the broker or dealer originating the transaction is usually responsible for the

12 CFR 701.23.
14 See 24 CFR 3500.2, 3500.5(b)(7).
flood hazard determination. If the transaction is not treated as a loan purchase, the acquiring regulated lender would have to perform a duplicative flood hazard determination—and the duplicative costs would have to be absorbed by the lender or borrower.

The joint final rule reflects the agencies’ position that, for flood hazard determination purposes, the substance of the table funded transaction should control and that the typical table funded transaction should be considered a loan made, rather than purchased, by the entity that actually supplies the funds. Regulated lenders who provide table funding to close loans originated by a mortgage broker or mobile home dealer will be considered to be “making” a loan for purposes of the flood insurance requirements. The agencies believe that this treatment most closely reflects the realities of such transactions, which are purchase only in a technical sense. The presence of a mortgage broker or a mobile home dealer in the transaction should not obscure the fact that the entity supplying funds is actually primarily responsible for the credit decision and will bear any risk inherent in the loan upon completion of the transaction.

The agencies have also concluded that it is appropriate to use the RESPA standard to define when a table funded loan will be treated as the making of a loan. Under the current RESPA regulations, table funding is defined as a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. This RESPA definition is used to determine whether a transaction will be treated as a loan or as a secondary market transaction. The funding entity is responsible for meeting the disclosure requirements of RESPA if the transaction is a loan; the funding entity generally would have no responsibilities under RESPA if the transaction is a secondary market transaction. The purpose for which the RESPA standard was developed is therefore similar to the purpose for which the standard would be used in connection with the flood insurance regulations.

The FASB standard referenced in the proposal, on the other hand, was intended to provide guidance to lenders on the proper accounting treatment for mortgage servicing rights and loan origination costs, and focused on factors such as which entity is the first titled owner of the loan, whether the broker is independent of the lender and sells loans to the lender, and whether the broker has been indemnified by the lender for the market and credit risks connected with the loan. Based on these criteria, the FASB guidance permitted transactions to be treated as purchased loans even where the lender had a significant level of involvement in the underwriting process.

In order to ensure that lenders are aware of the treatment of table funded transactions, the joint final rule includes a definition of table funding that is identical to the current RESPA definition. The joint final rule also states that a lender that acquires a loan from a mortgage broker or other entity through table funding will be considered to be making a loan for the purposes of the joint final rule.

The agencies also note that treating table funded loans as loans made by the funding entity need not result in duplication of flood hazard determinations and borrower notices, a possibility that concerned several commenters. The funding entity may delegate to the broker or dealer originating the transaction the responsibility for fulfilling the flood insurance requirements or may otherwise divide the responsibilities with the broker or dealer, as is currently done with respect to the RESPA requirements.

Applicability of Federal Flood Insurance Requirements to Subsidiaries

In the preamble to the proposal, each of the agencies briefly discussed the applicability of its flood insurance rules to the subsidiaries of the institutions it regulates. The OCC noted that a national bank’s operating subsidiary is subject to the rules applicable to the operations of its parent bank as provided under 12 CFR 5.34. Similarly, the Board noted that a state member bank’s operating subsidiary is subject to the rules applicable to its parent bank, and the OTS said that a savings association’s operating subsidiary is subject to the rules applicable to its parent thrift. The FDIC stated that its authority to regulate insured nonmember banks extends to activities that such institutions may conduct through a subsidiary. The FCA indicated that a Farm Credit System service corporation does not have the authority to extend credit. The NCUA indicated that a credit union’s subsidiary organization, called a credit union service organization (CUSO), is not a “regulated lending institution” subject to the Reform Act, but as a practical matter, a CUSO must adhere to the flood insurance requirements. The agencies also indicated that the question of whether the Federal flood insurance statutes apply to a mortgage banking subsidiary of a regulated lending institution is mooted to some extent by the Reform Act’s amendment requiring Fannie Mae and Freddie Mac to ensure that flood insurance requirements are met for the loans they purchase.

The OTS also noted in the proposal that its current regulations did not apply to service corporations but that the OTS interpreted the Reform Act’s new definition of “regulated lending institution,” including the phrase “similar institution subject to the supervision of a Federal agency for lending regulation,” to include subsidiaries of thrift institutions that are service corporations. The OTS proposed to apply its flood insurance regulations to service corporations that engage in mortgage lending. The OTS believed that this position was consistent with the Reform Act’s statutory language and Congressional intent, and would ensure uniform and consistent treatment for regulated financial institutions.

The FDIC invited comment on its proposed interpretation requiring subsidiaries of insured nonmember banks that engage in lending secured by real estate to comply with the flood insurance requirements.

The agencies received eight comment letters on this issue. Seven supported the OTS’s and FDIC’s positions. One, a thrift trade association, opposed extending flood insurance regulations to service corporations because of the unfair burden that would be placed on bank and thrift subsidiaries relative to mortgage bankers. The agencies received one comment letter that supported the NCUA’s position.

Based on the commenters’ responses and the desire for regulatory consistency, the OTS’s portion of the joint final rule applies to service corporations. The OTS believes that the purpose of the Federal flood insurance statutes is best served by treating loans made by service corporations in the same way as loans made elsewhere in the corporate structure by the thrift institution or its operating subsidiaries. The FDIC’s portion of the joint final rule makes subsidiaries of insured nonmember banks subject to Federal flood insurance regulations by defining the term “bank” to include a subsidiary of such institutions. The positions of the other agencies, as reflected in their statements in the preamble to the proposal, are unchanged.

Exemptions

The proposal retained the exemption from the basic flood insurance requirement for State-owned property that is self-insured in a manner...
satisfactory to the Director of FEMA, and added the Reform Act's new exemption for loans with an original principal balance of $5,000 or less and a repayment term of one year or less. The agencies received 19 comment letters on this issue. Fifteen commenters requested expansion of the statutory exemption for loans in the amount of $5,000 or less with a term of one year or less. Because the exemption has been established by statute (see 42 U.S.C. 4012a(c)(2)), it may only be expanded by a legislative amendment. The joint final rule therefore adopts the language as proposed.

Escrow of Flood Insurance Payments

Definition of residential improved real estate. As required by the Reform Act, the proposal stated that a regulated lender must require the escrow of flood insurance premiums for loans secured by residential improved real estate if the lender requires the escrow of other funds to cover other charges associated with the loan, such as taxes, premiums for hazard or fire insurance, or any other fees. The proposal also cautioned that, depending on the type of loan, the escrow account for flood insurance premiums may be subject to section 10 of RESPA, 12 U.S.C. 2609, which generally limits the amount that may be maintained in escrow accounts for consumer mortgage loans, and requires notices containing escrow account statements for those accounts.

There are differences between the scope of the Reform Act's coverage and the scope of RESPA's coverage that raise a question about how the two laws should be applied together. The Reform Act's escrow provision applies to loans secured by "residential improved real estate," a term defined in the Reform Act as improved real estate for which the improvement is a residential building. This definition does not distinguish between mortgage loans secured by one to four family residential buildings and commercial loans secured by residential buildings. Under the language of the proposal, therefore, the Reform Act's escrow provision applied to both home mortgage loans and commercial loans—including, for example, mortgages on apartment buildings or construction loans secured by residential buildings—but, only if the lender requires the escrow of other charges for those loans.

RESPA, on the other hand, applies to a "federally related mortgage loan," which is defined as a loan secured by a first or subordinate lien on residential real property designed principally for the occupancy of from one to four families. Further, by regulation HUD has determined that RESPA does not cover construction financing, loans primarily for business, commercial, or agricultural purposes, loans secured by 25 acres or more of real estate, whether residential or commercial, and loans on vacant or undeveloped property not developed within two years. Similarly, the limits on amounts escrowed and the escrow account statement requirements prescribed by RESPA section 10, which is the only RESPA section that the Reform Act makes applicable to flood insurance premiums, apply only to consumer mortgage loans.

In the proposal, the agencies resolved the differences between the scope of coverage of the two statutes by applying RESPA section 10 only to flood insurance escrow accounts for loans that are already subject to RESPA generally, i.e., escrows for consumer mortgage loans. The agencies took the position that (1) the escrow of flood insurance premiums is required whenever the lender escrows other charges associated with the loan, but (2) the detailed requirements of RESPA section 10 do not apply unless the loan itself is subject to RESPA.

The agencies received 20 comments on the scope of the escrow requirement. Five commenters generally agreed with the proposal, while 15 requested additional clarification on specific matters. Five commenters said that the term "residential improved real estate" as defined in the proposal could be interpreted to include loans on multi-family properties, which are mortgage loans secured by five or more family residential units typically processed as commercial loans made for a business purpose. These commenters recommended that the agencies limit the Reform Act's escrow requirement only to those loans that are subject to RESPA. Some commenters requested that the final rule distinguish between mortgage loans secured by one to four family residential units and mortgage loans secured by multi-family units, and asked that the definition be modified so that it applies only to the former type of mortgage loans. They stated that if this change were made, lenders would not have to escrow for flood insurance coverage of the two statutes by applying RESPA section 10 only to flood insurance escrow accounts for loans that are already subject to RESPA generally, i.e., escrows for consumer mortgage loans. The agencies took the position that (1) the escrow of flood insurance premiums is required whenever the lender escrows other charges associated with the loan, but (2) the detailed requirements of RESPA section 10 do not apply unless the loan itself is subject to RESPA.

However, the Reform Act itself does not restrict the flood insurance escrow requirement to consumer mortgage loans. The determinative factor in the coverage of the escrow requirement is not the purpose of the loan, but the purpose of the building—whether it is primarily used for residential purposes.

Section 10 of RESPA, the only RESPA provision that the Reform Act makes applicable to flood insurance escrow accounts, limits the amounts that lenders and servicers may legally require borrowers to deposit in escrow accounts. In 1994, HUD amended its RESPA regulations to interpret section 10 of RESPA by establishing a nationwide standard escrow accounting method known as aggregate accounting and giving lenders and servicers specific guidance on the requirements of section 10. The final rules required lenders and servicers to use the aggregate accounting method for escrow accounts involving

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20 See 24 CFR 3500.5(b).
consumer mortgage loans, instead of the method known as single-item analysis accounting, and provided a phase-in period for existing escrow accounts to convert to the aggregate accounting method. This change was intended to reduce the cost of home ownership, by ensuring that funds would not be held in escrow accounts in excess of the amounts necessary to protect lenders’ interests in preserving loan collateral. It appears that Congress intended to apply the same section 10 limits to the new flood insurance escrow accounts required under the Reform Act. Because of the differences between the scope of coverage of the Reform Act and RESPA, however, the agencies do not believe that the Reform Act is intended to impose the particular requirements of section 10 on loans that are not subject to RESPA generally, for example, commercial loans secured by residential buildings. There is nothing in the legislative history of the Reform Act suggesting that Congress meant to extend the scope of section 10 of RESPA in this way through the enactment of the Reform Act, and absent specific direction from Congress, the agencies did not believe that they had the authority to expand RESPA’s section 10 coverage to loans that are not otherwise subject to RESPA.

In addition, RESPA only applies to mobile home loans if they are also secured by real estate, whereas the Reform Act applies to mobile home loans whether or not secured by real estate. RESPA also exempts all loans secured by 25 acres or more of real estate, whether residential, commercial, or agricultural, whereas the Reform Act applies to all such loans if secured by structures primarily used for residential purposes. While RESPA and the Reform Act cover refinancings, the Reform Act also covers increases, extensions, and renewals.

In the joint final rule, the text of the agencies’ definition of residential improved real estate is the same as was proposed. It primarily covers loans that are otherwise subject to RESPA. But, because the Reform Act defines “residential improved real estate” as “improved real estate for which the improvement is a residential building,” multi-family properties containing five or more residential units are covered under the Act’s escrow provisions, as are single family dwellings (including mobile homes) and two to four family dwellings. A construction loan, loan secured by 25 acres or more of real estate, or commercial loan is subject to the escrow requirements if the loan is secured by improved real estate primarily used for residential purposes and an escrow account is required in connection with the loan for taxes, insurance premiums, fees, and other charges. Finally, except for escrows on consumer mortgage loans, the escrow accounts established for these loans need not comply with the requirements of section 10 of RESPA. The agencies have also made minor conforming changes to the text of the escrow provision.

Types of escrow accounts covered. Six commenters asked for clarification of what constitutes a “required” escrow. The commenters were divided on whether a “voluntary” escrow account (where the borrower requests the lender to establish an escrow account) should trigger a flood insurance escrow requirement. The Reform Act mandates a flood insurance escrow only when a regulated lending institution requires an escrow account for taxes, insurance, fees, or other charges. Although exclusion of voluntary escrows could lead to the possibility of evasion and difficulties in enforcing compliance, the agencies do not believe that the Reform Act mandates escrow of flood insurance premiums in connection with escrow accounts specifically requested by the borrower. However, where a lender is escrowing for hazard insurance premiums or taxes without also escrowing for flood insurance premiums, the lender will have the burden of demonstrating that the escrow arrangement is truly voluntary.

In determining whether an escrow arrangement is voluntary, the agencies believe it is appropriate to look to the loan policies of the regulated lender and the contractual agreement underlying the loan. If the loan documentation permits the lender to require an escrow account, and the lender’s loan policies normally would require an escrow account for a loan with particular characteristics, an escrow account in connection with such a loan generally would not be considered to be voluntary. An escrow arrangement generally would be viewed as voluntary, however, if the policies of the lender do not require the establishment of an escrow account in connection with the particular type of loan, even though the loan documentation may permit a lender to require the establishment of an escrow account.

Additionally not all accounts established in connection with a loan secured by residential improved real estate are considered to be escrow accounts that would trigger the requirement for the escrow of flood insurance premiums. For example, accounts established in connection with commercial loans for such items as interest or maintenance reserves or compensating balances are not considered to be escrow accounts for the purposes of this provision. As a general matter, accounts established in connection with the underlying agreement between the buyer and seller that relate to the commercial venture itself, rather than to the protection of the property, would not be considered to trigger the escrow requirements for flood insurance premiums.

Several commenters asked if the requirement to escrow flood insurance premiums would be triggered only if other escrows were required on the particular loan in question, rather than if the institution generally required escrows on other loans of similar type. The agencies agree that the final rule should be applied on a loan-by-loan basis within similar types of loans.

Several commenters asked whether voluntary payments for credit life insurance would trigger a flood insurance escrow. The agencies note, as did some of these commentators, that HUD takes the position that voluntary payments for credit life insurance do not constitute escrows for purposes of RESPA, and, accordingly, believe that payments under credit life insurance and similar types of contracts should not trigger the escrow of flood insurance premiums. Escrows for hazard insurance such as fire, storm, wind, or earthquake are the types of insurance that trigger the requirement to escrow flood insurance premiums if such insurance is required on the loan.

Various commenters opposed flood insurance escrows in general or thought that insurance companies or municipalities would be the logical entities to enforce the purchase and maintenance of flood insurance. However, the agencies note that the requirement is mandated by the Reform Act. Other commenters pointed out that their institutions lack the capability for escrows, either in general or with respect to mobile homes. Both the statute and this joint final rule specify that escrow of flood hazard insurance payments is required only when other payments also are escrowed.

24 See 60 FR 24733 (May 9, 1995) (revising 24 CFR 3500.17).
Forced Placement

The proposal sets forth the requirement imposed by the Reform Act on a regulated lender or a servicer acting on its behalf to purchase or “force place” flood insurance for the borrower if the lender or the servicer determines that adequate coverage is lacking. The agencies received 31 comments on this issue.

Four commenters asked if a loan could be made without flood insurance in place provided the lender gave notice to the borrower at closing that flood insurance must be obtained by the borrower within 45 days from the date of closing and that the lender would force place insurance if the borrower had not complied by the end of that period. Section 102(e)(2) of the 1973 Act, as amended, 42 U.S.C. 4012a(e)(2), provides for forced placement of flood insurance 45 days after the borrower is notified of deficient flood insurance coverage. The agencies do not interpret this provision of the Reform Act as granting a borrower 45 days from loan closing to arrange for flood insurance on the security property.

The agencies believe that the addition of the forced placement authority does not lessen the need for flood insurance to be in place at the time a loan is made. Section 102(e) of the 1973 Act provides that the agencies must require a regulated lending institution not to make, increase, extend, or renew any loan secured by improved real property located in a SFHA unless the security property is covered by the minimum amount of flood insurance required by the statute. The agencies interpret this provision to mean that the flood insurance regulations must require that such insurance be in place at the time a lender makes a loan that is secured by improved real property located in a SFHA.

The agencies believe that the forced placement provision of the Reform Act is designed to complement the other statutory tripping wires for ensuring that security property located in a SFHA is adequately covered by flood insurance. As a practical matter, forced placement should not be necessary at the time of making, increasing, extending, or renewing a loan, when the lender is obligated to require that flood insurance be in place. Rather, forced placement authority is designed to be used if, over the term of the loan, the lender or its servicer determines that flood insurance coverage on the security property is deficient under section 102(e) of the 1973 Act.

To further emphasize this point, the agencies are removing the phrase “at the time of origination or” from the final version of the forced placement regulation. The agencies realize that this phrase tracks the statutory language set forth in section 102(e)(1) of the 1973 Act. The agencies believe, however, that the removal of this phrase will not substantively alter the requirements of the rule since this joint final rule still provides, in accordance with the statute, that a lender or servicer acting on its behalf is under a duty during the term of a designated loan to force place insurance if the lender or servicer acting on the lender’s behalf determines that the security property is not adequately insured. The removal of this phrase clarifies (1) that flood insurance coverage must be in effect at the time of closing of a designated loan, and (2) the duties of a lender or its servicer with respect to forced placement of flood insurance.

Forced Placement

Forced Placement

The preamble to the proposal indicated that neither the Reform Act nor the proposed rule required a regulated lending institution or servicer acting on the lender’s behalf to conduct a review of all loans in portfolio as of September 23, 1994, that is, a retroactive portfolio review. The Reform Act does not require such a review. The agencies note that the 1968 and 1973 Acts, as amended by the Reform Act, do not prescribe portfolio review as the means that a lender or servicer acting on its behalf must use to determine whether security property is covered by flood insurance. The flood statutes do not require that determinations be made at any particular time, other than in connection with making, increasing, extending, or renewing a loan. Nonetheless, the preamble indicated that a regulated lending institution and servicer acting on its behalf should develop policies and procedures to ensure that, upon a determination that property securing a loan is located in a SFHA, they satisfy the requirements of the Reform Act’s forced placement provision.

The proposal also noted that it might be appropriate as a matter of safety and soundness for the agencies to ensure that institutions that are significantly exposed to the risks for which flood insurance is designed to compensate determine the adequacy of flood insurance coverage by (1) periodic reviews, or (2) reviews triggered by remapping of areas represented in a regulated lending institution’s loan portfolio.

The agencies invited comment on the advisability of issuing guidance in this area and on the guidance should differentiate among regulated lending institutions based on their levels of exposure to flood risk. In particular, the agencies invited comment on the methods that regulated lending institutions that are considering for determining the adequacy of flood insurance coverage;
the cost (or other burden) associated with portfolio reviews; and on whether the additional loans for which flood insurance would be required as a result of portfolio reviews would be significant in relation to a regulated lending institution's or its servicer's portfolio. The agencies received 76 comment letters on this issue, the most letters received on one topic. Forty-four commenters agreed with the agencies' view that the Reform Act does not require retroactive or prospective portfolio review. The same number agreed with the agencies' view that the final rule should not impose a requirement for retroactive or prospective portfolio reviews. Eleven commenters urged the agencies not to issue additional guidance as a safety and soundness matter for institutions that are significantly exposed to the risks for which flood insurance is designed to compensate. However, fourteen commenters recommended that the agencies issue informal guidance addressing, for example, when an institution is ``significantly exposed.''

Twenty commenters stated that the decision whether to engage in portfolio review should be left to the lender. Six recommended that the decision should be determined as a result of examinations, and not dictated in advance by regulations or agency guidance. Some of these commenters stated that the agencies should impose a portfolio review burden only on those individual institutions found in examinations to have inadequate systems in place. Others recommended that safety and soundness issues with respect to the adequacy of flood insurance should be handled on a case-by-case basis through the examination process.

An issue that generated significant comment is whether the Reform Act's forced placement provision implicitly imposes on lenders an affirmative obligation to monitor loans for FEMA map changes for the life of the loan. Ten commenters requested the agencies to address this uncertainty in the final rule. Nine commenters questioned whether the agencies' position on portfolio review is consistent with the forced placement language of the Reform Act. These commenters stated that the forced placement provision appears to require some action on the lender's part in response to remappings, as a lender will not know whether to force place flood insurance unless it is apprised of changes in the flood zone status of the property. These commenters indicated that the preamble's statement that prospective portfolio review is not required implies that a lender is not required to monitor for map changes subsequent to origination. Another commenter also pointed out that in order to comply with the forced placement provision, a lender may be obliged to conduct a retroactive portfolio review to determine whether it is required to force place insurance on any loans in its portfolio. Fourteen commenters, however, stated that prospective monitoring is not required because the Reform Act did not group map changes with the statutory triwire events in the basic purchase provision of the Reform Act. In their view, a lender does not have a duty to track for map changes. Seven commenters recommended that the final rule explicitly state that there is no duty to track for map changes or that ongoing monitoring is not required. Others pointed out that a requirement to make flood determinations upon remapping alone, without an intervening triwire event, would impose costly and unnecessary burdens on lenders.

One proposed that the final rule provide that the lender's flood determination obligation after loan origination is limited only to the triwire events, unless the lender, for its own portfolio risk management reasons, wishes to adopt a different approach. Fourteen commenters suggested that life of loan monitoring is one less expensive method lenders could use, pointing out that the cost for ongoing tracking of loans for flood map changes would be lower than the cost of performing periodic reviews on the portfolio reviews triggered by remappings. Five commenters stated that the additional loans for which flood insurance would be required as a result of portfolio reviews would be insignificant in relation to the lender's or its servicer's portfolio. The agencies reiterate their view that the Reform Act does not require lenders to engage in retroactive or prospective portfolio reviews or any other specific method for carrying out their responsibilities under the Federal flood insurance statutes. The Reform Act clearly requires lenders to check the status of security property for loans when triggered by the statutory triwire events. The Reform Act did not add remappings to the list of statutory triwire events. The Reform Act does not require lenders to monitor for map changes, and the agencies will not impose such a requirement by regulation. The joint final rule does not require that determinations be made at any time insurance is required. The Reform Act requires the lender, or servicer acting on the lender's behalf, to initiate forced placement procedures. A lender, or servicer acting on the lender's behalf, continues to be responsible for ensuring that where flood insurance was required at origination, the borrower renewes the flood insurance policy and continues to renew it for as long as flood insurance is required for the security property. If a borrower allows a policy to lapse when insurance is required, the lender, or servicer acting on its behalf, is required to commence forced placement procedures.28

The preamble to the proposal stated that depending on the location and activities of a lender, adequate flood insurance coverage may be important from a safety and soundness perspective as a component of prudent underwriting and as a means of protecting the lender's ongoing interest in its collateral. The agencies believe that each lender is in the best position to tailor its flood insurance policies and procedures to suit its business. Lenders should evaluate and, when necessary, modify their flood insurance programs to comport with both the requirements of Federal flood insurance statutes and regulations and principles of safe and sound banking. The agencies believe that more experience should be gained before a decision is made that further guidance is necessary for institutions in areas that have significant exposure to flood hazards. The agencies caution, however, that an institution with a lending area that includes communities that are subject to significant flood hazards, but that do not participate in the NFIP, presents special problems that may not be adequately addressed by the procedures generally used to limit flood risks, such as monitoring of remappings and other procedures.

Penalties

The proposal noted that the penalty provisions of the Reform Act are self-executing and do not require the agencies to develop regulations to implement them. Thus, the agencies did not propose regulations on the penalty provisions. The agencies received six comment letters on this issue. Two recommended that the final rule set out the statutory provisions contained in

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28The insurance provider routinely notifies the lender, or servicer acting on behalf of the lender, along with the borrower when the insurance contract is due for renewal. The insurance provider also routinely notifies the lender or its servicer as well as the borrower if the insurance provider has not received the policy renewal.
section 102(f) and (g) of the 1973 Act, as amended by the Reform Act, 42 U.S.C. 4012a(f) and (g). Two others requested that the final rule provide guidance on how the agencies intend to implement the broad enforcement authority given to them to take remedial action under section 102(g) of the 1973 Act. One asked the agencies to provide guidance on how the phrase “pattern or practice” of noncompliance will be construed, expressing the concern that interpretations should be uniform and not left completely to the discretion of individual examiners. The agencies have determined not to repeat the provisions of the statute in the joint final rule.

One commenter suggested that the final rule refer to the procedural rules that apply to such enforcement actions. The uniform rules of practice and procedure for agency administrative enforcement actions developed by the OCC, Board, FDIC, OTS, and NCUA (Uniform Rules) apply to such actions. Those rules were amended recently to apply the Uniform Rules to the civil money penalty provisions and the remedial actions described in section 102(f) and (g) of the 1973 Act.

Determinations Fees

General. The proposed rule included a provision that set forth the authorization conferred by the Reform Act on a lender, or servicer acting on the lender’s behalf, to charge a reasonable fee for the costs of making a flood hazard determination under specified circumstances: if the borrower initiates the transaction (making, increasing, extending, or renewing a loan) that triggers a flood hazard determination; if the determination reflects FEMA’s revision of flood maps; or if the determination results in the purchase of flood insurance by the lender, or servicer acting on behalf of the lender, under the forced placement provision.

The agencies received 43 comment letters on this issue. Fifteen commenters requested that the final rule clarify that the authority to charge a reasonable fee for the costs of making a flood hazard determination covers a “life-of-loan” charge to the borrower that would pay for monitoring of the flood hazard status of the security property for the term of the loan. The agencies believe that the statutory authority to charge a borrower a reasonable fee for a flood hazard determination does extend to a fee for life-of-loan monitoring by either the lender, or servicer acting on behalf of the lender, or by a third party, such as a flood hazard determination company.

While the Reform Act specifies the circumstances that may give rise to the charging of a determination fee, the Act does not expressly provide what may be included in the determination fee nor does the joint final rule adopt a rigid definition. However, the agencies agree that a determination fee may include, among other things, reasonable fees for the costs of an initial flood hazard determination, as well as reasonable fees for a lender, servicer, or third party to monitor the flood hazard status of a security property during the life of a loan for purposes of making determinations on an ongoing basis. Consequently, the joint final rule has been clarified to provide that a determination fee may include, but is not limited to, a life-of-loan monitoring fee. Because the authority to charge a life-of-loan monitoring fee is based on the authority to charge a determination fee, the monitoring fee may be charged only if one of the specified events in the statute occurs.

A commenter asked whether the authority to charge a reasonable determination fee extended to a situation where there has been a remapping, but the security property was found not to be in a SFHA. Section 102(h) of the 1973 Act, 42 U.S.C. 4012a(h), does not distinguish between positive and negative flood hazard determinations in its authorization to charge a reasonable fee for that service in the event of a remapping. Consequently, the agencies believe that a lender, or servicer acting on the lender’s behalf, may charge a fee in either situation.

One commenter inquired whether authority to charge determination fees extended only to determinations by third parties. Section 102(h) of the 1973 Act does not distinguish between determinations done in-house by a lender or servicer acting on its behalf and those performed by another entity. The agencies believe that a lender, or servicer acting on its behalf, may charge a determination fee if either of the entities performs this service itself or if the lender or its servicer arranges to have a third party perform the determination.

One commenter requested that the final rule provide that a lender may include out of pocket costs, internal costs, and profit as part of a reasonable flood hazard determination fee. Another suggested that a reasonable fee should cover the costs of notification, obtaining flood insurance, and adding flood insurance premiums to the loan balance.

The agencies decline, however, to list all of the components of a reasonable flood hazard determination fee (which may include a life-of-loan monitoring fee) in the joint final rule because that determination may vary depending upon circumstances and is best determined on a case-by-case basis by the regulated lending institution.

Truth in Lending Act Issues

Seven commenters raised issues concerning the interaction between the rules concerning flood insurance and rules under the Truth in Lending Act, 15 U.S.C. 1601 et seq., particularly with respect to the treatment of determination fees charged at consummation that include life-of-loan coverage and fees charged subsequent to closing.

Some commenters argued that Regulation Z should not require the portion of a life-of-loan monitoring fee that is not related to the initial determination to be included as part of the finance charge. One commenter stated that, in its experience, the addition of a portion of the life-of-loan monitoring fee to the finance charge did not have a significant impact on the finance charge disclosed, although the costs involved in breaking down charges for the purposes of Regulation Z impose a burden on lenders.

The official staff commentary to Regulation Z (12 CFR part 226 (Supplement I)) explains the proper treatment of life-of-loan fees. The commentary states that fees for services that will be performed periodically during the loan term, including fees for determinations as to whether security property is in a SFHA, may not be excluded from the finance charge, regardless of when the fee is charged. The commentary further indicates that any portion of a fee that does not relate to the initial decision to grant credit must be included in the finance charge.

If creditors are uncertain about what portion of a fee is related to the initial decision to grant credit, the entire fee may be treated as a finance charge. Further consideration of this issue would be beyond the scope of this rulemaking.

Several commenters indicated that determination fees assessed after consummation, such as fees for a new determination following a remapping, should not be included as part of the finance charge disclosures under Regulation Z. These commenters argued that
that whether or not a new determination will be necessary and a fee imposed during the loan term is unknown at the time disclosure is provided. Regulation Z and the commentary state that, generally, if a disclosure provided at or before consummation becomes inaccurate because of a subsequent event, the inaccuracy does not result in a violation. Accordingly, no additional clarification is needed.

Notice Requirements

Borrower. The proposed rule closely tracked the specific notice requirements of section 1364 of the 1968 Act, as amended by the Reform Act, 42 U.S.C. 4104a. Moreover, like the statute, the proposal contained a provision authorizing regulated lending institutions to use an alternate form of notice in certain situations. The alternate notice provision allows the lender to rely on assurances from a seller or lessor that the seller or lessor has provided the requisite notice to the purchaser or lessee of the property who is the ultimate recipient, or borrower, of the lender’s funds. The need for this alternate form of notice would arise, for example, in a situation where the lender is providing financing through a developer for the purchase of condominium units by multiple borrowers. The lender may not deal directly with the individual condominium unit purchaser and, in such a case, need not provide notice to each purchaser but may instead rely on the developer/seller’s assurances that the developer/seller has given the necessary notice. The same may be true for a cooperative conversion, in which case the sponsor of the conversion may be providing the required notice to the purchasers of the cooperative shares. A purchaser of shares in a cooperative may be considered to be a “lessee” rather than a purchaser with respect to the underlying real property. For the reasons explained later, the agencies are adopting the notice requirements provision essentially as it was proposed with minor revisions to clarify the text. Twenty-two commenters expressed broad support for the continued use of the term “borrower” in the notice requirement rather than the phrase “purchaser or lessee” used in the statute. The joint final rule retains the term “borrower,” except that the alternate notice provision has been revised to clarify that the recipient of the notice to the borrower in cases where the alternate method applies will be the purchaser or lessee of the property.

Twenty commenters, citing increasingly compressed time frames for loan approval and closing in certain circumstances, requested specific guidance on what is meant by the “reasonable time” standard for notice delivery established by section 1364 of the 1968 Act, and followed by the agencies in the proposed rule. Other commenters noted that the “Use of Prescribed Form of Notice” provision of the proposed rule appeared to establish a conflicting standard of reasonable time—ten days—for notice purposes. These commenters asked whether the standard controlled. The agencies noted that the statutory standard of providing written notification of special flood hazards within a reasonable period before completion of the transaction offers regulated lending institutions sufficient flexibility to meet the statutory goal of providing adequate notice to borrowers and services, while accommodating the need in appropriate circumstances for an abbreviated notice period.

What constitutes “reasonable” notice will necessarily vary according to the circumstances of particular transactions. Regulated lending institutions should bear in mind, however, that a borrower should receive notice timely enough to ensure that (1) The borrower has the opportunity to become aware of the borrower’s responsibilities under the NFIP; and (2) where applicable, the borrower can purchase flood insurance before completion of the loan transaction. In light of these considerations, the joint final rule does not establish a fixed time period during which a lender must provide notice to the borrower. To avoid any confusion regarding application of the “reasonableness” standard to notice delivery, the proposed rule authorizing use of the sample form of notice provided in appendix A of the rule has been revised to provide that delivery of notice based on the sample form of notice must take place within a reasonable time before the completion of the transaction. The agencies generally continue to regard ten days as a “reasonable” time interval.

Two commenters also raised questions regarding the alternate method of notice provision in the proposed rule. One commenter questioned whether the seller or lessor of the property—opposed to the lender—is supposed to make the determination regarding the flood status of a security property pursuant to this provision. Another commenter questioned whether the seller or lessor must use the sample form of notice set forth in appendix A to the final rule. In response, the agencies note that this section of the joint final rule does not shift the burden of determining flood status from the lender to the seller or lessor. Rather, it implements the provision of section 1364(a)(1) of the 1968 Act that permits borrower notice delivered by a seller or lessor to substitute for lender notice so long as the lender receives satisfactory assurances that the notice has been delivered to the borrower. The prescribed contents of the notice do not change when the seller or lessor provides notice to the borrower. Before relying on the alternate form of notice, a lender must have a written assurance that the notice provided by the seller or lessor contained all the elements required by section 1364 of the 1968 Act. The alternate notice provision in the joint final rule is not intended to set a lower notification standard. The seller or lessor notice is subject to the same content requirement as notice by the lender, but a seller or lessor need not provide the sample form of notice provided in appendix A to the final rule in order for a lender to rely on the notice.

The agencies received three comments concerning the effect of the proposed notice provisions on lenders that finance the purchase of mobile homes. These commenters noted that, in some mobile home lending transactions, the lender may not know where the mobile home is to be located until just prior to the time of loan closing. In other so-called “home only” transactions, the purchaser of the mobile home buys and finances the home separately from the land on which it ultimately will be located. The commenters asserted that they would be unable to comply with the notice requirements until they learn where the mobile home will be located and can thus determine whether the mobile home will be located in a SFHA. Consistent with the previous discussion in this section of the reasonable notice standard, the agencies believe that the notice requirements of the 1968 Act, as amended, can be met by lenders in mobile home loan transactions if notice is provided to the borrower as soon as practicable after determination that the mobile home is or will be located in a SFHA and before completion of the loan transaction. Particularly in those circumstances where time constraints can be anticipated, regulated lenders should use their best efforts to provide adequate notification of flood hazards to borrowers at the earliest practicable time.

Moreover, the agencies will not apply the borrower notice requirements to “home only” mobile home transactions that close before the permanent location for the mobile home...
is known. Clearly, a lender cannot determine whether flood insurance is required before the location of the mobile home has been fixed. When the lender learns the location of the mobile home, the lender must determine whether the mobile home is in a SFHA, notify the borrower and require the purchase of any required flood insurance. The agencies recommend that lenders consider notifying borrowers in "home only" mobile home transactions, at the time the loan closes, that they will be required to have and pay for flood insurance if the mobile home they purchase is eventually located in a SFHA in a participating community. The joint final rule does not require this type of notice because the statute does not require it. The agencies’ recommendation reflects their view that it would be prudent practice for lenders to avoid imposing unanticipated obligations and costs on borrowers if and when flood insurance becomes necessary.

Service. The Reform Act added loan servicers to the entities that must be notified of special flood hazards, and the proposal requested comment on the appropriate timing of notice to the servicer. Thirty commenters felt that notification to the servicer in advance of the closing would not be possible or would serve no purpose. Commenters also pointed out that transfer to a servicer can take up to four months and that in many cases the servicer’s identity will not be known until well after the closing. A number of alternative schedules were suggested, including a requirement that the notice of special flood hazards be transmitted to the servicer along with the other data on hazard insurance and taxes required to service a loan with an escrow, so that the servicer can escrow for flood insurance payments along with other escrowing for hazard insurance and taxes. In recognition that the servicer is often not identified prior to closing, the joint final rule requires notice to the servicer as promptly as practicable after the lender provides notice to the borrower, and provides that notice to the servicer must be given no later than at the time the lender transmits to the servicer other loan data concerning hazard insurance and taxes.

Six commenters recommended that the final rule state that a copy of the notice to the borrower’s notice to the servicer suffices as notice to the servicer. Several commenters recommended that a separate notice to a servicer affiliated with the lender not be required. The agencies do not agree with this recommendation. The statute requires the lender to notify the servicer of special flood hazards, and the joint final rule reflects this requirement. Moreover, even in the case of servicing by an affiliate, the lender would ordinarily transmit a file to the servicer, either in writing or electronically, to enable the servicer to collect and disburse payments, and the notice of special flood hazards can be transmitted as part of that process without imposing an undue regulatory burden.

The proposed rule has been revised to indicate that the notice to the servicer may be transmitted in written or electronic form. FEMA or FEMA’s Designee. The joint final rule also implements the statutory requirement that, in connection with making, increasing, extending, renewing, selling, or transferring a loan secured by improved real estate or a mobile home located in a SFHA, regulated lenders notify the Director of FEMA or the Director’s designee of the identity of the loan servicer and of any change in the servicer. Notice of the identity of the servicer will enable FEMA to provide notice to the servicer of a loan 45 days before the expiration of a flood insurance contract, as required by section 1364(c) of the 1968 Act, as amended. FEMA has designated the insurance provider as its designee to receive notice of the servicer’s identity and of any change therein, and at FEMA’s request this designation is stated in the joint final rule.

Six commenters requested a model form of notice to the Director of FEMA or the Director’s designee, or guidance on the information to be included in the notice. Some commenters suggested that, in the case of a loan subject to RESPA where a Notice of Transfer of servicing to the borrower is required, sending to the Director or the Director’s designee a copy of such Notice of Transfer should suffice. The agencies believe that delivery of a copy of the Notice of Transfer, which includes the name, address, and other information concerning the servicer, may be sufficient if the sender includes enough information on or with the notice to enable the Director or the Director’s designee to identify the loan and the security property. Other forms of notice also are consistent with notice requirements that enable the Director or the Director’s designee to identify the loan, the security property, the servicer, and the servicer’s address.

Several commenters inquired about electronic transmission of the notice, and one inquired about the possibility of batch transmission. As in the case of notice to the servicer, the joint final rule permits electronic transmission of the notice to the Director or the Director’s designee. The agencies also noted that nothing in the joint final rule prohibits a timely batch transmission.

Several commenters questioned the need to notify the Director or the Director’s designee if the servicer is the owner or affiliate of the lender. The agencies believe that the statute requires notice by the lender to the Director or designee of the initial servicer, and the joint final rule reflects this requirement. However, since the Director has chosen the insurance provider as his designee, the agencies believe that the regulatory burden of notification is minor because there is ordinarily an exchange of information between the lender and the insurance provider at the time a loan is made. Therefore, the agencies have not adopted this suggestion.

Three commenters objected to notifying FEMA when a loan is sold on a “service released” basis, where the servicing is sold along with the loan. Failure to provide such notice would defeat the purpose of the requirement, however, as FEMA will have no record of the identity of either the owner or servicer of the loan. The joint final rule is therefore unchanged in this regard.

Three commenters expressed confusion over a lender’s obligation in the event of a subsequent transfer of servicing by a transferee servicer, on the grounds that the lender would not necessarily be aware of the transfer. The agencies note that under section 1364(b)(1) of the 1968 Act, as amended, the duty to provide notice to FEMA follows the servicing, and the joint final rule reflects this. Accordingly, the obligation to notify the Director or the Director’s designee of subsequent changes is transferred to the new servicer along with a transfer of servicing.

Two commenters wanted to limit notice to the “making” of a loan and any transfer of servicing, on the grounds that notices in connection with increasing, extending, renewing, selling, or transferring a loan will be redundant. The statute, however, requires notice in all such cases. Moreover, in the case of a loan made before the effective date of the joint final rule, a notice on an increase, extension, renewal, sale, or transfer of servicing is required. The Joint final rule requires the first illegally required notice to the Director or the Director’s designee. Therefore, the
agencies have not adopted this suggestion.

Five commenters argued that it is an unnecessary regulatory burden to notify FEMA when the servicing is transferred or the loan is paid off. The statute requires notice to the Director or the Director’s designee when servicing is transferred, but neither the statute nor the joint final rule requires notice when a loan is paid off.

Appendix A—Sample Form of Notice

The agencies received 22 comments on the sample form of notice set forth in appendix A of the proposed regulation. Five commenters asked whether use of the sample form of notice is mandatory. The agencies stress that use of the sample form of notice is not mandatory. A regulated lender may choose to use the sample form as presented in appendix A of the joint final rule to comply with the notice requirements of section 1364 of the 1968 Act. In addition, lenders may personalize, change the format of, and add information to the sample form if they wish to do so. The agencies stress that the sample form merely provides an example of an acceptable form that notice may take. However, to ensure compliance with the notice requirements contained in the joint final rule, a lender-revised notice form must provide the borrower at a minimum with the information in the sample form of notice.

The agencies made several changes to the sample form in response to suggestions from commenters. To streamline the sample form, the agencies combined the introductory paragraphs of the sample notice. The agencies adopted a language change suggested by FEMA regarding the statistical risk of flooding in a SFHA. To increase borrower recognition of their flood insurance responsibilities under the NFIP, the agencies added a reference to the authority and obligation of a regulated lender to force place flood insurance under the 1973 Act. Finally, to clarify that flood insurance is not available for land, the agencies added a sentence that with respect to the amount of flood insurance coverage allowable under the NFIP, the value of the land should be deducted from the overall value of the security property.

Use of Standard Flood Hazard Determination Form

The proposed rule required a regulated lender to use the standard flood hazard determination form (SFHD form) developed by FEMA to determine whether the building or mobile home offered as security property is or will be located in a SFHA in which flood insurance is available under the 1968 Act. The proposed rule allowed the lender to use the form in a printed, computerized or electronic form. The proposed rule required the lender to retain a copy of the completed form, in either hard copy or electronic form, for the period of time the lender owns the loan.

The agencies received 22 comments regarding use of the SFHD form. Four commenters raised issues dealing with the format of the form. For example, two commenters requested clarification about how an electronically maintained form could be used and whether it must be in the same format as the hard-copy form. FEMA addressed the format of an electronically maintained form in the preamble of its final rule adopting the SFHD form.31 FEMA stated that if an electronic format is used, the format and exact layout of the SFHD form is not required, but the fields and elements listed on the form are required. Any electronic format used by lenders must contain all mandatory fields indicated on the SFHD form.

One commenter asked whether FEMA and the agencies could work together to combine the SFHD form, the notice of flood hazards to the borrower and servicer, and notice commencing the forced placement procedure. The agencies have not adopted this suggestion because the three documents have different purposes. The SFHD form must be used in connection with all loans to determine whether the security property is located in an area having special flood hazards. On the other hand, the notice to the borrower and the servicer must be provided to the borrower and servicer only when the security property is located in a SFHA. The Reform Act does not require the agencies to develop a specific form of notice to borrowers for use in connection with the forced placement procedures. For example, a lender, or servicer acting on the lender’s behalf, may choose to send the notice directly. Others may decide to use the insurance company that issues the forced placement policy to send the notice. FEMA has developed the Mortgage Portfolio Protection Program (MPPP) to assist lenders in connection with forced placement procedures. For information concerning the contents of the notification letters used under the MPPP, lenders should consult FEMA’s MPPP Notice.34

Thirteen commenters addressed the topics of the guarantee of information provided by a third party and reliance on a previous determination under section 1365(d) and (e) of the 1968 Act. The agencies’ proposed rule did not specifically address these issues, but the preamble discussed them. The preamble explained that the Reform Act permits lenders to rely on third-party flood hazard determinations only if the third party guarantees the accuracy of the information provided to the lender. The Reform Act also permits a lender to rely on a previous determination whether or not the security property is located in a SFHA. A lender is exempt from liability for errors in the previous determination if the previous determination is not more than seven years old and the basis for it was recorded on the SFHD form mandated by the Reform Act. There are, however, two circumstances in which a lender may not rely on a previous determination: (1) if FEMA’s map revisions or updates show that the security property is now located in a SFHA, or (2) if the lender contacts FEMA and discovers that map revisions or updates affecting the security property have been made after the date of the previous determination.

Several commenters requested clarification about the statutory provision that a regulated lender may not rely on a previous determination unless the determination was made on FEMA’s SFHD form. The agencies believe that this is the correct reading of the statutory provision. Section 1365 of the 1968 Act, as amended by the Reform Act, 42 U.S.C. 4104b, states that a person increasing, extending, renewing, or purchasing a loan secured by improved real estate or a mobile home may rely on a previous determination if the basis for the previous determination was set forth on FEMA’s SFHD form. Two commenters pointed out that pursuant to section 1365 of the 1968 Act, a lender cannot rely on a previous determination set forth on a SFHD form when it makes a loan, only when it increases, extends, renews or purchases a loan. The agencies agree with this interpretation of section 1365 of the 1968 Act but note that subsequent transactions by the same lender with respect to the same property will be

32 See 60 FR 35276 (July 6, 1995) (codified at 44 CFR 65.16 and Appendix A to part 65).
33 The agencies required regulated lending institutions to use the FEMA-devised SFHD form by means of a joint final rule issued without notice and comment prior to the issuance of the proposal to implement the other Reform Act amendments. The agencies’ proposal incorporated that provision. See 60 FR 35286 (July 6, 1995).
34 Notice by FEMA, 60 FR 44881 (August 29, 1995).
treated as renewals and will require no new determination.

The agencies adopt this provision as proposed.

Recordkeeping Requirements

The proposed rule included two recordkeeping requirements: (1) retention of a copy of the completed SFHD form, in either hard copy or electronic form, for the period of time the regulated lender owns the loan; and (2) retention of the record of the receipt of notice to the borrower and the servicer for the period of time the regulated lender owns the loan. In addition, the agencies asked for comment on whether the final rule should require the lender to retain in its files a copy of each notice to FEMA of the identity of the servicer and/or a copy of each mandatory notice to borrowers and servicers. The agencies received 58 comment letters addressing these and other issues pertaining to recordkeeping.

Of the 25 comment letters addressing whether the final regulation should require the lender to retain in its files a copy of each notice to FEMA of the identity of the servicer, 19 commenters believed that such a requirement is unnecessary. Like the proposed rule, the joint final rule does not require that the lender retain in its loan files a copy of the notice to FEMA of the identity of the loan servicer. The joint final rule continues to implement the statutory requirement that lenders must notify FEMA in writing of the identity of the loan servicer and/or of a transfer in servicing rights.

Commenters were mixed in their views whether a regulated lender should be required to maintain a copy in its loan files of the notice to the borrower and the servicer. The joint final rule does not require that a copy of these notices be maintained in the loan files because the Reform Act does not require it. Like Section 1364 of the 1968 Act, as amended, and the proposed rule, the joint final rule requires lenders to retain a record of the receipt of the notices by the borrower and the servicer for the period of time the lender owns the loan. A number of commenters requested clarification about what constitutes a “record of receipt.” The joint final rule does not prescribe a particular form for the record of receipt. However, the agencies believe that the record of receipt should contain a statement from the borrower indicating that the borrower has received the notification. Examples of records of receipt may include a borrower’s signed acknowledgment on a copy of the notice, a borrower-initialed list of documents and disclosures that the lender provided the borrower, or a scanned electronic image of a receipt or other document signed by the borrower. A lender may keep the record of receipt provided by the borrower and the servicer in a form that best suits the lender’s business practices.

Two commenters supported the requirement that lenders must retain a copy of the completed SFHD form, in either hard-copy or electronic form, for the period of time the lender owns the loan. One commenter stated that a copy of the completed form should be retained in the appropriate loan file; the other commenter stated that it need not necessarily be kept in the loan file. The agencies have adopted the SFHD form retention requirement of the proposed rule unchanged. The joint final rule does not specify the location where the copy must be kept. A lender may, but is not required to, retain the copy in the relevant loan file.

Seven commenters stressed that lenders should be able to retain both the record of the receipt of the notices by the borrower and the servicer and the SFHD form in electronic form. As discussed earlier, lenders may retain these records electronically. Lenders are expected, however, to be able to retrieve these electronic records within a reasonable time pursuant to a document request from their Federal supervisory agency.

Agricultural Lending Considerations

Six commenters responded to the discussion in the preamble to the proposal on agricultural lending considerations. The comments generally related to the characteristics that make agricultural lending different from other types of commercial and residential mortgage lending for purposes of flood insurance. Unlike residential lending, where most of the value of the loan collateral is in the residence, in agricultural lending the value of the collateral is concentrated not only in the land, but also in multiple farm buildings. The commenters asserted that it will be difficult to value agricultural buildings for flood insurance purposes. Some agricultural buildings have valuable utility to farm operations but are of relatively nominal market value. Other buildings may have a higher market value but comprise a relatively low percentage of the total loan collateral. Commenters also opined that many agricultural structures would suffer little damage in a flood. To the extent that NFIP flood insurance pricing does not recognize differences in the market value and susceptibility to flood damage of various agricultural structures, commenters asserted that borrowers of regulated agricultural lenders will be forced to pay the same rates for flood insurance as are applicable to other types of commercial structures. Thus, these commenters maintained that participation in the NFIP may be disproportionately expensive for regulated agricultural lenders and their borrowers.

To address these issues, one commenter requested reconsideration of the appropriateness of the proposed regulation for agricultural lending. Another commenter suggested that the agencies create a separate definition for agricultural buildings that would make it possible to treat agricultural structures on a collateral property as a group for flood insurance purposes.

While recognizing that agricultural lenders and their borrowers may be in a different position from others affected by the requirements of the NFIP, the agencies have concluded that Congress did not intend to differentiate agricultural from other types of lenders in the Federal flood insurance legislation. Agricultural lending by commercial banks, thrifts, and credit unions has been covered by the flood insurance statutes since the passage of the 1973 Act. The Reform Act extended the scope of the NFIP to the institutions of the Farm Credit System, which lend substantially in the agricultural sector. The Reform Act clearly identifies the regulated lending institutions covered by the NFIP and offers no leeway for a regulatory exclusion of agricultural lenders. Similarly, issues related to pricing of flood insurance, while obviously significant to regulated lenders and their borrowers, are not within the regulatory purview of the agencies.15

As noted in the preamble to the proposal, the FCA encourages Farm Credit System institutions, as well as other agricultural lenders, to work with FEMA to resolve questions regarding the operation and cost structure of the NFIP as it applies to insurance of agricultural structures. In its comment letter on the proposed rule, FEMA indicated that it is studying wet floodproofing techniques to determine whether wet floodproofing criteria can be included in the NFIP floodplain management regulations.16

15 As regards the treatment of a group of agricultural buildings for flood insurance purposes, the preamble to the proposal noted that FRA permits borrowers to insure their nonresidential buildings using one policy with a schedule separately listing the buildings. However, each building must be covered by flood insurance.

16 In this connection, one commenter questioned why the proposal did not address the effect of...
Concurrently, FEMA has indicated that it plans to determine the appropriate flood insurance rates for agricultural structures under the NFIP. Any proposed changes in the NFIP floodplain management regulations will occur through a rulemaking process that provides for public notice and comment. The agencies urge agricultural lenders and their borrowers to participate in pertinent FEMA proceedings so that they may have an opportunity to raise these issues with FEMA. In the agencies’ view, these issues are subject to FEMA’s administrative and regulatory jurisdiction as administrator of the NFIP.

FEMA Flood Hazard Determination Appeals

The proposed rule did not address the process for appealing flood hazard determinations to FEMA; however, the agencies received eleven letters with comments about various aspects of the process. Many of the commenters’ concerns are addressed in FEMA’s final rule entitled “Review of Determinations for Required Purchase of Flood Insurance” and in the preamble to that final rule. For example, two commenters commented on whether the borrower and the lender must jointly submit an appeal, or whether an appeal submitted by one or the other would be accepted. In its final rule, FEMA clarified that a request must be submitted jointly by the lender and the borrower.

Two commenters recommended that the agencies’ final rule include instructions on how to file a flood determination appeal with FEMA. The agencies believe it is inappropriate to provide this information in the joint final rule because the flood determination appeal process is governed by FEMA and delineated in FEMA’s regulations. The agencies understand that FEMA is currently developing a “sample letter” with filing instructions for use by lenders and borrowers in submitting an appeal to FEMA.

Three commenters asked which party, the lender or the borrower, should pay FEMA’s fee for deciding the appeal. While this is a matter for the lender and the borrower to determine, the agencies believe that the party who requests the appeal of a flood determination generally will bear the cost of the appeal. An appeal is typically initiated at the request of a borrower who believes the property securing the loan is, in fact, not located in an SFHA, despite a flood determination to the contrary. The appeal fee is not charged by the lender as an incident to or condition of the credit. The official staff commentary to Regulation Z provides that charges imposed by someone other than the creditor are generally finance charges only if the creditor requires the borrower to use the third party’s services, or the creditor retains the charge.

Finally, four commenters inquired about the flood insurance requirement when a flood determination appeal is in process. FEMA responded to similar questions in the preamble to its final rule. Generally, under section 102(e)(3) of the 1973 Act, 42 U.S.C. 4012a(e)(3), the mandatory flood insurance requirement is temporarily delayed until FEMA responds to an appeal. If FEMA fails to respond before the later of 45 days or the closing of the loan, the mandatory flood insurance purchase requirement is delayed until FEMA provides a response.

Miscellaneous Issues

Standards with respect to purchased loans. Five commenters requested guidance on minimum standards for loan participations and purchased loans. Six other commenters indicated that no guidance on purchased loans is necessary because institutions can manage their own risks internally. Some of those commenters also noted that additional guidance would be tantamount to increased regulatory burden.

If institutions purchasing loans use underwriting standards that address flood insurance, such as requirements for representations from the seller that flood insurance has been purchased for security property located in a special flood hazard area, the agencies agree that no further guidance is necessary. Where an institution’s portfolio includes more than an insignificant number of purchased loans and its underwriting standards do not address flood insurance coverage, however, the agencies would expect the institution to have other procedures in place to ensure that it does not expose itself to significant risks through such purchases.

Moreover, the agencies believe that the effects of the Reform Act-mandated standards for flood insurance for loans purchased by Fannie Mae and Freddie Mac should be gauged over a period of time before determining whether further guidance is necessary for institutions in areas that have significant exposure to flood hazards. Institutions with significant lending in non-participating communities should have procedures to ensure that loans on properties in flood hazard areas where flood insurance is not available do not constitute an unacceptably large portion of the institution’s loan portfolio.

Subordinate Liens. The agencies received 14 comments concerning flood insurance requirements for second mortgages or home equity loans. Because a second mortgage or a home equity loan is secured by a building or mobile home, these loans are covered by the flood insurance requirements, unless one of the statutory exemptions specifically applies.

Effective Date of Flood Insurance Policies. Some commenters asked about the applicability in various lending situations of the 30-day delay in effectiveness of flood insurance policies as prescribed in section 1306 of the 1968 Act, as amended by the Reform Act, 42 U.S.C. 4013. FEMA addressed this issue in its Policy Issuance 8-95, dated December 5, 1995. FEMA determined that the 30-day waiting period generally is not applicable to the purchase of flood insurance in connection with making, increasing, extending, or renewing a loan.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act as amended, 5 U.S.C. 605(b), the OCC, Board, FDIC, OTS, and NCUA (banking agencies) hereby certify that this joint final rule will not have a significant economic impact on a substantial number of small entities. Moreover, this joint final rule is required by the Reform Act. Accordingly, a regulatory flexibility analysis is not required.

In response to comments received during the public comment period (a substantial number representing smaller entities), the banking agencies have attempted to minimize regulatory burden by: (1) adding and revising definitions to make technically complex flood insurance rules more readily understood; (2) determining that the purchase of a loan is not the equivalent of the making of a loan for flood insurance purposes; and (3) minimizing the recordkeeping and notice requirements to include only those matters required by the statute.
As a general matter, the joint final rule does not impose standards that are in excess of industry standards with respect to flood insurance, as those standards are reflected in the underwriting standards for Fannie Mae and Freddie Mac. Further, for those lenders already covered by existing flood insurance requirements, the joint final rule does not represent a significant increase over the burden imposed under the current rules. For such lenders, the joint final rule would increase burden above that imposed under the current rules in the following cases: (1) where residential property securing a loan is located in a special flood hazard area and the lender requires escrows for other tax and insurance payments, premiums for required flood insurance must be escrowed as well; (2) the content of the notices currently provided to borrowers is modified to provide additional information to the borrower; and (3) notice to FEMA of the servicer of the loan secured by property located in a special flood hazard area is required to permit FEMA to contact the servicer if the flood insurance lapses. The banking agencies believe that these increases in burden will result only in minor additional expenses for depository institutions.

V. Paperwork Reduction Act of 1995

The OCC, Board, FDIC, OTS, and NCUA (banking agencies) invite comment on:

1. Whether the collection of information contained in this joint final rule is necessary for the proper performance of each agency’s functions, including whether the information has practical utility;

2. The accuracy of each agency’s estimate of the burden of the information collection;

3. Ways to enhance the quality, utility, and clarity of the information to be collected; and

4. Ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

The banking agencies asked similar questions in the proposal. Several commenters indicated that the banking agencies had underestimated the paperwork burden associated with the flood rules. For purposes of allocating the paperwork burden for the flood rules, FEMA is charged with the hours for completing the SFHD form (FEMA form 81–93; OMB Control No. 3067–0264), while the banking agencies are charged with the recordkeeping burden associated with the SFHD form and the notifications and additional recordkeeping required when a property is located in a SFHA. The separation of burden responsibility and reporting easily could cause the paperwork burden of these rules to appear to be understated. When viewed in conjunction with FEMA’s burden, however, the banking agencies believe that the recordkeeping and notification burden estimates associated with these rules are reasonable.

Respondents/recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number. OCC: The collection of information requirements contained in the OCC’s portion of this joint final rule have been approved by the Office of Management and Budget under OMB Control No. 1557–0202 in conjunction with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information requirements should be sent to the Office of Management and Budget, Paperwork Reduction Project (1557–0202), Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

FDIC: The collection of information contained in the FDIC’s portion of this joint final rule have been approved by the Office of Management and Budget under OMB Control No. 3064–0120 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget.
The collection of information requirements relating to the FDIC’s portion of this joint final rule are found in 12 CFR 339.6, 339.7, 339.9, and 339.10. This information is required to evidence compliance with the requirements of the NFIP with respect to lenders (state chartered nonmember banks) and borrowers (anyone who applies for a loan secured by improved real estate or a mobile home which may be located in a SFHA). The likely respondents/recordkeepers are insured nonmember banks and their subsidiaries.

Estimated number of respondents/recordkeepers: 6,250.

Estimated average annual burden hours per respondent/recordkeeper: 26 hours.

Estimated total annual reporting and recordkeeping burden: 162,500 hours.

Start-up costs to respondents: None.

Records are to be maintained for the period of time respondent/recordkeeper owns the loan.

OTS: The collection of information requirements contained in the OTS’s portion of this joint final rule have been approved by the Office of Management and Budget under OMB Control No. 1550-0088 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550-0088), Washington, DC 20503, with a copy to the OTS, 1700 G Street, NW., Washington, DC 20552.

The collection of information requirements relating to the OTS’s portion of this joint final rule are found in 12 CFR 563.10. This information is required to evidence compliance with the requirements of the NFIP with respect to lenders ( Federally-insured credit unions) and borrowers (members that apply for a loan secured by improved real estate or a mobile home which may be located in a SFHA). The likely recordkeepers are Federally-insured credit unions.

Estimated number of respondents and/or recordkeepers: 700.

Estimated average annual burden hours per respondent/recordkeeper: 26 hours.

Estimated total annual reporting and recordkeeping burden: 16,325 hours.

Start-up costs to respondents: None.

Records are to be maintained for the period of time respondent/recordkeeper owns the loan.

VI. Executive Order 12866

OCC and OTS: The OCC and the OTS each has determined that its portion of this joint final rule is not a significant regulatory action as defined in Executive Order 12866.

VII. Executive Order 12612

Executive Order 12612 requires the NCUA to consider the effects of its actions on State interests. The NCUA’s portion of this joint final rule will apply to all Federally-insured credit unions and reduce regulatory requirements. The NCUA Board has determined that the NCUA’s portion of the joint final rule would not have a substantial direct effect 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.

VIII. Unfunded Mandates Reform Act of 1995

OCC and OTS: Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (1995) (Unfunded Mandates Act) requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

As discussed in the preamble, this joint final rule revises current OCC and OTS flood insurance regulations as prescribed by the Reform Act. The Reform Act specifically requires six agencies, including the OCC and OTS, to implement certain of the Reform Act’s amendments through regulations. Therefore, to the extent that the joint final rule imposes new Federal requirements, the requirements are statutorily mandated by the Reform Act. Nevertheless, the OCC and OTS each has determined that its portion of the joint final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC and OTS have not prepared budgetary impact statements or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 22
Flood insurance, Mortgages, National banks, Reporting and recordkeeping requirements.

12 CFR Part 208
Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Flood insurance, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 339
Flood insurance, Reporting and recordkeeping requirements.

12 CFR Part 563
Accounting, Advertising, Crime, Currency, Flood insurance, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 572
Flood insurance, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 614
Agriculture, Banks, banking, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 760
Credit unions, Mortgages, Flood insurance, Reporting and recordkeeping requirements.

**Office of the Comptroller of the Currency**

12 CFR CHAPTER I

**Authority and Issuance**

For the reasons set forth in the joint preamble, part 22 of chapter 1 of title 12 of the Code of Federal Regulations is revised to read as follows:

**PART 22—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS**

Sec. 22.1 Authority, purpose, and scope.

(a) Authority. This part is issued pursuant to 12 U.S.C. 93a and 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) Purpose. The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) Scope. This part, except for §22.6 and 22.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 22.6 and 22.8 apply to loans secured by buildings or mobile homes, regardless of location.

§ 22.2 Definitions.


(b) Bank means a national bank or a bank located in the District of Columbia and subject to the supervision of the Comptroller of the Currency.

(c) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) Designated loan means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) Director of FEMA means the Director of the Federal Emergency Management Agency.

(g) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this part, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(h) NFIP means the National Flood Insurance Program authorized under the Act.

(i) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

(j) Servicer means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 22.3 Requirement to purchase flood insurance where available.

(a) In general. A bank shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) Table funded loans. A bank that acquires a loan from a mortgage broker or other entity through table funding shall be required to be making a loan for the purposes of this part.

§ 22.4 Exemptions.

The flood insurance requirement prescribed by §22.3 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 22.5 Escrow requirement.

If a bank requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the bank shall also require the escrow of all premiums and fees for any flood insurance required under §22.3. The bank, or a servicer acting on behalf of the bank, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the bank, or a servicer acting on behalf of the bank, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§ 22.6 Required use of standard flood hazard determination form.

(a) Use of form. A bank shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44
CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

§ 22.8 Determination fees. 

(a) The determination fees incurred in purchasing the insurance in an amount less than the designated loan is not covered by flood insurance within 45 days after notification, then the bank or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in an amount at least equal to the amount required under § 22.3, for the remaining term of the loan.

(b) Retention of form. A bank shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the bank owns the loan.

§ 22.7 Forced placement of flood insurance.

If a bank, or a servicer acting on behalf of the bank, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 22.3, then the bank or the servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in an amount at least equal to the amount required under § 22.3, for the remaining term of the loan.

§ 22.8 Determination fees.

(a) General. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973 as amended (42 U.S.C. 4001–4129), any bank, or a servicer acting on behalf of the bank, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) Borrower fee. The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA’s revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA’s publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the bank or its servicer on behalf of the borrower under § 22.7.

(c) Purchaser or transferee fee. The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 22.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) Notice requirement. When a bank makes, increases, extends, or renew a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the bank shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) Contents of notice. The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirement set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally declared disaster.

(c) Timing of notice. The bank shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the bank provides notice to the borrower and in any event no later than the time the bank provides other similar notices to the servicer concerning hazard insurance and taxes.

Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) Record of receipt. The bank shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the bank owns the loan.

(e) Alternate method of notice. Instead of providing notice to the borrower required by paragraph (a) of this section, a bank may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the servicer or lessor has provided such notice to the purchaser or lessee. The bank shall retain a record of the written assurance from the servicer or lessor for the period of time the bank owns the loan.

(f) Use of prescribed form of notice. A bank will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

§ 22.10 Notice of servicer’s identity.

(a) Notice requirement. When a bank makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the bank shall notify the Director of FEMA (or the Director’s designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the bank’s notice of the servicer’s identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee.

(b) Transfer of servicing rights. The bank shall notify the Director of FEMA (or the Director’s designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix A to Part 22—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.
The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA’s Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community: . This area has at least one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

• Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

• At a minimum, flood insurance purchased must cover the lesser of:
  (1) the outstanding principal balance of the loan; or
  (2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community’s participation in the NFIP is in accordance with NFIP requirements.

Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

Dated: August 14, 1996.
Eugene A. Ludwig,
Comptroller of the Currency.
Federal Reserve System
12 CFR CHAPTER II
Authority and Issuance
For the reasons set forth in the joint preamble, part 208 of chapter II of title 12 of the Code of Federal Regulations is amended as set forth below:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 is revised to read as follows:


2. In § 208.8, paragraph (e) is removed and reserved, and appendix A—Sample Notices following paragraph (k)(6)(iii) is removed.

3. A new § 208.23 is added at the end of subpart A to read as follows:

§ 208.23 Loans in areas having special flood hazards.

(a) Purpose and scope—(1) Purpose. The purpose of this section is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(2) Scope. This section, except for paragraphs (f) and (h) of this section, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Paragraphs (f) and (h) of this section apply to loans secured by buildings or mobile homes, regardless of location.


(2) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(3) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(4) Designated loan means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(5) Director of FEMA means the Director of the Federal Emergency Management Agency.

(6) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this section, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(7) NFIP means the National Flood Insurance Program authorized under the Act.

(8) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

(9) Servicer means the person responsible for:

(i) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(ii) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(10) Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(11) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

(c) Requirement to purchase flood insurance where available—(1) In general. A state member bank shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(2) Table funded loans. A state member bank that acquires a loan from
a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this section.

(d) Exemptions. The flood insurance requirement prescribed by paragraph (c) of this section does not apply with respect to:

(1) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(2) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

(e) Escrow requirement. If a state member bank requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the state member bank shall require the escrow of all premiums and fees for any flood insurance required under paragraph (c) of this section. The state member bank, or a servicer acting on its behalf, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the state member bank, or a servicer acting on its behalf, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

(f) Required use of standard flood hazard determination form—(1) Use of form. A state member bank shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(2) Retention of form. A state member bank shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the bank owns the loan.

(g) Forced placement of flood insurance. If a state member bank, or a servicer acting on behalf of the bank, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under paragraph (c) of this section, then the bank or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in an amount at least equal to the amount required under paragraph (c) of this section, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the state member bank or its servicer shall purchase insurance on the borrower’s behalf. The state member bank or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

(h) Determination fees—(1) General. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001-4129), any state member bank, or a servicer acting on behalf of the bank, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(2) Borrower fee. The determination fee authorized by paragraph (h)(1) of this section may be charged to the borrower if the determination:

(i) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(ii) Reflects the Director of FEMA’s revision or updating of floodplain areas or flood-risk zones;

(iii) Reflects the Director of FEMA’s publication of a notice or compendium that:

(A) Affects the area in which the building or mobile home securing the loan is located; or

(B) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(iv) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under paragraph (g) of this section.

(3) Purchaser or transferee fee. The determination fee authorized by paragraph (h)(1) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

(i) Notice of special flood hazards and availability of Federal disaster relief assistance—(1) Notice requirement. When a state member bank makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the bank shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(2) Contents of notice. The written notice must include the following information:

(i) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(ii) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(iii) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(iv) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally declared disaster.

(3) Timing of notice. The state member bank shall provide the notice required by paragraph (i)(1) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the bank provides notice to the borrower and in any event no later than the time the bank provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(4) Record of receipt. The state member bank shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the bank owns the loan.

(5) Alternate method of notice. Instead of providing the notice to the borrower required by paragraph (i)(1) of this section, a state member bank may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller
or lessor has provided such notice to the purchaser or lessee. The state member bank shall retain a record of the written assurance from the seller or lessor for the period of time the bank owns the loan.

(6) Use of prescribed form of notice. A state member bank will be considered to be in compliance with the requirement for notice to the borrower of this paragraph (i) by providing written notice to the borrower containing the language presented in appendix A to this section within a reasonable time before the completion of the transaction. The notice presented in appendix A to this section satisfies the borrower notice requirements of the Act.

(j) Notice of servicer’s identity—(1) Notice requirement. When a state member bank makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the bank shall notify the Director of FEMA (or the Director’s designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the state member bank’s notice of the servicer’s identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee.

(2) Transfer of servicing rights. The state member bank shall notify the Director of FEMA (or the Director’s designee) of any change in the servicer of a loan described in paragraph (j)(1) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee. Upon any change in the servicing of a loan described in paragraph (j)(1) of this section, the duty to provide notice under this paragraph (j)(2) shall transfer to the transfereefee servicer.

Appendix A to § 208.23—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA’s Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community:

This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%). Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.
- At a minimum, flood insurance purchased must cover the lesser of:
  1. The outstanding principal balance of the loan; or
  2. The maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community’s participation in the NFIP is in accordance with NFIP requirements.
- Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

By order of the Board of Governors of the Federal Reserve System, August 15, 1996.

Jennifer J. Johnson,
Deputy Secretary of the Board.

Federal Deposit Insurance Corporation
12 CFR CHAPTER III
Authority and Issuance

For the reasons set forth in the joint preamble, the Board of Directors of the FDIC revises part 339 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 339—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
339.1 Authority, purpose, and scope.
339.2 Definitions.
339.3 Requirement to purchase flood insurance where available.
339.4 Exemptions.
339.5 Escrow requirement.
339.6 Required use of standard flood hazard determination form.
339.7 Forced placement of flood insurance.
339.8 Determination fees.
339.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
339.10 Notice of servicer’s identity.

Appendix A to Part 339—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

Authority: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

§ 339.1 Authority, purpose, and scope.

(a) Authority. This part is issued pursuant to 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) Purpose. The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

§ 339.2 Definitions.


(b) Bank means an insured state nonmember bank and an insured state branch of a foreign bank or any subsidiary of an insured state nonmember bank.

(c) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) Designated loan means a loan secured by a building or mobile home that is located or to be located in a...
special flood hazard area in which flood insurance is available under the Act.

(f) Director of FEMA means the Director of the Federal Emergency Management Agency.

(g) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this part, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(h) NFIP means the National Flood Insurance Program authorized under the Act.

(i) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

(j) Servicer means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 339.3 Requirement to purchase flood insurance where available.

(a) In general. A bank shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) Table funded loans. A bank that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this part.

§ 339.4 Exemptions.

The flood insurance requirement prescribed by § 339.3 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 339.5 Escrow requirement.

If a bank requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the bank shall also require the escrow of all premiums and fees for any flood insurance required under § 339.3. The bank, or a servicer acting on behalf of the bank, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums have been charged by the bank, or a servicer acting on behalf of the bank, the bank shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§ 339.6 Required use of standard flood hazard determination form.

(a) Use of form. A bank shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) Retention of form. A bank shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the bank owns the loan.

§ 339.7 Forced placement of flood insurance.

If a bank, or a servicer acting on behalf of the bank, determines, at any time during the term of a designated loan, that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 339.3, then the bank or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in an amount at least equal to the amount required under § 339.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the bank or its servicer shall purchase flood insurance on the borrower’s behalf. The bank or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 339.8 Determination fees.

(a) General. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any bank, or a servicer acting on behalf of the bank, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) Borrower fee. The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA’s revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA’s publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 339.7.
(c) Purchaser or transferee fee. The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 339.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) Notice requirement. When a bank makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the bank shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) Contents of notice. The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster.

(c) Timing of notice. The bank shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the bank provides notice to the borrower and in any event no later than the time the bank provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of a notice to the borrower.

(d) Record of receipt. The bank shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the bank owns the loan.

(e) Alternate method of notice. Instead of providing the notice to the borrower required by paragraph (a) of this section, a bank may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The bank shall retain a record of the written assurance from the seller or lessor for the period of time the bank owns the loan.

(f) Use of prescribed form of notice. A bank will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

§ 339.10 Notice of servicer’s identity.

(a) Notice requirement. When a bank makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the bank shall notify the Director of FEMA (or the Director of FEMA’s designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the bank’s notice of the servicer’s identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee.

(b) Transfer of servicing rights. The bank shall notify the Director of FEMA (or the Director of FEMA’s designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix A to Part 339—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

- The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA’s Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community:

- This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation in any year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense:

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

At a minimum, flood insurance purchased must cover the lesser of:

(1) the outstanding principal balance of the loan; or

(2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community’s participation in the NFIP is in accordance with NFIP requirements.

Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

By order of the Board of Directors.

Dated at Washington, D.C., this 13th day of August, 1996.

Jerry L. Langley,
Executive Secretary.

Office of Thrift Supervision
12 CFR CHAPTER V

Authority and Issuance

For the reasons set forth in the joint preamble, chapter V of title 12 of the Code of Federal Regulations is amended as set forth below:
PART 572—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
572.1 Authority, purpose, and scope.
572.2 Definitions.
572.3 Requirement to purchase flood insurance where available.
572.4 Exemptions.
572.5 Escrow requirement.
572.6 Required use of standard flood hazard determination form.
572.7 Forced placement of flood insurance.
572.8 Determination fees.
572.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
572.10 Notice of servicer’s identity.

Appendix A to Part 572—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance


§ 572.1 Authority, purpose, and scope.

(a) Authority. This part is issued pursuant to 12 U.S.C. 1462, 1462a, 1463, 1464, and 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) Purpose. The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) Scope. This part, except for §§ 572.6 and 572.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 572.6 and 572.8 of this part apply to loans secured by buildings or mobile homes, regardless of location.

§ 572.2 Definitions.


(b) Savings association means, for purposes of this part, a savings association as that term is defined in 12 U.S.C. 1813(b)(1) and any subsidiaries or service corporations thereof.

(c) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) Designated loan means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) Director of FEMA means the Director of the Federal Emergency Management Agency.

(g) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this part, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(h) NFIP means the National Flood Insurance Program authorized under the Act.

(i) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

(j) Servicer means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 572.3 Requirement to purchase flood insurance where available.

(a) In general. A savings association shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) Table funded loans. A savings association that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this part.

§ 572.4 Exemptions.

The flood insurance requirement prescribed by § 572.3 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 572.5 Escrow requirement.

If a savings association requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the savings association shall also require the escrow of all premiums and fees for any flood insurance required under § 572.3. The savings association, or a servicer acting on behalf of the savings association, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the savings association or a servicer acting on behalf of the savings association, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.
§ 572.6 Required use of standard flood hazard determination form.

(a) Use of form. A savings association shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) Retention of form. A savings association shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the savings association owns the loan.

§ 572.7 Forced placement of flood insurance.

If a savings association, or a servicer acting on behalf of the savings association, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 572.3, then the savings association or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in an amount at least equal to the amount required under § 572.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the savings association or its servicer shall purchase insurance on the borrower’s behalf. The savings association or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 572.8 Determination fees.

(a) General. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any savings association, or a servicer acting on behalf of the savings association, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) Borrower fee. The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

1. Is made in connection with making, increasing, extending, or renewing of the loan that is initiated by the borrower;
2. Reflects the Director of FEMA’s revision of updating of floodplain areas or flood-risk zones;
3. Reflects the Director of FEMA’s publication of a notice or compendium that:
   (i) Affects the area in which the building or mobile home securing the loan is located; or
   (ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or
4. Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 572.7.

(c) Purchaser or transferee fee. The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 572.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) Notice requirement. When a savings association makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the savings association shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) Contents of notice. The written notice must include the following information:

1. A warning, in a form approved by the Director of FEMA, that the building or mobile home is or will be located in a special flood hazard area;
2. A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012(b));
3. A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers;
4. A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster;
5. Timing of notice. The savings association shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the savings association provides notice to the borrower and in any event no later than the savings association provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) Record of receipt. The savings association shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the savings association owns the loan.

(e) Alternate method of notice. Instead of providing the notice to the borrower required by paragraph (a) of this section, a savings association may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The savings association shall retain a record of the written assurance from the seller or lessor for the period of time the savings association owns the loan.

(f) Use of prescribed form of notice. A savings association will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

§ 572.10 Notice of servicer’s identity.

(a) Notice requirement. When a savings association makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the savings association shall notify the Director of FEMA (or the Director’s designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the savings association’s notice of the servicer’s identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee.

(b) Transfer of servicing rights. The savings association shall notify the Director of FEMA (or the Director’s designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to
the Director of FEMA’s designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix A to Part 572—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA’s Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community:

[Community Name]

This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

• Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.
• At a minimum, flood insurance purchased must cover the lesser of:
  1. the outstanding principal balance of the loan; or
  2. the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community’s participation in the NFIP is in accordance with NFIP requirements.

Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a federally-declared flood disaster.

Dated: August 16, 1996.

By the Office of Thrift Supervision.

John F. Downey,
Executive Director, Supervision.

Farm Credit Administration

12 CFR CHAPTER VI

Authority and Issuance

For the reasons stated in the preamble, part 614 of chapter VI, title 12 of the Code of Federal Regulations is amended as follows:

PART 614—LOAN POLICIES AND OPERATIONS

1. The authority citation for part 614 continues to read as follows:

Authority: 42 U.S.C. 4012a, 4014a, 404b, 4016, and 4128; secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12a, 4.13, 4.13b, 4.14, 4.14a, 4.14c, 4.14d, 4.14e, 4.18, 4.19, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.7, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2096, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2199, 2201, 2202, 2202a, 2202c, 2202d, 2202e, 2206, 2207, 2219a, 2219b, 2243, 2244, 2252, 2279a, 2279a-2, 2279b-2, 2279b-1, 2279b-2, 2279f, 2279f-1, 2279a, 2279aa-5); sec. 413 of Pub. L. 100–233, 101 Stat. 1568, 1639.

2. Part 614 is amended by revising subpart S to read as follows:

Subpart S—Flood Insurance Requirements

Sec.
614.4920 Purpose and scope.
614.4925 Definitions.
614.4930 Requirement to purchase flood insurance.
614.4935 Escrow requirement.
614.4940 Required use of standard flood hazard determination form.
614.4945 Forced placement of flood insurance.
614.4950 Determination fees.
614.4955 Notice of special flood hazards and availability of Federal disaster relief assistance.
614.4960 Notice of servicer’s identity.

Appendix A to Subpart S of Part 614—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

Subpart S—Flood Insurance Requirements

§614.4920 Purpose and scope.


(b) Scope. This subpart, except for §§614.4940 and 614.4950, applies to loans of Farm Credit System (System) institutions that are secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 614.4940 and 614.4950 apply to loans secured by buildings or mobile homes, regardless of location.

§614.4925 Definitions.

(a) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(b) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(c) Designated loan means a loan secured by a building or a mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the 1968 Act.

(d) Director of FEMA means the Director of the Federal Emergency Management Agency.

(e) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this subpart, the term mobile home means a mobile home on a permanent foundation. The term mobile home includes a manufactured home as that term is used in the NFIP.

(f) NFIP means the National Flood Insurance Program authorized under the 1968 Act.

(g) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.
(h) Servicer means the person responsible for:
(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and
(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(i) Special flood hazard area means the land in the floodplain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(j) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 614.4930 Requirement to purchase flood insurance where available.
(a) In general. A System institution shall not make, increase, extend or renew any designated loan unless the building or mobile home and any personal property securing the loan are covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the 1968 Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) Table funded loans. A System institution that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for purposes of this part.

(c) Exemptions. The flood insurance requirement of paragraph (a) of this section does not apply with respect to:
(1) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or
(2) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 614.4935 Escrow requirement.
If a System institution requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by a fully improved real estate or a mobile home that is made, increased, extended or renewed on or after October 4, 1996, the institution shall also require the escrow of all premiums and fees for any flood insurance required under § 614.4930. The institution, or a servicer acting on behalf of the institution, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the institution, or a servicer acting on behalf of the institution, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§ 614.4940 Required use of standard flood hazard determination form.
(a) Use of form. System institutions shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the 1968 Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) Retention of form. System institutions shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the institution owns the loan.

§ 614.4945 Forced placement of flood insurance.
If a System institution, or a servicer acting on behalf of the institution, determines at any time during the term of a designated loan, that the building or mobile home and any personal property securing the designated loan are not covered by flood insurance or are covered by flood insurance in an amount less than the amount required under § 614.4930(a), then the institution or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 614.4930(a), for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the institution or its servicer shall purchase insurance on the borrower's behalf. The institution or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 614.4950 Determination fees.
(a) General. Notwithstanding any Federal or State law other than the 1973 Act, any System institution, or a servicer acting on behalf of the institution, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) Borrower fee. The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:
(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;
(2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;
(3) Reflects the Director of FEMA's publication of a notice or compendium that:
   (i) Affects the area in which the building or mobile home securing the loan is located; or
   (ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or
(4) Results in the purchase of flood insurance coverage under § 614.4945.
(c) Purchaser or transferee fee. The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 614.4955 Notice of special flood hazards and availability of Federal disaster relief assistance.
(a) Notice requirement. When a System institution makes, increases, extends, or renews a loan secured by a building or mobile home located or to be located in a special flood hazard area, the institution shall mail or deliver a written notice containing the information specified in paragraph (b) of this section to the borrower and to the servicer of the loan. Notice is required whether or not flood insurance is available under the 1968 Act for the collateral securing the loan.
§ 614.4960 Notice of servicer's identity.
(a) Notice requirement. When a System institution makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the institution shall notify the Director of FEMA (or the Director’s designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the institution’s notice of the servicer’s identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee.

(b) Transfer of servicing rights. The institution shall notify the Director of FEMA (or the Director’s designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA’s designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix A to Subpart S of Part 614—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA’s Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community:

This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

• Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

• At a minimum, flood insurance purchased must cover the lesser of:
  (1) The outstanding principal balance of the loan; or
  (2) The maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

• Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community’s participation in the NFIP is in accordance with NFIP requirements.

Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

Dated: August 8, 1996.

Floyd Fithian,
Secretary, Farm Credit Administration Board.

National Credit Union Administration

12 CFR CHAPTER VII

Authority and Issuance

For the reasons set forth in the joint preamble, part 760 of chapter VII of title 12 of the Code of Federal Regulations is revised to read as follows:

PART 760—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
760.1 Authority, purpose, and scope.
760.2 Definitions.
760.3 Requirement to purchase flood insurance where available.
760.4 Exemptions.
760.5 Escrow requirement.
760.6 Required use of standard flood hazard determination form.
760.7 Forced placement of flood insurance.
760.8 Determination fees.
760.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
760.10 Notice of servicer’s identity.

§ 760.1 Authority, purpose, and scope.

(a) Authority. This part is issued pursuant to 12 U.S.C. 1757, 1789 and 42 U.S.C. 4012a, 4104a, 4104b, 4106, 4128.

(b) Purpose. The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) Scope. This part, except for §§ 760.6 and 760.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 760.6 and 760.8 apply to loans secured by buildings or mobile homes, regardless of location.

§ 760.2 Definitions.


(b) Credit union means a Federal or State-chartered credit union that is insured by the National Credit Union Share Insurance Fund.

(c) Building means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) Community means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) Designated loan means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) Director of FEMA means the Director of the Federal Emergency Management Agency.

(g) Mobile home means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term mobile home does not include a recreational vehicle. For purposes of this part, the term mobile home means a mobile home on a permanent foundation. The term mobile home means a manufactured home as that term is used in the NFIP.

(h) NFIP means the National Flood Insurance Program authorized under the Act.

(i) Residential improved real estate means real estate upon which a home or other residential building is located or to be located.

(j) Servicer means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) Special flood hazard area means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 760.3 Requirement to purchase flood insurance where available.

(a) In general. A credit union shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) Table funded loan. A credit union that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this part.

§ 760.4 Exemptions.

The flood insurance requirement prescribed by § 760.3 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption.

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 760.5 Escrow requirement.

If a credit union requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by residential improved real estate or a mobile home that is made, increased, extended, or renewed on or after November 1, 1996, the credit union shall require the escrow of all premiums and fees for any flood insurance required under § 760.3. The credit union, or a servicer acting on behalf of the credit union, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the credit union, or a servicer acting on behalf of the credit union, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§ 760.6 Required use of standard flood hazard determination form.

(a) Use of form. A credit union shall use the standard flood hazard determination form developed by the Director (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) Retention of form. A credit union shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the credit union owns the loan.

§ 760.7 Forced placement of flood insurance.

If a credit union, or a servicer acting on behalf of the credit union, determines, at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered...
by flood insurance in an amount less than the amount required under § 760.3, then the credit union or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 760.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the credit union or its servicer shall purchase insurance on the borrower's behalf. The credit union or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 760.8 Determination fees.
(a) General. Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any credit union, or a servicer acting on behalf of the credit union, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.
(b) Borrower fee. The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:
   (1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;
   (2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;
   (3) Reflects the Director of FEMA's publication of a notice or compendium that:
      (i) Affects the area in which the building or mobile home securing the loan is located; or
      (ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or
   (4) Results in the purchase of flood insurance coverage by the credit union or its servicer on behalf of the borrower under § 760.7.
(c) Purchaser or transferee fee. The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 760.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
(a) Notice requirement. When a credit union makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the credit union shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.
(b) Contents of notice. The written notice must include the following information:
   (1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;
   (2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));
   (3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and
   (4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster.
(c) Timing of notice. The credit union shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction and to the servicer as promptly as practicable after the credit union provides notice to the borrower and in any event no later than the time the credit union provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.
(d) Record of receipt. The credit union shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the credit union owns the loan.
(e) Alternate method of notice. Instead of providing the notice to the borrower required by paragraph (a) of this section, a credit union may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The credit union shall retain a record of the written assurance from the seller or lessor for the period of time the credit union owns the loan.
(f) Use of prescribed form of notice. A credit union will be considered to be in compliance with the requirement for the notice of this section providing written notice to the borrower containing the language presented in the appendix to this part within a reasonable time before the completion of the transaction. The notice presented in the appendix to this part satisfies the borrower notice requirements of the Act.
§ 760.10 Notice of servicer's identity.
(a) Notice requirement. When a credit union makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the credit union shall notify the Director of FEMA (or the Director's designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the credit union's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee.
(b) Transfer of servicing rights. The credit union shall notify the Director of FEMA (or the Director's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix to Part 760—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's Flood Insurance Rate Map or the Flood Hazard Boundary Map for the following community:

This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

The community in which the property securing the loan is located...
participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.

- At a minimum, flood insurance purchased must cover the lesser of:
  (1) the outstanding principal balance of the loan; or
  (2) the maximum amount of coverage allowed for the type of property under the NFIP.

  Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

  Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

Dated: August 19, 1996.

Becky Baker,
Secretary of the Board, National Credit Union Administration.

[FR Doc. 96–21860 Filed 8–28–96; 8:45 am]
Part V

Department of Education

Inviting Applications for New Awards for Fiscal Year 1997; Notice
DEPARTMENT OF EDUCATION

Notice Inviting Applications for New Awards for Fiscal Year 1997

AGENCY: Department of Education.
SUMMARY: This notice provides closing dates and other information regarding the transmittal of applications for fiscal year 1997 competitions under three programs authorized by the Individuals with Disabilities Education Act. This notice supports the National Education Goals by improving understanding of how to enable children and youth with disabilities to reach higher levels of academic achievement.

Research in Education of Individuals With Disabilities Program [CFDA No. 84.023]

Purpose of Program: To advance and improve the knowledge base and improve the practice of professionals, parents, and others providing early intervention, special education, and related services—including professionals in regular education environments—to provide children with disabilities effective instruction and enable these children to learn successfully.

Eligible Applicants: State and local educational agencies; institutions of higher education; and public agencies and nonprofit private organizations.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 80, 81, 82, 85, and 86; and (b) the regulations for this program in 34 CFR Part 324.

Note: The regulations in 34 CFR Part 86 apply to institutions of higher education only.

Priorities: Under 34 CFR 75.105(c)(3) and 34 CFR 324.10, the Secretary gives an absolute preference to applications that meet the following priorities. The Secretary funds under these competitions only those applications that meet any one of these absolute priorities:

Note: If an applicant wishes to apply under more than one of these absolute priorities, the applicant must submit a separate application under each affected priority.

Absolute Priority 1—Student-Initiated Research Projects (84.023B)

This priority provides support for short-term (up to 12 months) postsecondary student-initiated research projects focusing on special education and related services for children and youth with disabilities and early intervention services for infants and toddlers, consistent with the purposes of the program, as described in 34 CFR 324.1. Projects must—
(1) Develop research skills in postsecondary students; and
(2) Include a principal investigator who serves as a mentor to the student-researcher while the project is carried out by the student.

A project must budget for a trip to Washington, DC for the annual two-day Research Projects’ Directors’ meeting.

Project Period: Up to 12 months.

Maximum Award: In no case does the Secretary make an award greater than $20,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative, to no more than 25 double-spaced, 8½ x 11” pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, résumé(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limitation.

Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.

Absolute Priority 2—Field-Initiated Research Projects (84.023C)

This priority provides support for a wide range of field-initiated research projects that support innovation, development, exchange, and use of advancements in knowledge and practice designed to contribute to the improvement of instruction and learning of infants, toddlers, children, and youth with disabilities.

Invitational Priorities

Within Absolute Priority 2, the Secretary is particularly interested in applications that meet one or more of the following invitational priorities. However, under 34 CFR 75.105(c)(1) an application that meets one or more of these invitational priorities does not receive competitive or absolute preference over other applications:

(1) Short-term (i.e. up to 12 months) research projects that are budgeted at $100,000 or less, and that are one or more of the following: pilot studies, projects that employ new methodologies, descriptive studies, projects to advance assessment, projects that synthesize state-of-the-art research and practice, projects for research dissemination and utilization, projects that analyze extant data bases.

The Secretary encourages studies that use these approaches to maximize the achievement of students with disabilities in core academic subjects and foster the full participation of students with disabilities in educational reform efforts related to the Goals 2000: Educate America Act.

(2) Projects that implement and examine a model or models for using research knowledge to improve educational practice and results for children with disabilities, and that include methodologies with the capacity to judge the effectiveness of the model or models as implemented in practice settings.

(3) Projects that study the delivery of coordinated services from providers such as health, social service, and mental health agencies.

(4) Projects that study non-categorical approaches to establishing eligibility for special education.

(5) Projects that study and develop instructionally relevant assessment practices that can also be used to establish student eligibility for special education.

Project Period: The majority of projects will be funded for up to 36 months. Only in exceptional circumstances—such as research questions that require repeated measurement, longitudinal design—will projects be funded for more than 36 months or up to a maximum of 60 months.

Maximum Award: In no case does the Secretary make an award greater than $180,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that
proposes a budget exceeding the maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative, to no more than 50 double-spaced, \( 8\times 11'' \) pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, resume(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limitation. Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.

Absolute Priority 3—Examining Alternatives for Results Assessment for Children with Disabilities (84.023F)

The Secretary establishes an absolute priority for research projects that meet the requirements of paragraphs (a), (b), and (c) as follows: (a) Pursue systematic programs of applied research focusing on one or more issues related to assessment or results based accountability for students with disabilities, or both. These issues include, but are not limited to the following: (1) Testing accommodations and adaptations. When adaptations and accommodations are made to permit students with disabilities to participate in results assessments, how are the technical characteristics of the assessments affected? How can the results be interpreted? To what degree can these scores be aggregated with nonadapted assessments? What are the best methods for selecting appropriate accommodations and adaptations? How can testing accommodations be related to instructional accommodations?

(2) Alternative assessments. If alternative assessments (such as performance assessments or portfolio assessments) are provided for students with disabilities, how can these assessments be compared with conventional assessments? What technical criteria can appropriately be applied to these assessments if used with students with disabilities?

(3) Development of assessments. How can general educational assessments be developed to be more inclusive for students with disabilities? How can problematic items and item formats be identified? How can students with disabilities be adequately represented in test development and validation samples? What are the effects if tests developed for general populations are administered to students with disabilities?

(4) Including students with disabilities in general assessments. How should decisions be made and documented to include students with disabilities in general educational assessments or alternative assessments? What factors influence these decisions?

(5) System development. How can assessment and accountability systems be developed with the range and flexibility to accommodate diverse student populations? How can accountability and individualization both be maintained?

(6) Basic concepts and principles. How can basic concepts and principles in assessment be revised to reflect new approaches to assessment and new roles and challenges in assessing children with disabilities?

(b) Produce and disseminate information that can be applied in educational programs, as well as in subsequent research.

(c) Coordinate their activities, as appropriate, with the Center to Support the Achievement of World Class Outcomes for Students with Disabilities and with other related projects funded under the Goals 2000: Educate America Act.

The budget for a project must provide for two trips annually to Washington, D.C. for (1) a two-day Research Project Directors' meeting; and (2) another meeting to meet and collaborate with the project officer of the Office of Special Education Programs and the other projects funded under this priority, to share information, and to discuss findings and methods of dissemination.

Project Period: Up to 36 months.

Maximum Award: In no case does the Secretary make an award greater than $185,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative, to no more than 50 double-spaced, \( 8\times 11'' \) pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, resume(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limitation. Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.


FOR TECHNICAL INFORMATION CONTACT: For Student-Initiated Research Projects
Training Personnel for the Education of Individuals With Disabilities—Grants for Personnel Training And Parent Training and Information Centers [CFDA No. 84.029]

Purpose of Program: (a) The purpose of Grants for Personnel Training is to increase the quantity and improve the quality of personnel available to serve infants, toddlers, children, and youth with disabilities. (b) The purpose of Parent Training and Information Centers is to enable parents to work more fully and effectively with professionals in meeting the needs of infants, toddlers, children, and youth with disabilities.

Eligible Applicants: Under Absolute Priority 1 (Preparation of Special Education, Related Services, and Early Intervention Personnel to Serve Infants, Toddlers, Children, and Youth with Low-Incidence Disabilities), Absolute Priority 2 (Preparation of Leadership Personnel), and Absolute Priority 3 (Ministry Institutions): Institutions of higher education and appropriate nonprofit agencies.

Under Absolute Priority 4 (Parent Training and Information Centers): parent organizations, as defined in 34 CFR 316.5(c).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 85, and 86; and (b) The regulations for these programs in 34 CFR parts 316 and 318.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Priorities: Under 34 CFR 75.105(b)(2) and (c)(3), 34 CFR 316, and 34 CFR 318, the Secretary gives an absolute preference to applications that meet the following priorities. The Secretary funds under these competitions only those applications that meet any one of these absolute priorities:

(Note: If an applicant wishes to apply under more than one of these absolute priorities, the applicant must submit a separate application under each appropriate priority.)

Absolute Priority 1—Preparation of Special Education, Related Services, and Early Intervention Personnel to Serve Infants, Toddlers, Children, and Youth with Low-Incidence Disabilities (84.029A)

Background: The national demand for educational, related services, and early intervention personnel to serve infants, toddlers, children, and youth with low-incidence disabilities exceeds available supply. However, because of the small number of these personnel needed in each State, institutions of higher education and individual States are reluctant to support the needed professional development programs. Of the programs that are available, not all are producing graduates with the prerequisite skills needed to meet the needs of the low-incidence disability population. Federal support is required to ensure an adequate supply of personnel to serve children with low-incidence disabilities and to improve the quality of appropriate training programs so that graduates possess necessary prerequisite skills.

Priority: The Secretary establishes an absolute priority to support projects that increase the number and quality of personnel to serve children with low-incidence disabilities. This priority supports projects that provide preservice preparation of special educators, early intervention personnel, and related services personnel at the associate, baccalaureate, master's, or specialist level.

The term “low-incidence disability” means a visual or hearing impairment, or simultaneous visual and hearing impairments (including deaf-blindness), significant mental retardation, or an impairment such as severe and multiple disabilities, severe orthopedic disabilities, autism, and traumatic brain injury, for which a small number of highly skilled and knowledgeable personnel are needed.

Applicants may propose to prepare one or more of the following types of personnel:

1. Special educators including early childhood, speech and language, adapted physical education, and assistive technology personnel;
2. Related services personnel who provide developmental, corrective, and other supportive services that assist children with low-incidence disabilities to benefit from special education. Both comprehensive programs and specialty components within a broader discipline that prepares personnel for work with the low-incidence population may be supported;
3. Early intervention personnel who serve children birth through age 2 with disabilities and their families. Early intervention personnel include persons prepared to provide training for, or be consultants to, service providers and case managers.

The Secretary particularly encourages projects that address the needs of more than one State, provide multidisciplinary training, and include collaboration among several institutions and between training institutions and public schools. In addition, projects that foster successful coordination between

Research in Education of Individuals With Disabilities Program Application Notice for Fiscal Year 1997

<table>
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<tr>
<th>CFDA No. and name</th>
<th>Applications available</th>
<th>Application deadline date</th>
<th>Deadline for Intergovernmental review</th>
<th>Estimated range of awards</th>
<th>Estimated average size of awards</th>
<th>Estimated No. of awards</th>
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<td>9/8/96</td>
<td>2/7/97</td>
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<td>$15,000</td>
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<td>84.023F Examining alternatives for results assessment for children with disabilities</td>
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<td>12/6/96</td>
<td>N/A</td>
<td>175,000–185,000</td>
<td>180,000</td>
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</tbody>
</table>
special education and regular education professional development programs to meet the needs of children with low-incidence disabilities in inclusive settings are encouraged.

Projects must:
(a) Show how their proposed activities address the demands for trained personnel to serve children with low-incidence disabilities in the State or States whose needs the project is expected to meet. The extent of the need for trained personnel in a particular State must be supported by the State’s Comprehensive System of Personnel Development (CSPD), or the CSPD supplemented by other additional relevant sources which the applicant demonstrates to be reliable and accurate.
(b) Prepare personnel to address the specialized needs of children with low-incidence disabilities from different cultural and language backgrounds;
(c) Incorporate curricula that focus on improving results for children with low-incidence disabilities;
(d) Promote high expectations for students with low-incidence disabilities and foster access to the general curriculum in the regular classroom, where appropriate; and
(f) Develop linkages with Education Department technical assistance providers to communicate information on program models used and program effectiveness.

Under this absolute priority, the Secretary plans to award approximately:
• 55 percent of the available funds for projects that support careers in special education, including early childhood educators;
• 30 percent of the available funds for projects that support careers in related services; and
• 15 percent of the available funds for projects that support careers in early intervention.

Project Period: Up to 36 months.

Maximum Award: In no case does the Secretary make an award greater than $225,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative, to no more than 40 double-spaced, 8 1/2 × 11” pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, resume(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limit. Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.

Absolute Priority 2—Preparation of Leadership Personnel (84.029D).

This priority supports projects that are designed to provide preservice professional preparation of leadership personnel in special education, related services, and early intervention. Leadership training is considered to be preparation in:
(a) Supervision and administration at the advanced graduate, doctoral, and post-doctoral levels;
(b) Research; and
(c) Personnel preparation at the doctoral and post-doctoral levels (34 CFR 318.11(a)(4)).

Invitational Priorities

Within Absolute Priority 1 the Secretary is particularly interested in applications that meet one or more of the following invitational priorities. However, under 34 CFR 75.105(c)(1) an application that meets one or more of these invitational priorities does not receive competitive or absolute preference over other applications:
(a) Projects designed to foster successful coordination between special education and regular education teachers, administrators, related services personnel, infant intervention specialists, and parents.
(b) Projects that coordinate their professional development programs for regular and special education personnel.
(c) Projects that include recruitment of leadership personnel from groups that are underrepresented in educational leadership positions.

Project Period: Up to 48 months.

Maximum Award: In no case does the Secretary make an award greater than $225,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative, to no more than 40 double-spaced, 8 1/2 × 11” pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, resume(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limit. Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.

Absolute Priority 3—Minority Institutions (84.029E).

This priority supports awards to Historically Black Colleges and Universities and other institutions of higher education whose minority student enrollment is at least 25 percent. Awards may provide training of personnel in all areas noted in 34 CFR
318.10(a) (1) and (2), and must be designed to increase the capabilities of the institution in appropriate training areas (34 CFR 318.11(a)(16)).

Project Period: Up to 48 months.

Maximum Award: In no case does the Secretary make an award greater than $200,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

Page Limits: Part III of the application, the Application Narrative, requires applicants to address the selection criteria that will be used by reviewers in evaluating individual proposals. The applicant must limit the Part III—Application Narrative to no more than 40 double-spaced, 8½ × 11” pages (on one side only) with one-inch margins. This page limitation applies to any charts and graphs included in the application narrative. The application narrative page limit does not apply to: Part I—the electronically scannable form; Part II—the budget section (including the narrative budget justification); and Part IV—the assurances and certifications. Also, the one page abstract, résumé(s), bibliography, or letters of support, while considered part of the application, are not subject to the page limitation. Applicants should note that reviewers are not required to review any information provided in addition to the application information listed above. If using a proportional computer font, use no smaller than a 12-point font. If using a nonproportional computer font or a typewriter, do not use more than 10 characters to the inch. Proposal narratives that exceed this page limit, or narratives using a smaller print size or spacing that makes the narrative exceed the equivalent of this limit, will not be considered for funding.

Absolute Priority 4—Parent Training and Information Centers (84.029M)

The purpose of this priority is to support Parent Training and Information Centers that assist parents to—

(1) Better understand the nature and needs of the disabling conditions of their children with disabilities;

(2) Provide follow-up support for the educational program of their children with disabilities;

(3) Communicate more effectively with special and regular educators, administrators, related services personnel, and other relevant professionals;

(4) Participate fully in educational decision making processes, including the development of the individualized education program, for a child with a disability;

(5) Obtain information about the range of options, programs, services, and resources available at the national, State, and local levels to children with disabilities and their families; and

(6) Understand the provisions for educating children with disabilities under the Individuals with Disabilities Education Act.

In order to assure that awards for parent centers serve parents of minority children with disabilities representative to the proportion of the minority population in the areas being served, applicants for awards shall identify with specificity the special efforts that will be undertaken to involve those parents, including efforts to interact with community-based and cultural organizations and the specification of supplementary aids, services, and supports that will be made available. Applicants shall also specify budgetary items earmarked to accomplish these efforts.

Competitive Priorities

Within Absolute Priority 4, the Secretary, under 34 CFR 75.105(c)(2)(i), gives preference to applications that meet one or more of the following competitive priorities:

(a) Providing parent training and information in one or more Empowerment Zones or Enterprise Communities. The Secretary awards 5 points to an application that meets the competitive priority relating to Empowerment Zones or Enterprise Communities published in the Federal Register on November 7, 1994 (59 FR 55534). These points are in addition to any points the application earns under the selection criteria for the program.

A list of areas that have been selected as Empowerment Zones or Enterprise Communities is included in an appendix to a notice published in the Federal Register on December 6, 1995 (60 FR 62699).

(b) To assist the Secretary in ensuring that awards are distributed geographically on a State or regional basis throughout all the States, the Secretary awards 15 points to an application that provides parent training and information in a geographic area, that would be unserved by an existing Parent Training and Information Center in FY 1997. These points are in addition to any points the application earns under the selection criteria for the program and under competitive preference (a).

Maximum Award: In no case does the Secretary make an award greater than $400,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

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SUPPLEMENTARY INFORMATION: The selection criteria that are used to evaluate applications under this priority award significant points based on the extent to which a proposed project addresses the needs of parents of minority infants, toddlers, children, and youth with disabilities.

Also, a list of States or geographic areas that are currently unfunded or
universities and other institutions of higher education, and local educational agencies. Other appropriating agencies include the National Institute of Mental Health, the National Institute of Environmental Health Sciences, and the National Institute of Mental Health. All other activities and expenses for projects must be pursuant to the requirements of the education grants program.


Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 260–7381.


TRAINING PERSONNEL FOR THE EDUCATION OF INDIVIDUALS WITH DISABILITIES—GRANTS FOR PERSONNEL TRAINING AND PARENT TRAINING AND INFORMATION CENTERS—APPLICATION NOTICE FOR FISCAL YEAR 1997

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<th>CFDA No. and name</th>
<th>Applications available</th>
<th>Application deadline date</th>
<th>Deadline for intergovernmental review</th>
<th>Estimated range of awards</th>
<th>Estimated average size of awards</th>
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<td>9/8/96</td>
<td>12/2/96</td>
<td>2/3/97</td>
<td>175,000–225,000</td>
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<td>84.029E—Minority Institutions</td>
<td>9/8/96</td>
<td>12/6/96</td>
<td>2/6/97</td>
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<td>84.029M—Parent training and information centers</td>
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PROGRAM FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE [CFDA No. 84.237]

Purpose of Program: To support projects designed to improve special education and related services to children and youth with serious emotional disturbance. Types of projects that may be supported under the program include, but are not limited to, research, development, and demonstration projects. Funds may also be used to develop and demonstrate approaches to assist and prevent children with emotional and behavioral problems from developing serious emotional disturbance.

Eligible Applicants: Institutions of higher education, State educational agencies, local educational agencies, and other appropriate public and nonprofit private institutions or agencies.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 85, and 86; and (b) The regulations for this program in 34 CFR Part 328.

Note: The regulations in 34 CFR Part 86 apply to institutions of higher education only.

Priority: Under 34 CFR 75.105(c)(3), and 34 CFR 328, the Secretary gives an absolute preference to applications that meet the following priority. The Secretary funds under this competition only those applications that meet this absolute priority:

Absolute Priority—Developing Effective Secondary School-Based Practices for Youth with Serious Emotional Disturbance (84.237H)

Background: Recent nationwide research on secondary school experiences and post-school outcomes for students with disabilities finds that youth with serious emotional disturbance (SED) are at particularly high risk for school failure and for poor post-school outcomes. While the majority of secondary age students with SED attend regular high schools, most of these students receive special education and related services outside the regular classroom for a substantial part, or all, of their school day. SED students attending regular secondary schools tend, as a group: to display erratic school attendance patterns; to achieve low levels of academic success despite generally normal and above ability levels; to be minimally involved in the social milieu of their schools; and to drop out of school at alarming rates. Fifty percent drop out of school, most by the tenth grade.

Poor adjustment and behavioral concerns are common during and beyond high school among these students. Data from the National Longitudinal Transition Study show that only one in ten students with serious emotional disturbance have behavior management plans. They tend to be under- or un-employed, are rarely involved in post-secondary education, and are at high risk for engaging in activities and behaviors outside the bounds of the law. While fairly substantial recent and current efforts are focusing on improving results for younger students with SED, little attention is being directed toward their secondary-age counterparts. This priority is intended to address this critical need.

Priority: The Secretary establishes an absolute priority for projects to develop, implement, test the efficacy of, and disseminate practices for improving academic, vocational, personal, social, and behavioral results for students with SED in regular high schools, including consideration of the most appropriate and least restrictive placements.

Under this priority, projects must—
(1) Develop practices with sound conceptual bases that are designed to improve critical academic, vocational, personal, social, and behavioral outcomes for SED students;
(2) Apply rigorous research standards in testing the efficacy of practices developed;
(3) Develop products that include clear, comprehensive descriptions of tested practices, test site contexts, and target student characteristics, and disseminate these products to appropriate research institutes, clearinghouses, and technical assistance providers.

A project must budget for two trips annually to Washington, D.C. for: (1) A two-day Research Project Directors’ meeting; and (2) another meeting to meet and collaborate with the OSEP project officer and with other relevant OSEP funded projects.

Project Period: Up to 48 months

Maximum Award: In no case does the Secretary make an award greater than $168,000 for a single budget period of 12 months. The Secretary rejects and does not consider an application that proposes a budget exceeding this maximum amount. However, because of budgetary considerations contingent upon congressional action, the Secretary may change the maximum amount through a note accompanying the application package. Multi-year projects will be level funded unless there are changes in costs attributable to significant changes in activity level.

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PROGRAM FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE—APPLICATION NOTICE FOR FISCAL YEAR 1987

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FOR ELECTRONIC ACCESS TO INFORMATION: Information about the Department’s funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department’s electronic bulletin board (ED Board), telephone (202) 260-9950; on the Internet Gopher Server at Gopher.ED.GOV (under Announcements, Bulletins and Press Releases) or World Wide Web site (at http://www.ed.gov/). However, the official application notice for a discretionary grant competition is the notice published in the Federal Register. Application packages will be available in alternative formats upon request.

Dated: August 22, 1996.

Judith E. Heumann,
Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 96–21872 Filed 8–28–96; 8:45 am]
Part VI

Federal Emergency Management Agency

Changes to the Hotel and Motel Fire Safety Act National Master List; Notice
FEDERAL EMERGENCY MANAGEMENT AGENCY

Changes to the Hotel and Motel Fire Safety Act National Master List

AGENCY: United States Fire Administration, FEMA.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA or Agency) gives notice of additions and corrections/changes to, and deletions from, the national master list of places of public accommodations which meet the fire prevention and control guidelines under the Hotel and Motel Fire Safety Act. Parties wishing to be added to the National Master List, or to make any other change to the list, please see Supplementary Information below.

FOR FURTHER INFORMATION CONTACT: John Ottoson, Fire Management Programs Branch, United States Fire Administration, Federal Emergency Management Agency, National Emergency Training Center, 16825 South Seton Avenue, Emmitsburg, MD 21727, (301) 447-1272.

SUPPLEMENTARY INFORMATION: Acting under the Hotel and Motel Fire Safety Act of 1990, 15 U.S.C. 2201 note, the United States Fire Administration has worked with each State to compile a national master list of all of the places of public accommodation affecting commerce located in each State that meet the requirements of the guidelines under the Act. FEMA published the national master list in the Federal Register on Friday, June 21, 1996, 61 FR 32036-32256.

Parties wishing to be added to the National Master List, or to make any other change, should contact the State office or official responsible for compiling listings of properties which comply with the Hotel and Motel Fire Safety Act. A list of State contacts was published in 61 FR 32032, also on June 21, 1996. If the published list is unavailable to you, the State Fire Marshal’s office can direct you to the appropriate office. The Hotel and Motel Fire Safety Act of 1990 National Master List is now accessible electronically. The National Master List Web Site is located at: http://www.usfa/fema.gov/hotel/index.htm

Visitors to this web site will be able to search, view, download and print all or part of the National Master List by State, city, or hotel chain. The site also provides visitors with other information related to the Hotel and Motel Fire Safety Act. Instructions on gaining access to this information are available as the visitor enters the site.

Periodically FEMA will update and redistribute the national master list to incorporate additions and corrections/changes to the list, and deletions from the list, that are received from the State offices. Each update contains or may contain three categories: “Additions;” “Corrections/changes;” and “Deletions.” For the purposes of the updates, the three categories mean and include the following:

“Additions” are either names of properties submitted by a State but inadvertently omitted from the initial master list or names of properties submitted by a State after publication of the initial master list;

“Corrections/changes” are corrections to property names, addresses or telephone numbers previously published or changes to previously published information directed by the State, such as changes of address or telephone numbers, or spelling corrections; and

“Deletions” are entries previously submitted by a State and published in the national master list or an update to the national master list, but subsequently removed from the list at the direction of the State.

Copies of the national master list and its updates may be obtained by writing to the Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325. When requesting copies, please refer to stock number 069-001-00049-1.

Dated: August 23, 1996.

Michael B. Hirsch,
Acting General Counsel.

The update to the national master list for the months of June and July 1996 follow:

THE HOTEL AND MOTEL FIRE SAFETY ACT OF 1990 NATIONAL MASTER LIST 8/20/96 UPDATE

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<tr>
<td>CA1472—Wyndham Garden Hotel, Marin County.</td>
<td></td>
<td>San Rafael</td>
<td>CA 94903</td>
<td>(415) 479-8800</td>
</tr>
<tr>
<td>Iowa:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IA0166—Shoney's Inn and Suites</td>
<td></td>
<td>Cedar Rapids</td>
<td>IA 52402</td>
<td>(319) 378-3948</td>
</tr>
<tr>
<td>IA0167—Radisson Hotel</td>
<td></td>
<td>Newton</td>
<td>IA 50208</td>
<td>(515) 792-3333</td>
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<tr>
<td>Illinois:</td>
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<tr>
<td>IL0551—Wyndham Garden Hotel - Oakbrook Terrace.</td>
<td></td>
<td>Oakbrook Terr.</td>
<td>IL 60181</td>
<td>(708) 833-3600</td>
</tr>
<tr>
<td>IL0550—Fairfield Inn Peru</td>
<td></td>
<td>Peru</td>
<td>IL 61354</td>
<td>(815) 223-7458</td>
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<tr>
<td>New York:</td>
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<tr>
<td>NY0634—Holiday Inn Fishkill</td>
<td></td>
<td>Fishkill</td>
<td>NY 12524</td>
<td>(914) 896-6281</td>
</tr>
<tr>
<td>NY0633—Clubquarters Downtown Hotel.</td>
<td></td>
<td>New York</td>
<td>NY 10005</td>
<td>(212) 575-0006</td>
</tr>
<tr>
<td>NY0635—Ramada Limited-Woodbury</td>
<td></td>
<td>Woodbury</td>
<td>NY 11797</td>
<td>(516) 921-8500</td>
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<td>Pennsylvania:</td>
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<tr>
<td>PA0440—Penn State Scanticon Conference Center Hotel.</td>
<td>215 Innovation Blvd.</td>
<td>State College</td>
<td>PA 16803</td>
<td>(814) 683-5000</td>
</tr>
<tr>
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<tr>
<td>TX0703—Wyndham Anatole</td>
<td></td>
<td>Dallas</td>
<td>TX 75207</td>
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<tr>
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<td></td>
<td>Plano</td>
<td>TX 75074</td>
<td>(214) 578-2243</td>
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<td>Washington:</td>
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<tr>
<td>WA0296—Timberland Inn &amp; Suites.</td>
<td>1271 Mt. Saint Helen's Way</td>
<td>Castle Rock</td>
<td>WA 98611</td>
<td>(360) 274–6002</td>
</tr>
<tr>
<td>WA0294—Holiday Inn Seattle Issaquah.</td>
<td>1801 12th Ave NW</td>
<td>Issaquah</td>
<td>WA 98027</td>
<td>(206) 392–6421</td>
</tr>
<tr>
<td>WA0295—Shilo Inn-Ocean Shores.</td>
<td>PO Box 1950, 707 Ocean Shores Blvd NW.</td>
<td>Ocean Shores</td>
<td>WA 98569</td>
<td>(360) 289–4600</td>
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<tr>
<td>WA0293—Best Western Tower Inn.</td>
<td>1515 George Washington Way</td>
<td>Richland</td>
<td>WA 99352</td>
<td>(509) 946–4121</td>
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<tr>
<td>West Virginia:</td>
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<tr>
<td>WV0222—Blackbear Woods Resort Inn.</td>
<td>Box 55, Rt. 1</td>
<td>Davis</td>
<td>WV 26260</td>
<td>(304) 866–4391</td>
</tr>
<tr>
<td>WV0223—Land of Canaan Vacation Resort.</td>
<td>Box 29, HC 70</td>
<td>Davis</td>
<td>WV 26260–9711</td>
<td>(304) 866–4788</td>
</tr>
<tr>
<td>WV0221—Paddle Creek Motel.</td>
<td>U.S. Rt. 52</td>
<td>Fort Gay</td>
<td>WV 25514</td>
<td>(304) 648–7393</td>
</tr>
<tr>
<td>WV0220—Ramada Limited.</td>
<td>419 Hurricane Creek Rd</td>
<td>Hurricane</td>
<td>WV 25526</td>
<td>(304) 562–3346</td>
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<tr>
<td>Corrections/Changes:</td>
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<tr>
<td>CA0362—Regal Biltmore Hotel ...</td>
<td>506 S. Grand Ave</td>
<td>Los Angeles</td>
<td>CA 90071</td>
<td>(213) 612–1575</td>
</tr>
<tr>
<td>CA1287—Wyndham Hotel, LAX Airport.</td>
<td>6225 W. Century Blvd</td>
<td>Los Angeles</td>
<td>CA 90045</td>
<td>(310) 670–9000</td>
</tr>
<tr>
<td>CA0713—Clarion Hotel Bay View</td>
<td>660 K St</td>
<td>San Diego</td>
<td>CA 92101</td>
<td>(619) 696–0234</td>
</tr>
<tr>
<td>CA0307—Wyndham Emerald Plaza.</td>
<td>400 W. Broadway</td>
<td>San Diego</td>
<td>CA 92101</td>
<td>(619) 239–4500</td>
</tr>
<tr>
<td>Mississippi:</td>
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<tr>
<td>MS0105—Sleep Inn.</td>
<td>1301 Hamilton Ave</td>
<td>Meridian</td>
<td>MS 39301</td>
<td>(601) 485–4646</td>
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<tr>
<td>Pennsylvania:</td>
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<tr>
<td>PA0200—Radisson Hotel Philadelphia Airport.</td>
<td>500 Stevens Dr</td>
<td>Philadelphia</td>
<td>PA 19113</td>
<td>(610) 521–5900</td>
</tr>
<tr>
<td>West Virginia:</td>
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<tr>
<td>MS0060—Holiday Inn North</td>
<td>I–55 N</td>
<td>Jackson</td>
<td>MS 39206</td>
<td>(601) 366–9411</td>
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<tr>
<td>Washington:</td>
<td>130 Market St</td>
<td>Chas</td>
<td>SC 29401</td>
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[FR Doc. 96–21966 Filed 8–28–96; 8:45 am]
BILLING CODE 6718–08–U
Securities and Exchange Commission

17 CFR Parts 210 and 240
Implementation of Section 10A of the Securities Exchange Act of 1934; Proposed Rule
17 CFR Parts 210 and 240
[Release No. 34-37594; IC-22162; File No. S7-20-96].

RIN 3235-AG70

Implementation of Section 10A of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Rule.

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") today is soliciting comments on proposed rule amendments to implement the reporting requirements in section 10A of the Securities Exchange Act of 1934 (the "Exchange Act"). Section 10A requires, among other things, that the auditor of a registrant’s financial statements report to the registrant’s board of directors certain uncorrected illegal acts of the registrant, and that the registrant notify the Commission that it has received such a report. If the registrant fails to provide that notice, the auditor is required by section 10A to furnish directly to the Commission the report given to the Board. The proposed amendments to the Commission’s Exchange Act Rules are intended to implement those reporting requirements. The proposed amendment to Regulation S-X would conform the definition of “audit” in that regulation with the wording in section 10A.

DATES: Comments on the proposed amendments should be received on or before October 28, 1996.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rules-comments@sec.gov. Comment letters should refer to File No. S7-20-96; this file number should be included on the subject line if E-mail is used. All comments will be available for public inspection and copying in the Commission’s Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comments may be posted on the Commission’s internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Robert E. Burns or W. Scott Bayless, at (202) 942-4400, Office of the Chief Accountant, Mail Stop 11-3, and for investment company issues, Kathleen Clarke, at (202) 942-0724, Division of Investment Management, Mail Stop 10-6, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.


I. Background

Title III to the Private Securities Litigation Reform Act of 1995, Public Law 104-67, enacted on December 22, 1995, added section 10A to the Exchange Act. This section codifies certain professional auditing standards and imposes expanded obligations on auditors to report in a timely manner certain uncorrected illegal acts to a registrant’s board of directors. It further requires the registrant, or if the registrant fails to do so then the auditor, to provide information regarding the illegal act to the Commission.

Section 10A(a) requires that audits of registrants’ financial statements include, “in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—” 1

1. Procedures designed to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts;

2. Procedures designed to identify related party transactions that are material to the financial statements or otherwise require disclosure therein; and

3. An evaluation of whether there is substantial doubt about the registrant’s ability to continue as a going concern. The Commission staff plans to continue these practices.

In addition to the requirement in section 10A(a) that auditors perform procedures designed to enhance the detection of fraudulent financial reporting, section 10A(b) contains provisions that would require an auditor to report directly to the Commission

...
certain detected illegal acts if the registrant fails to do so.

Under section 10A(b), if, while conducting the audit of the registrant's financial statements, the auditor becomes aware of information indicating that an illegal act (whether or not material to the financial statements) has occurred or may have occurred, then the auditor would be required, in accordance with GAAS, "as may be modified or supplemented from time to time by the Commission," to determine whether it is "likely" that an illegal act has occurred and, if so, its possible effect on the financial statements (including any contingent monetary effects, such as fines, penalties, and damages). The auditor would be required to inform the registrant's management of the illegal act "as soon as practicable." In addition, the auditor must assure him/herself that the registrant's board of directors is adequately informed, by management or otherwise, of any detected illegal act.

Although GAAS contains procedures for similar notification of illegal acts to managers and boards of directors, section 10A(b) contains the additional requirement that these notifications occur "as soon as practicable." The three conclusions set forth in section 10A(b)(2) that trigger the auditor's obligation to report to the board are that:

1. The illegal act has a material effect on the registrant's financial statements,

   including contingent liabilities that might be created by the illegal act. See, e.g., SAS 54, ¶ 13, AU § 317.13.

2. Senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act, and

3. The failure to take remedial action is reasonably expected to warrant either a departure from the auditor's standard audit report, when made, or the auditor's resignation from the audit engagement.

If the board of directors receives a report that the auditor has reached these conclusions, then the board has one business day to notify the Commission that it received such a report. If the auditor does not receive a copy of the board's notice to the Commission within that one business day period, then by the end of the next business day the auditor is required to furnish directly to the Commission a copy of the report given to the board (or the documentation of any oral report) 

The auditor's resignation from the audit engagement does not negate the auditor's obligation to furnish his or her report to the Commission in these circumstances. Section 10A(b)(c) states that there is no private right of action against auditors based on any findings, conclusions, or statements expressed in their reports to the Commission. It should be noted, however, that this section does not address private rights of action based on, among other things, the auditor's failure to make the required report, the auditor's failure to comply with GAAS or Commission requirements during the conduct of its audit or other work, or for the preparation of any other reports or statements filed with the Commission.

Section 10A(b)(d) subjects auditors to civil money penalties if the Commission finds in a cease and desist proceeding that the auditor willfully failed to comply with the direct reporting provisions in section 10A. Similar penalties may be imposed on any person who was a cause of such a violation.

Section 10A(e) states that, except for the civil money provisions in section 10A(d), nothing in section 10A shall be held to limit or otherwise affect the authority of the Commission under the Exchange Act.

II. Discussion of Proposed Rules

A. Proposed Rule 10A-1

Proposed Rule 10A-1 is based on the premise that the notice and reports under section 10A are to assist the Commission in performing its enforcement responsibilities and, therefore, will be non-public. Disclosure to the public of registrants' illegal acts will continue to be made in modified audit reports or, when the auditor has resigned, been dismissed, or elected not to stand for re-election, on Form 8-K.

The registrant's Form 8-K must state, among other things: whether the former auditor resigned, declined to stand for re-election, or is dismissed, and within five business days of the date a new auditor is engaged. The registrant is to ask the former auditor to provide the registrant with a letter indicating whether the former auditor agrees with the disclosures in the Form 8-K that reports the termination of the audit engagement and, if not, the respects in which the auditor disagrees. This letter is to be filed with the Commission as an exhibit by amendment to the registrant's Form 8-K within 10 business days of the date that the Form 8-K was filed.

The registrant's Form 8-K must state, among other things: whether the former auditor resigned, was dismissed, or declined to stand for re-election and the date thereof; whether the auditor modified his or her report on the registrant's financial statements for either of the last two fiscal years and, if so, the nature of the modification; whether the decision to change auditors was recommended or approved by the audit committee or board of directors.
public and exempt from disclosure under the Freedom of Information Act to the same extent as the Commission's investigative records.

Despite the confidential nature of the reports under section 10A, these reporting requirements should improve the quality of public disclosures in Forms 8-K and N-SAR and in audit reports on registrants' financial statements, because it is unlikely that registrants and auditors will make public disclosures that are incompatible with the confidential reports made to the Commission. Also, the direct reporting requirements in section 10A should give auditors additional leverage to prompt management to correct illegal acts and to make appropriate adjustments in their financial statements.

Proposed Rule 10A–1 designates the Commission's Office of the Chief Accountant ("OCA") as the appropriate office to receive the notice provided by any registrant under section 10A(b)(3) and any reports provided by auditors under section 10A(b)(3) or 10A(b)(4). OCA expeditiously will forward copies of the notice or report to all appropriate offices and divisions within the Commission. The notice or report may be provided to other agencies, as appropriate.

Delivery of the notice or report to OCA may occur under proposed Rule 10A–1 in any manner, provided the notice or report is received by OCA within the statutory time period. Currently, the most timely manner of delivery may be through submission of a facsimile, telegraph, or personal delivery. In the future, procedures may be developed for registrants and auditors to deliver confidential information directly to OCA via electronic mail. Proposed Rule 10A–1 would permit use of such means of delivery.

Proposed Rule 10A–1 sets forth the required contents for a registrant's notice to the Commission. This notice would be in writing and identify the registrant and the auditor, state the date the auditor made its report to the board, and provide a summary of the report. The required summary would describe the act and the potential impact of that act on the registrant's financial statements. This information is consistent with the requirement under GAAS that the auditor's communication with the registrant's audit committee "should describe the act, the circumstances of its occurrence, and the effect on the financial statements." The proposed rule specifically would permit a registrant to provide additional information regarding its view of, and response to, the section 10A report it has received from the auditor.

Regarding reports filed by auditors, proposed Rule 10A–1 would specify that if the report does not identify clearly both the registrant and the auditor, then the auditor must attach that information to the report submitted to OCA.

Proposed Rule 10A–1 makes it clear that providing the notice or report in accordance with section 10A and the proposed rule does not, in any way, affect the obligations of the registrant and the auditor to file and make all applicable disclosures required by the Commission's rules, including, without limitation, Forms 8-K and N-SAR, and of the auditor to comply with GAAS reporting requirements. Similarly, the proposed rule states that the confidential nature of the notice and the report to the Commission does not diminish a registrant's or auditor's obligations to make full disclosures required by the Commission's rules, forms, reports, or disclosure items, or by applicable professional standards.

B. Proposed Rule 1–02(d).

The proposed amendment would conform the definition of "Audit (or examination)" in Rule 1–02(d) of Regulation S–X with section 10A, by noting that audits of the financial statements of Commission registrants should be performed in accordance with generally accepted auditing standards as auditor must inform the Commission and the designated examining authority of the material inadequacy within the next 24 hours.
may be modified or supplemented by the Commission.

III. Investment Companies

Section 10A and proposed Rule 10A±1 apply to all audits required pursuant to the Exchange Act, including those prepared on behalf of investment companies that have reporting obligations under the Exchange Act. The Commission requests comment whether the proposed reporting requirements under Rule 10A±1 need to be modified to reflect the operations of investment companies.

IV. General Request for Comments

The Commission seeks comments from all interested persons wishing to address any aspect of the proposed rules.

The Commission also is requesting comments on whether the proposed amendments, if adopted, would have an adverse impact on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Securities Act of 1933 and the Exchange Act. Comments in this regard will be considered by the Commission in complying with its responsibilities under section 23(a) of the Exchange Act.

V. Cost/Benefit Analysis

Comments are requested related to any costs or benefits associated with the proposed rules. The costs of complying with proposed Rule 10A±1, which is intended to carry out the purposes of section 10A of the Exchange Act, are expected to be de minimis. Such costs for a registrant may include converting the information in the auditor’s report to the board into a notice that conforms to the rule and delivering that notice, via facsimile or otherwise, to the Commission’s Office of the Chief Accountant. Costs for the auditor may include assuring that the report to the board identifies the registrant, as required by the proposed rule, and the cost of delivering that report, via facsimile or otherwise, to the Commission’s Office of the Chief Accountant.

Benefits would include an earlier warning to the Commission of possible illegal acts by registrants and potential improvements in public disclosures in Forms 8-K and N-SAR regarding changes in registrants’ auditors and in audit reports that are modified due to registrants’ illegal acts.

VI. Summary of Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603 concerning proposed Rule 10A-1. The analysis notes that the proposed rule is intended to implement the reporting requirements of section 10A of the Exchange Act.

As discussed more fully in the analysis, the proposed rule would affect small entities, as defined by the Commission’s rules, but would affect small entities in the same manner as other registrants. The analysis notes that alternatives that provide for different forms of compliance for small entities or which exempt small entities from the proposed rules would not be consistent with the statutory requirements. Moreover, the cost of complying with the proposed rule should be de minimis, even for small registrants.

Written comments are encouraged with respect to any aspect of the analysis. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed rules are adopted. A copy of the analysis may be obtained by contacting Robert E. Burns, Chief Counsel, Office of the Chief Accountant, U.S. Securities and Exchange Commission, Mail Stop 11-3, 450 Fifth Street, N.W., Washington, D.C. 20549.

VII. Paperwork Reduction Act

Proposed Rule 10A-1 contains “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and the Commission has submitted the proposed rules to the Office of Management and Budget for review in accordance with 44 U.S.C. 3507(d). The title for the collection of information is “Amendments to Implement Exchange Act Section 10A.”

The Supporting Statement to the Paperwork Reduction Act submission notes that the proposed rule is intended to implement the reporting requirements found in recently enacted section 10A of the Exchange Act, and that the proposed rule would have a negligible effect on the annual reporting and compliance of Commission registrants. As discussed above, the notice provided by the registrant would contain the minimum amount of information necessary to identify the registrant and the auditor, indicate the date the auditor provided the report to the board of directors as specified in section 10A, and summarize the report given to the board. The summary would be based on information required to be given to the board of directors under GAAS. The auditor’s report, furnished only in the event that the registrant does not fulfill its reporting responsibilities, would consist only of the report given to the board of directors and, if necessary, additional information to identify clearly the registrant and the auditor.

Potential respondents are entities with reporting obligations under the Exchange Act and their auditors, although it is anticipated that the reporting requirements under section 10A rarely will be triggered. On those rare occasions when the reporting requirement is triggered, it is estimated that the total recordkeeping and reporting burden, beyond that already incurred by the statutory, would not exceed one hour per respondent.

As notes must be filed by a registrant within one day of receiving a report from its auditor, and the auditor must file its report (if necessary) the next day, there are essentially no recordkeeping or retention requirements.

Filing the notices and reports, when necessary, is required by section 10A of the Exchange Act and therefore is mandatory. As explained above, however, the notices and reports will be kept confidential while the Commission has an enforcement interest in the information contained in those notices and reports.

Pursuant to 44 U.S.C. § 3506(c)(2)(B), the Commission requests comments concerning: whether the proposed collection of information is necessary for the proper performance of the function of the Commission, including whether the information shall have practical utility; on the accuracy of the Commission’s estimate of the burden of the proposed collection of information; on the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission.
PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 is revised to read as follows: Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77ee, 77ggg, 77n, 77ss, 77ttt, 78c, 78d, 78f, 78j, 78k, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78y(d), 79q, 79r, 80a±20, 80a±23, 80a±29, 80a±37, 80b±3, 80b±4, and 80b±11, unless otherwise noted.

4. By adding §240.10A–1 to read as follows:

§240.10A–1 Notice to Commission of issuers’ illegal acts.

(a)(1) If any issuer with a reporting obligation under the Act receives a report requiring a notice to the Commission in accordance with section 10A(b)(3) of the Act, 15 U.S.C. 78j±1(b)(3), the issuer shall provide such notice to the Commission’s Office of the Chief Accountant within the time period prescribed in that section. The notice may be provided by facsimile, telegraph, personal delivery, or any other means, provided it is received by the Office of the Chief Accountant within the required time period.

(2) The notice specified in paragraph (a)(1) of this section shall be in writing and:

(i) Shall identify the issuer (including the issuer’s name, address, phone number, and file number assigned to the issuer’s filings with the Commission) and the independent accountant (including the independent accountant’s name and phone number, and the address of the independent accountant’s residence or principal office);

(ii) Shall state the date that the issuer received from the independent accountant the report specified in section 10A(b)(2) of the Act, 15 U.S.C. 78j±1(b)(2);

(iii) Shall provide a summary of the independent accountant’s report, including a description of the act that the independent accountant has identified as a likely illegal act and the potential impact of that act on all affected financial statements of the issuer or those related to the most current three year period, whichever is shorter; and

(iv) May provide additional information regarding the issuer’s views of and response to the independent accountant’s report.

(3) Provision of the notice in paragraphs (a)(1) and (a)(2) of this section does not relieve the issuer from its obligations to comply fully with any other reporting requirements, including, without limitation:

(i) The filing requirements of Form 8-K, §249.308 of this chapter, and Form N–SAR, §274.101 of this chapter, regarding a change in the issuer’s certifying accountant and

(ii) The disclosure requirements of item 304 of Regulation S–B or item 304 of Regulation S–K, §§228.304 and 229.304 of this chapter.

(b)(1) Any independent accountant furnishing to the Commission a copy of a report (or the documentation of any oral report) in accordance with section 10A(b)(3) or section 10A(b)(4) of the Act, 15 U.S.C. 78j±1(b)(3) or 78j±1(b)(4), shall provide that report (or documentation) to the Commission’s Office of the Chief Accountant within the time period prescribed by the appropriate section of the Act. The report (or documentation) may be provided to the Commission’s Office of the Chief Accountant by facsimile, telegraph, personal delivery, or any other means, provided it is received by the Commission’s Office of the Chief Accountant within the time period set forth in section 10A(b)(3) or 10A(b)(4) of the Act, 15 U.S.C. 78j±1(b)(3) or 78j±1(b)(4), whichever is applicable in the circumstances.

(2) If the report (or documentation) provided to the Office of the Chief Accountant in accordance with paragraph (b)(1) of this section does not clearly identify both the issuer (including the issuer’s name, address, phone number, and file number assigned to the issuer’s filings with the Commission) and the independent accountant (including the independent accountant’s name and phone number, and the address of the independent accountant’s residence or principal office), then the independent accountant shall place that information in a prominent attachment to the report (or documentation) and shall provide that attachment to the Office of the Chief Accountant at the same time and in the same manner as the report (or documentation) is provided to that Office.

(3) Provision of the report (or documentation) by the independent accountant as described in paragraphs (b)(1) and (b)(2) of this section does not replace, or otherwise satisfy the need for, the newly engaged and former accountants’ letters under items 304(a)(2)(D) and 304(a)(3) of Regulation S–K, §§229.304(a)(2)(D) and 229.304(a)(3) of this chapter, respectively, and under items 304(a)(2)(D) and 304(a)(3) of Regulation S–B, §§228.304(a)(2)(D) and 228.304(a)(3) of this chapter, respectively, and does not limit, reduce, or affect in any way the independent accountant’s obligations to comply fully with all other legal or professional
responsibilities, including, without limitation, those under generally accepted auditing standards and the rules or interpretations of the Commission that modify or supplement those auditing standards.

(c) Notices and reports furnished to the Office of the Chief Accountant in accordance with paragraphs (a) and (b) of this section shall be non-public and exempt from disclosure pursuant to the Freedom of Information Act to the same extent and for the same periods of time that the Commission's investigative records are non-public and exempt from disclosure under, among other applicable provisions, 5 U.S.C. 552(b)(7) and § 200.80(b)(7) of this chapter. The preceding sentence shall not relieve, limit, delay, or affect in any way, any issuer's or independent accountant's obligations to provide all public disclosures required by law, by any Commission disclosure item, rule, report, or form, or by any applicable accounting, auditing, or professional standard.

By the Commission.

Dated: August 22, 1996.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 96–21889 Filed 8–28–96; 8:45 am]

BILLING CODE 8010–01–P
Part VIII

Department of Commerce

Economic Development Administration

13 CFR Part 316

Simplification and Streamlining of Regulations; General Requirements for Financial Assistance—Excess Capacity; Correction; Rule
DEPARTMENT OF COMMERCE

Economic Development Administration

13 CFR Part 316

[Docket No. 950525142–6220–04]
RIN 0610–AA47

Simplification and Streamlining of Regulations: General Requirements for Financial Assistance—Excess Capacity; Correction

AGENCY: Economic Development Administration (EDA), Department of Commerce (DoC).

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to EDA’s regulations at 13 CFR Chapter III; EDA’s final rule which adopted the interim-final rule (60 FR 49702), September 26, 1995, as modified by the changes noted in the final rule (61 FR 7979), published and effective on March 1, 1996, as corrected, and the correction (61 FR 15371), April 8, 1996. This correction is to the regulation on general requirements for financial assistance—excess capacity.

EFFECTIVE DATE: August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Awilda R. Marquez, (202) 482–4687; fax number: (202) 482–5671.

SUPPLEMENTARY INFORMATION:

Background

EDA recently amended its entire body of regulations to make them easier to read and to understand, by removing numerous unnecessary, redundant, and outdated parts, sections and portions thereof, and by clarifying and simplifying those remaining. The final rule includes program requirements, evaluation criteria, and the selection process in implementing programs under the Public Works and Economic Development Act of 1965, as amended (PWEDA or the Act), the Trade Act of 1974, as amended (the Trade Act), and other applicable statutes.

Need for Correction

As published, the final rule contains an error which may prove to be misleading and is in need of clarification. Currently, § 316.3 on excess capacity as codified in the Code of Federal Regulations (13 CFR, revised as of March 1, 1996) at Chapter III does not contain two crucial definitions—“market area” and “primary beneficiary”. These two definitions were inadvertently deleted when the final version of EDA’s rule was codified in the CFR. Since these terms must be defined in order to determine when a report or study (or exemption) is needed, to meet the excess capacity requirement under the Public Works and Economic Development Act of 1965, as amended, (42 U.S.C. 3121 et. seq.), these definitions must be reinserted in the definitions paragraph of this section of the rule.

List of Subjects in 13 CFR Part 316

Community development, grant programs-community development, Freedom of Information, Uniform Relocation Act.

Accordingly, 13 CFR Part 316 is corrected by making the following correcting amendment:

PART 316—GENERAL REQUIREMENTS FOR FINANCIAL ASSISTANCE

1. The authority citation for Part 316 continues to read as follows:


2. Section 316.3 is amended by revising paragraph (b) to read as follows:

§ 316.3 Excess Capacity.

Capacity means the maximum amount of a product or service that can be supplied to the market area over a sustained period by existing enterprises through the use of present facilities and customary work schedules for the industry.

Demand means the actual quantity of a product or service that users are willing to purchase for use in the market area served by the intended commercial or industrial beneficiary.

Efficient capacity means that part of capacity derived from the use of contemporary structures, machinery and equipment, designs and technologies.

Existing competitive enterprise means an established operation which either produces the same product or delivers the same service to all or a substantial part of the market area.

Market Area means the geographic area within which products and/or services compete for purchase by customers.

Primary Beneficiary means one or more firms within the same industry which may reasonably be expected to use 50 percent or more of the capacity of an EDA-financed facility in order to expand the supply of goods or services sold in competition with other producers or suppliers of such goods or services.

Dated: August 21, 1996.

Wilbur F. Hawkins,
Deputy Assistant Secretary for Economic Development.

[FR Doc. 96–21955 Filed 8–28–96; 8:45 am]

BILLING CODE 3510–24–P
Part IX

Legal Services Corporation

45 CFR Part 1609, et al.
Grantees: Regulations Implementing New Statutory Restrictions; Interim Final Rules and Proposed Rule
LEGAL SERVICES CORPORATION

45 CFR Parts 1610 and 1636

Use of Non-LSC Funds; Client Identity and Statement of Facts

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a restriction contained in the Legal Services Corporation's ("LSC" or "Corporation") FY 1996 appropriations act. The rule requires LSC recipients to identify by name each plaintiff they represent in any litigation. In the case of pre-litigation negotiation, the regulation requires recipients representing plaintiffs to notify potential defendants of the names of the plaintiffs represented by the recipient. The rule also requires that a plaintiff sign a written statement of facts on which a complaint is based before the recipient engages in litigation or before it undertakes pre-litigation negotiations on the plaintiff's behalf. Although this interim rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

This rule also amends part 1610 to reference 5 interim rules included in this publication of the Federal Register in the definition of "Activity prohibited by or inconsistent with Section 504."

DATES: This interim rule and the revision to part 1610 are effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St., NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement § 504(a)(8), a restriction in the Corporation's FY 1996 appropriations act which requires LSC recipients to identify the plaintiffs they represent and have the plaintiffs sign written statements of the facts underlying the claims. The Committee held hearings on staff proposals on July 8 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the rule for review and consideration by the Committee. After receipt of public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

A section-by-section discussion of this interim rule is provided below.

Section 1636.1 Purpose

The purpose of the rule is to ensure that during pre-litigation settlement negotiations and when filing a complaint in a court of law or otherwise participating in litigation against a defendant, Corporation recipients identify their clients to the adverse party. The rule also seeks to ensure that recipients undertake such activities based on facts which support the complaint.

Section 1636.2 Requirements

This section sets forth the requirement that plaintiffs identify the plaintiffs in all court complaints filed and prior to engaging in any pre-litigation settlement negotiations. The disclosure of a client's identity is not required when a court of competent jurisdiction has entered an order protecting the client from such disclosure to prevent probable, serious harm to significant client interests. In addition, this section requires that prior to the recipient entering in any pre-litigation settlement negotiations or prior to filing the complaint in court, each recipient obtain from the client being represented a signed statement of the facts supporting the complaint. The section does not apply to defendants represented by a recipient for counterclaims filed against a plaintiff. The requirements also do not apply to a recipient's delivery of advice and brief services to attempt to resolve matters for a client through negotiations in which there is no contemplation of litigation.

The statement of facts is to be written in English and in the client's language if the client does not understand English. If the client's language is only an oral and not a written language, such as the Navajo language, the statement in English should be certified to have been translated orally to the client prior to the client's signing.

In a few emergency situations, it may be necessary for the recipient to negotiate with a prospective defendant or to file an action before the plaintiff's statement of facts can be prepared or signed. This section allows the recipient to proceed without a signed statement in such emergencies, if delay in proceeding is reasonably likely to cause harm to a significant interest of the client. Emergency situations might include threats to take the client's child out of State, to assault the client, or to evict the client without following the required legal procedures. Where a recipient proceeds on an emergency basis, a statement must be prepared and signed as soon as possible.

Section 1636.3 Access to Written Statements

This part provides a right of access to the statements of facts for certain specified governmental officials and their agents but not for adverse parties and others. The required statement of facts must be available in order for the auditors and monitors to review in order to confirm that the statement of facts has been obtained. The Corporation does not anticipate that copies of the statement will normally be retained in any LSC files. Access to the statement of facts by parties to the lawsuit is governed solely by the discovery rules of the court. This part does not create any new right of access to information for parties to a lawsuit or for others and the Corporation anticipates that, pursuant to current law, courts will, in most cases, determine that the statement is not discoverable by an adverse party in litigation.

A copy of each statement drafted according to this section should be maintained separate from the client's case file.

Section 1636.4 Applicability

This section specifies that the requirements of this part apply not only to cases handled by recipient staff but also to cases for which private attorneys are compensated by the recipient. Attorneys who are handling cases pro bono, however, are not required by the rule to maintain such documentation because pro bono attorneys are...
uncompensated and do not fall within the prohibition. In addition, it is the Corporation’s judgment that the requirement of a plaintiff’s statement of facts would be a substantial impediment to the recruitment of pro bono lawyers. Besides, the fact that pro bono lawyers are volunteering their time provides some protection against their bringing frivolous law suits.

Section 1636.5 Recipient Policies, Procedures and Recordkeeping
This section requires recipients to establish policies and procedures to ensure compliance with this part and to maintain records sufficient to document compliance with this part.

Amendment to 45 CFR Part 1610 to Reference This Part and Parts 1637, 1638, 1639, and 1642
This interim rule also amends 45 CFR Part 1610 as published in an interim rule at 61 FR 41960 on August 13, 1996, to include references to this part and parts 1637, 1638, 1639 and 1642 in the definition of “Activity prohibited by or inconsistent with Section 504.”

List of Subjects
45 CFR Part 1610
Grant programs—law, Legal services.
45 CFR Part 1636
Client identity, Grant programs, Legal services.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended as follows:

PART 1610—[AMENDED]
1. 45 CFR Part 1610, as published in the Federal Register as an interim rule at 61 FR 41960 on August 13, 1996, is amended in parts 1637, 1638, 1639 and 1642 in the definition of “Activity prohibited by or inconsistent with Section 504.”

PART 1636—CLIENT IDENTIFICATION AND STATEMENT OF FACTS

§ 1636.1 Purpose.
§ 1636.2 Requirements.
§ 1636.3 Access to written statements.
§ 1636.4 Applicability.
§ 1636.5 Recipient policies, procedures, and recordkeeping.


§ 1636.1 Purpose.
The purpose of this rule is to ensure that, when an LSC recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant or engages in pre-complaint settlement negotiations, the recipient identifies the plaintiff it represents and assures that the plaintiff has a colorable claim.

§ 1636.2 Requirements.
(a) When a recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant, or before a recipient engages in pre-complaint settlement negotiations on behalf of a client who has authorized it to file suit in the event that the settlement negotiations are unsuccessful, it shall:
1. identify each plaintiff by name in any complaint it files and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations, unless a court of competent jurisdiction has entered an order protecting the client from such disclosure based on a finding, after notice and an opportunity for a hearing on the matter, of probable, serious harm to the plaintiff if the disclosure is not prevented; and
2. prepare a dated written statement signed by each plaintiff, enumerating the particular facts supporting the complaint, insofar as they are known to the plaintiff when the statement is signed.
(b) The statement of facts must be written in English and, if necessary, in a language other than English that the plaintiff understands.
(c) In the event of an emergency, where the recipient reasonably believes that delay is likely to cause harm to a significant safety, property or liberty interest of the client, the recipient may proceed with the litigation or negotiation without a signed statement of fact, provided that the statement is signed as soon as possible thereafter.

§ 1636.3 Access to written statements.
(a) Written statements of fact prepared in accordance with this part are to be kept on file by the recipient and made available to the Corporation to any Federal department or agency auditing or monitoring the activities of the recipient of the Corporation or to any auditor or monitor receiving Federal funds to audit or monitor on behalf of a Federal department or agency or on behalf of the Corporation.
(b) This part does not give any other party any right of access to the plaintiff’s written statement of facts, either in the lawsuit or through any other procedure. Access by other parties to the statement of facts is governed solely by the discovery rules of the court in which the action is brought.

§ 1636.4 Applicability.
This part applies to cases for which private attorneys are compensated by the recipient as well as to those cases initiated by the recipient’s staff.

§ 1636.5 Recipient policies, procedures and recordkeeping.
Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient’s compliance with this part.

Dated: August 20, 1996.
Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.

[FR Doc. 96–21666 Filed 8–28–96; 8:45 am]
BILLING CODE 7050–01–P

45 CFR Part 1612
Restrictions on Lobbying and Certain Other Activities

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule completely revises the Legal Services Corporation’s (“Corporation” or “LSC”) regulation on lobbying, rulemaking and other restricted activities. It is intended to implement provisions in the Corporation’s FY 1996 appropriations act which prohibit recipients from engaging in any agency rulemaking, in legislative or lobbying activity or in advocacy training. The interim rule also implements statutory exceptions to the prohibitions on rulemaking and lobbying, which permit recipients to comment in public rulemaking, respond to requests from legislative and administrative bodies, and engage in State and local fund raising activities when using non-LSC funds. Finally, the interim rule continues the pre-existing prohibitions on participation in public...
The purpose of this rule is to ensure that LSC recipients and their employees do not engage in certain activities banned by the Corporation’s FY 1996 appropriations act, 110 Stat. 1321, including rulemaking, lobbying, grassroots lobbying, and advocacy training. The rule also continues existing provisions of the LSC Act that prohibit participation in public demonstrations, strikes, boycotts and organizing activities. Finally, the rule also provides guidance on when recipients may participate in public rulemaking, respond to requests from legislative and administrative bodies, and seek funds from State and local legislative bodies and administrative agencies using non-LSC funds.

Section 1612.2 Definitions

The rule significantly revises the definitions that were used in prior rules in order to reflect the new statutory restrictions and thus ensure that recipients do not engage in prohibited activity and to provide greater clarity about the scope of the restrictions. In addition, definitions have been revised or eliminated because they are no longer necessary or the prior definition defied the common sense usage of terms (such as the term “legislation,” which was defined to include administrative rulemaking).

“Grassroots lobbying” is defined to prohibit all communications and participation in activities which are designed to influence the public to contact public officials to support or oppose pending or proposed legislation. The new definition does not use the term “publicity or propaganda” which was used in prior regulations, because the FY 1996 appropriations act, 110 Stat. 1321, does not use these terms. However, the new definition of grassroots lobbying incorporates the definition of “publicity or propaganda” that was previously used. The definition also provides that “grassroots lobbying” does not include communications which are limited solely to reporting the content or status of pending or proposed legislation or regulations, or the effect which such legislation or regulations may have on eligible clients or on their legal representation.

“Legislation” means any action or proposal for action by Congress or by a State or local legislative body which is intended to prescribe law or public policy. It does not include those actions of a legislative body which adjudicate the rights of individuals under existing laws (such as action taken by a local council sitting as a Board of Zoning Appeals). The Corporation also retained the long-standing interpretation that “legislative bodies” do not include Indian Tribal Councils.

“Public policy” was defined to include an overall plan embracing the general goals and procedures of any governmental body as well as pending or proposed statutes, rules, and regulations. This term is found in this rule’s section on training and is also found in the definition of “legislation.” As used in § 1612.8 in regard to training, the modification of the definition from the prior regulation ensures that, consistent with current law, information on existing laws and regulations may be disseminated during training programs.

The definition of “political activity” is eliminated from this regulation, because the provision in which it was used in the prior rule has been deleted. The provision was deleted because it deals with electoral and partisan political activities, not lobbying activities, and is already in another LSC regulation, 45 CFR part 1608.

“Rulemaking” is defined to include the customary procedures that are used by an agency to develop and adopt proposals for the issuance of a new or revised legislative or administrative body or the revocation of regulations, or other statements of general applicability and future effect, such as notice and comment rulemaking procedures under the Federal Administrative Procedure Act or similar procedures used by State or local government agencies as well as negotiated rulemaking. Also “rulemaking” includes adjudatory proceedings that are formal adversarial proceedings intended to formulate or modify an agency policy of general applicability and future effect.

To clarify that recipients can participate in administrative proceedings adjudicating the rights of individuals, “rulemaking” does not include administrative proceedings that produce determinations that are of particular, rather than general, applicability and affect only the private rights, benefits or interests of individuals, such as social security hearings, welfare fair hearings or granting or withholding of licenses.

In addition, “rulemaking” does not include litigation or any other judicial proceedings challenging agency rules, regulations, guidelines, policies or practices. The Committee Reports accompanying H.R. 2076, the predecessor legislation to 110 Stat. 1321, the debate on the Senate consideration of the Domenici Amendment [141 Cong. Rec. 14586 et seq. (Sept. 24, 1995)] and the provisions of the McCollum-Stenholm bill, H.R. 1806, from which the restrictions on lobbying and rulemaking were taken, distinguished “lobbying” and “rulemaking” from litigation and did not contemplate prohibiting litigation.
under §§ 504(a)(2)–(6) of 110 Stat. 1321. Finally, the prohibition on rulemaking was not intended to prohibit recipients from communicating with agency personnel for the purpose of obtaining information, clarification, or interpretation of the agency’s rules, regulations, guidelines, policies or practices.

The term “public rulemaking,” which is used in § 504(e) of 110 Stat. 1231, is defined as any rulemaking proceeding that is open to the public. The term would include proceedings that are the subject of (1) notices of proposed rulemaking published in the Federal Register or similar State or local journals, (2) announcements of public hearings on proposed rules or notices of proposed rulemaking, including those that are routinely sent to interested members of the public or (3) other similar notifications to members of the public.

The term “similar procedure,” which is used in the prohibition on legislative lobbying in § 504(a)(4) of 110 Stat. 1321, is defined to mean a legislative process for the consideration of matters which by law must be determined by a vote of the electorate.

Section 1612.3 Prohibited Legislative and Administrative Activities

This section sets out the broad prohibitions on lobbying and rulemaking of §§ 504(a)(2)–(6) of 110 Stat. 1321. These prohibitions are far more extensive than those included in prior appropriations’ provisions or in the LSC Act, which permitted rulemaking activity and direct contact with legislators on behalf of clients or when engaged in self-help lobbying. The prohibitions of 110 Stat. 1321 prohibit any lobbying or rulemaking activity.

Paragraph (b) sets out the prohibitions on rulemaking and efforts to influence executive orders. Under the prohibition, recipients cannot participate in agency rulemaking proceedings such as is done through notice and comment rulemaking, and adjudications intended to formulate or modify agency policy. Paragraphs § 504(a)(6) of 110 Stat. 1321, and provides that recipients may not use any funds to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or any other device associated with an activity prohibited in paragraphs (a) and (b) in this section.

Section 1612.4 Grassroots Lobbying

This section sets out the absolute prohibition on grassroots lobbying by a recipient and its employees. There is no exception to the prohibition on grassroots lobbying. For example, none of the activities permitted under § 1612.6 may include grassroots lobbying.

Section 1612.5 Permissible Activities Using Any Funds

Because the prohibitions on lobbying and rulemaking are extensive and differ from past restrictions, the interim regulation seeks to clarify the activities that are not included within the prohibition. Previous LSC regulations on lobbying and rulemaking also listed activities that were not prohibited. Paragraph (a) provides that recipients may represent eligible clients in administrative agency proceedings that are intended to adjudicate the rights of an individual client, such as welfare and food stamp fair hearings, Social Security or SSI hearings, public housing hearings, veterans benefits hearings, unemployment insurance hearings and similar administrative adjudicatory hearings or negotiations directly involving that client’s legal rights or responsibilities, including pre-litigation negotiation and negotiation in the course of litigation.

Paragraph (b) provides that an employee of a recipient may initiate or participate in any litigation challenging agency rules, guidelines or policies, unless, of course, such litigation is otherwise prohibited by law or other Corporation regulations, such as part 1639 on welfare reform or part 1617 on class actions. The legislative history of the lobbying restrictions does not suggest that they were intended to include litigation challenging agency regulations or legislation.

Paragraph (c) includes a list of some of the other activities that are not prescribed by the prohibitions on lobbying or rulemaking. The listing includes many permissible activities that have been included in prior regulations and others about which the Corporation has received inquiries. First, recipients and employees of recipients can communicate with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency’s rules, regulations, practices, or policies.

Second, recipients and their employees can inform clients, other recipients or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations. Thus, recipients can advise clients about the effect of agency rules and policies by analyzing and explaining proposed changes and their effect, and advise clients about their right to participate on their own behalf in agency rulemaking proceedings.

Third, recipients and their employees may communicate directly or indirectly with the Corporation for any purpose, including commenting upon existing or proposed Corporation rules, regulations, guidelines, instructions and policies. Because the restriction applies to contacts with government agencies, recipients can contact LSC about any matter and comment on LSC rules, regulations or policies, since the Corporation is not a department, agency or instrumentality of the Federal Government. 42 U.S.C. 2996e(d)(1).

Fourth, recipients and their employees can participate in meetings or serve on committees of bar associations provided that no recipient resources are used to support prohibited legislative or rulemaking activities and the recipient is not identified with activities of bar associations that include such prohibited activities. This is a change from the current provisions on participation in bar association activities, which permit a recipient’s employees to use recipient funds to participate in bar activities involving otherwise prohibited advocacy, provided the employee does not engage in grassroots lobbying. This change was made because the statutory prohibitions on lobbying and rulemaking in 110 Stat. 1321 are far more extensive and restrictive than in past legislation. This rule allows recipient attorneys to participate in bar association activities, including holding an official position in a bar association, because they are permitted to participate as members of the legal profession rather than as staff attorneys. Nevertheless, the Corporation recognizes that there will be some situations where bar association activities will require the staff of a recipient to decline participation or to participate on the employee’s own time.

Fifth, recipients and their employees may advise a client of the client’s right to communicate directly with an elected official. For example, recipient staff may advise specific clients whom they are representing of the identity of their elected representatives are, about how legislation is enacted, and about the procedures for testifying. However, providing advice does not authorize recipient staff to prepare testimony for their clients or to conduct formal training sessions for clients on how to participate in lobbying or rulemaking.

Sixth, recipients and their employees may participate in activity related to the judiciary, such as the promulgation of court rules, rules of professional responsibility or disciplinary rules or participating on committees appointed
Section 1612.6 Permissible Activities Using Non-LSC Funds

This section sets out activities authorized by §§ 504 (b) and (e) of the Corporation’s FY 1996 appropriation’s act with non-LSC funds. Paragraphs (a) through (e) set out the parameters of § 504(e) and set out the records required to be maintained by recipients responding to requests from appropriate officials. Paragraph (a) provides that employees of recipients may use non-LSC funds from sources other than the Corporation to respond to a written request from a governmental agency or official thereof, elected official, legislative body, committee, or member thereof made to the employee, or to a recipient. Under no circumstances may recipients engage in any grassroots lobbying when responding to a request for information or testimony.

Paragraph (b) provides that responses to requests may be distributed only to parties that make the request or to other persons or entities to the extent that such distribution is required to comply fully with the request. For example, agencies may require that those requested to appear before an agency proceeding comply with agency or legislative rules regarding how written testimony is to be given to a legislative committee.

Paragraph (c) includes the statutory restriction that no employee of the recipient shall solicit or arrange a request from any official to testify or otherwise provide information in connection with legislation or rulemaking. In order to ensure compliance with § 504(e), paragraph (d) requires that recipients maintain copies of all written requests received by the recipient and any written responses provided and make such requests and written responses available to monitors and other representatives of the Corporation upon request.

Paragraph (e) provides that recipients may provide oral or written comment to an agency and its staff in a public rulemaking proceeding when using non-LSC funds. This provision is included in § 504(e). Recipients may prepare written comments in response to a Notice of Proposed Rulemaking in the Federal Register. In response to a similar notice in a state or local public notice, recipients may provide any notice to the general public regarding a rulemaking proceeding that is public under State or local law. Commenting in public rulemaking, however, does not permit a recipient to engage in grassroots efforts to encourage comment by other recipients or other persons.

Paragraph (f) sets out the provision of § 504(b), 110 Stat. 1321, on contacts with State and local government agencies to seek funds for program activities when using non-LSC funds. Recipients may contact, communicate with, or respond to a request from a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient. It should be noted that writing grant proposals in response to a request for proposals is not covered by this section and is not prohibited by this part. Both LSC and non-LSC funds may be used for this activity.

Section 1612.7 Public Demonstrations and Activities

This section prohibits participation in public demonstrations and related activities. Paragraph (a) prohibits any recipient employee from participating in public demonstrations, picketing, boycotts, or strikes (except as permitted by law in connection with the employee’s own employment situation) or encouraging, directing, or coercing others to engage in such activities during working hours, or while providing legal assistance or representation that is funded with LSC or private funds. This section is similar to previous regulations, but the text was rewritten to set out the prohibition more clearly.

Paragraph (b) sets out prohibitions on employee activities at any time, whether during working hours or not. These prohibitions apply to any recipient employee and apply regardless of what source of funds is used for the employee’s compensation. Thus, employees of a recipient may not engage in or encourage others to engage in (1) any rioting or civil disturbance; (2) any activity determined by a court to be in violation of an outstanding injunction of any court of competent jurisdiction; or (3) any other illegal activity that is inconsistent with an employee’s responsibilities under the LSC Act, appropriation law, Corporation regulation, or the rules of professional responsibility of the jurisdiction where the recipient is located or the employee practices law.

Minor changes in the regulatory provisions made from the previous rule. First, the prohibition on identification of the Corporation or any recipient with any political activity was removed from part 1612 because an identical prohibition is included in 45 CFR § 1608.4(b). In addition, the regulatory language used in § 1612.7(b)(2) now explicitly provides that it is a court, and not LSC, that should determine whether there has been a violation of an outstanding injunction. Finally, the regulation clarifies in § 1612.7(b)(3) that the prohibition against the participation by employees in other illegal activity refers to activity that violates the LSC Act or other appropriate law or the rules of professional responsibility in the jurisdiction where the recipient is located or the employee practices law. By clarifying what activity is proscribed, § 1612.7(b)(3) gives realistic guidance to recipients about what illegal activity would result in a violation of the LSC Act and what employee activity recipients would have to police.

Consistent with the longstanding regulatory provisions, paragraph (c) provides that the restrictions on public demonstrations, strikes, and boycotts do not prohibit an attorney working for or paid by a recipient from (1) informing and advising a client about legal alternatives to litigation or the lawful conduct thereof; or (2) taking such action on behalf of a client as may be required by professional responsibilities or applicable law of any State or other jurisdiction.

Section 1612.8 Training

This section implements the prohibitions on public policy advocacy training in § 504(a)(12) of 110 Stat. 1321. Paragraph (a) sets out the prohibition on advocacy training.

Paragraph (b) tracks other provisions of § 504(a)(12) and provides that attorneys or paralegals may be trained to prepare them to (1) provide adequate legal assistance to eligible clients and (2) inform any eligible client of the client’s rights under any statute, order or regulation already enacted, or about the meaning or significance of particular bills. In previous regulations on training, there was an explicit statement that it was permissible to train attorneys and paralegals to understand what activities are permitted or prohibited under relevant laws and regulations. This language was removed as unnecessary, since recipient staff must be trained on what they can and cannot do under LSC regulations and applicable law.

Paragraph (c) includes a final restriction to address a problem that may arise in training events sponsored or conducted by recipients or their employees. It provides that recipients or...
their employees may not conduct or participate in training programs that are designed to train participants in activities prohibited by the Act, other applicable Federal law, or Corporation regulations, guidelines or instructions.

Section 1612.9 Organizing

This section implements § 1007(b)(7), 42 U.S.C. 2996f(b)(7), of the LSC Act which prohibits organizing activities. It is essentially the same as in the prior rule but has been restructured for easier reading. Paragraph (a) provides that no funds made available by the Corporation or by private entities may be used to initiate the formation or to act as an organizer of any association, federation, labor union, coalition, network, alliance, or any similar entity. Paragraph (b) includes the two existing exceptions that were included in prior regulations. It first provides that the prohibition on organizing does not apply to informational meetings attended by persons engaged in the delivery of legal services at which information about new developments in law and pending cases or matters are discussed. Thus, recipients can establish or participate in task forces and other meetings of advocates to share information and develop more effective approaches to representation in particular subject areas. Paragraph (b) also provides that the prohibition does not apply to organizations composed exclusively of eligible clients formed for the purpose of advising a legal services programs about the delivery of legal services. Finally, paragraph (c) provides that the organizing prohibition does not prevent recipients and their employees from providing legal advice or assistance to eligible clients who desire to plan, establish or operate organizations, such as by preparing articles of incorporation and bylaws.

Section 1612.10 Recordkeeping and Accounting for Activities Funded With Non-LSC Funds

This section implements § 504(a)(6) of 110 Stat. 1321. Thus, under paragraph (a) no LSC funds may be used to pay for administrative overhead or related costs associated with any activity permitted to be undertaken with non-LSC funds by § 1612.6.

Paragraph (b) continues existing practice that requires recipients to maintain separate records documenting the expenditure of non-LSC funds for legislative and rulemaking activities permitted by § 1612.6.

Paragraph (c) provides that recipients shall submit semi-annual reports describing their non-LSC funded legislative and rulemaking activities conducted pursuant to these regulations under § 1612.6, together with such supporting documentation as specified by the Corporation. The only change from existing policy is that the period for reporting such activities has been changed from quarterly to semi-annually in order to reduce the administrative burdens on recipients.

Section 1612.11 Recipient Policies and Procedures

A new section was added to require that recipients adopt written policies and procedures to guide the recipient’s staff in compliance with the requirements of this part.

Additional Changes

The prior rule, which is superseded by this interim regulation, included § 1612.12, which set out enforcement procedures for Part 1612. Section 1612.12 was deleted because the Corporation will be developing a comprehensive enforcement regulation that will address enforcement of all regulations and restrictions. Section 1612.13, permitting the use of private funds for certain lobbying activities, was also deleted, because, under 110 Stat. 1321, all funds of a recipient are restricted and the statutory exceptions to the prohibitions in § 1612.6 make no distinction between private funds and non-LSC public funds.

List of Subjects in 45 CFR Part 1612

Civil disorders, Grant program—Law, Legal services, Lobbying.

For the reasons set forth in the preamble, LSC revises 45 CFR Part 1612 to read as follows:

PART 1612—RESTRICTIONS ON LOBBYING AND CERTAIN OTHER ACTIVITIES

Sec.

1612.1 Purpose.

1612.2 Definitions.

1612.3 Prohibited legislative and administrative activities.

1612.4 Grassroots lobbying.

1612.5 Permissible activities using any funds.

1612.6 Permissible activities using non-LSC funds.

1612.7 Public demonstrations and activities.

1612.8 Training.

1612.9 Organizing.

1612.10 Recordkeeping and accounting for activities funded with non-LSC funds.

1612.11 Recipient policies and procedures.

Authority: Sections 504(a) (2), (3), (4), (5), (6), and (12), 504 (b) and (e), Pub. L. 104–134, 110 Stat. 1321; 42 U.S.C. 2996e(b)(5); 2996f(a) (5) and (6); 2996f(b) (4), (6) and (7), and 2996g(e).

§ 1612.1 Purpose

The purpose of this rule is to ensure that LSC recipients and their employees do not engage in certain prohibited activities, including representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities. The rule also provides guidance on when recipients may participate in State or local fund raising or in public rulemaking, and when they may respond to requests of legislative and administrative officials using non-LSC funds.

§ 1612.2 Definitions.

(a)(1) Grassroots lobbying means any oral, written or electronically transmitted communication or any advertisement, telegram, letter, article, newsletter, or other printed or written matter or device which contains a direct suggestion to the public to contact public officials in support of or in opposition to pending or proposed legislation, regulations, executive decisions, or any decision by the electorate on a measure submitted to it for a vote. It also includes the provision of financial contributions by recipients to or participation by recipients in any demonstration, march, rally, fund raising drive, lobbying campaign, letter writing or telephone campaign for the purpose of influencing the course of such legislation, regulations, decisions by administrative bodies, or any decision by the electorate on a measure submitted to it for a vote.

(2) Grassroots lobbying does not include communications which are limited solely to reporting the content or status of pending or proposed legislation or regulations or the effect which such legislation or regulations may have on eligible clients or on their legal representation.

(b) Legislation means any action or proposal for action by Congress or by a State or local legislative body which is intended to prescribe law or public policy. The term includes, but is not limited to, action on bills, constitutional amendments, the ratification of treaties and intergovernmental agreements, approval of appointments and budgets, and approval or disapproval of actions of the executive. It does not include those actions of a legislative body which adjudicate the rights of individuals under existing laws; nor does it include legislation adopted by an Indian Tribal Council.

(c) Public policy means an overall plan embracing the general goals and procedures of any governmental body.
and pending or proposed statutes, rules, and regulations.

(d)(1) Rulemaking means any agency process for formulating, amending, or repealing rules, regulations or guidelines of general applicability and future effect issued by the agency pursuant to Federal, State or local rulemaking procedures, including:

(i) The customary procedures that are used by an agency to formulate and adopt proposals for the issuance, amendment or revocation of rules or other statements of general applicability and future effect, such as “notice and comment” rulemaking procedures under the Federal Administrative Procedure Act or similar procedures used by State or local government agencies and negotiated rulemaking; and

(ii) Adjudicatory proceedings that are formal adversarial proceedings to formulate or modify an agency policy of general applicability and future effect.

(2) Rulemaking does not include:

(i) Administrative proceedings that produce determinations that are of particular, rather than general, applicability and affect only the private rights, benefits or interests of individuals, such as social security hearings, welfare fair hearings or granting or withholding of licenses;

(ii) Communication with agency personnel for the purpose of obtaining information, clarification, or interpretation of the agency’s rules, regulations, guidelines, policies or practices.

(e) Public rulemaking means any rulemaking proceeding or portion of such proceeding or procedure that is open to the public through notices of proposed rulemaking published in the Federal Register or similar State or local journals, announcements of public hearings on proposed rules or notices of proposed rulemaking including those that are routinely sent to interested members of the public, or other similar notifications to members of the public;

(f) The term similar procedure refers to a legislative process by which matters must be determined by a vote of the electorate.

§ 1612.3 Prohibited legislative and administrative activities.

(a) Except as provided in §§ 1612.5 and 1612.6, recipients shall not attempt to influence—

(1) The passage or defeat of any legislation or constitutional amendment;

(2) Any initiative, or any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity;

(3) Any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or the Corporation; or,

(4) The conduct of oversight proceedings concerning the recipient or the Corporation.

(b) Except as provided in §§ 1612.5 and 1612.6, recipients shall not participate in or attempt to influence any rulemaking, or attempt to influence the issuance, amendment or revocation of any executive order.

(c) Recipients shall not use any funds to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in paragraphs (a) and (b) in this section.

§ 1612.4 Grassroots lobbying.

A recipient shall not engage in any grassroots lobbying activity.

§ 1612.5 Permissible activities using any funds.

(a) A recipient may provide administrative representation for an eligible client in a proceeding that adjudicates the particular rights or interests of such eligible client or in negotiations directly involving that client’s legal rights or responsibilities including pre-litigation negotiation and negotiation in the course of litigation.

(b) A recipient may initiate or participate in litigation challenging agency rules, regulations, guidelines or policies, unless such litigation is otherwise prohibited by law or Corporation regulations.

(c) Nothing in this Part is intended to prohibit a recipient from—

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency’s rules, regulations, practices, or policies;

(2) Informing clients, recipients, or attorneys representing eligible clients, about new or proposed statutes, executive orders, or administrative regulations;

(3) Communicating directly or indirectly with the Corporation for any purpose including commenting upon existing or proposed Corporation rules, regulations, guidelines, instructions and policies;

(4) Participating in meetings or serving on committees of bar associations, provided that no recipient resources are used to support prohibited legislative or rulemaking activities and the recipient is identified with activities of bar associations that include such prohibited activities;

(5) Advising a client of the client’s right to communicate directly with an elected official; or

(6) Participating in activity related to the judiciary, including the promulgation of court rules, rules of professional responsibility and disciplinary rules.

§ 1612.6 Permissible activities using non-LSC funds.

(a) If the conditions of paragraphs (b) and (c) of this section are met, recipients and their employees may use non-LSC funds to respond to a written request from a governmental agency or official thereof, elected official, legislative body, committee, or member thereof made to the employee, or to a recipient to—

(1) Testify orally or in writing;

(2) Provide information which may include analysis of or comments upon existing or proposed rules, regulations or legislation, or drafts of proposed rules, regulations or legislation;

(3) Testify before or make information available to commissions, committees or advisory bodies; or

(4) Participate in negotiated rulemaking under the Negotiated Rulemaking Act of 1990, 5 U.S.C. 561 et seq., or comparable State or local laws.

(b) Communications made in response to requests under paragraph (a) may be distributed only to the party or parties that make the request or to other persons or entities only to the extent that such distribution is required to comply with the request.

(c) No employee of the recipient shall solicit or arrange a request from any official to testify or otherwise provide information in connection with legislation or rulemaking.

(d) Recipients shall maintain copies of all written requests received by the recipient and written responses made in response thereto and make such requests and written responses available to monitors and other representatives of the Corporation upon request.

(e) Recipients may provide oral or written comment to an agency and its staff in a public rulemaking proceeding using non-LSC funds.

(f) Recipients may use non-LSC funds to contact or communicate with, or respond to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

§ 1612.7 Public demonstrations and activities.

(a) During working hours, while providing legal assistance or
representation to the recipient’s clients or while using resources provided by the Corporation or by private entities, no employee of a recipient shall—
(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee’s own employment situation; or
(2) Encourage, direct, or coerce others to engage in such activities.

(b) No employee of a recipient shall at any time engage in or encourage others to engage in any:
(1) Rioting or civil disturbance;
(2) Activity determined by a court to be in violation of an outstanding injunction of any court of competent jurisdiction; or
(3) Other illegal activity that is inconsistent with an employee’s responsibilities under applicable law, Corporation regulations, or the rules of professional responsibility of the jurisdiction where the recipient is located or the employee practices law.

(c) Nothing in this section shall prohibit an attorney from—
(1) Informing and advising a client about legal alternatives to litigation or the lawful conduct thereof; or
(2) Taking such action on behalf of a client as may be required by professional responsibilities or applicable law of any State or other jurisdiction.

§ 1612.8 Training.
(a) A recipient may not support or conduct training programs that—
(1) Advocate particular public policies; or
(2) Encourage or facilitate political activities, labor or anti-labor activities, picketing, strikes or demonstrations, or the development of strategies to influence legislation or rulemaking; or
(3) Disseminate information about such policies or activities.
(b) Nothing in this section shall be construed to prohibit training of any attorneys or paralegals, clients, lay advocates, or others involved in the representation of eligible clients necessary for preparing them—
(1) To provide adequate legal assistance to eligible clients; or
(2) To provide advice to any eligible client as to the legal rights of the client.

(c) No funds of a recipient shall be used to train participants to engage in activities prohibited by the Act, other applicable Federal law, or Corporation regulations, guidelines or instructions.

§ 1612.9 Organizing.
(a) No funds made available by the Corporation or by private entities may be used to initiate the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity.

(b) This section shall not be construed to apply to:
(1) Informational meetings attended by persons engaged in the delivery of legal services at which information about new developments in law and pending cases or matters are discussed; or
(2) Organizations composed exclusively of eligible clients formed for the purpose of advising a legal services program about the delivery of legal services.

(c) Recipients and their employees may provide legal advice or assistance to eligible clients who desire to plan, establish or operate organizations, such as by preparing articles of incorporation and bylaws.

§ 1612.10 Recordkeeping and accounting for activities funded with non-LSC funds.
(a) No funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with any activity listed in § 1612.6.
(b) Recipients shall maintain separate records documenting the expenditure of non-LSC funds for legislative and rulemaking activities permitted by § 1612.6.
(c) Recipients shall submit semi-annual reports describing their legislative activities with non-LSC funds conducted pursuant to § 1612.6 of these regulations, together with such supporting documentation as specified by the Corporation.

§ 1612.11 Recipient policies and procedures.
Each recipient shall adopt written policies and procedures to guide its staff in complying with this part.

Dated: August 20, 1996.
Suzanne B. Glasow,
Senior Counsel for Operations and Regulations.

[FR Doc. 96–21670 Filed 8–28–96; 8:45 am]
BILLING CODE 7550–01–P

45 CFR Part 1620
Priorities in Use of Resources

Agency: Legal Services Corporation.

Action: Interim rule with request for comments.

Summary: This interim rule completely revises the current Legal Services Corporation’s (“Corporation” or “LSC”) regulation concerning priorities. The revisions are intended to implement a restriction contained in the Corporation’s FY 1996 appropriations act, which prohibits LSC recipients from expending resources on activities that are outside their specific priorities. Although this rule is effective upon publication, the Corporation solicits public comment in anticipation of adoption of a final rule at a later time.

Dates: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

Addresses: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, DC 20002–4250.

For further information contact: Victor M. Fortuno, General Counsel, (202) 336–8910.

Supplementary information: On May 19, 1996, the Operations and Regulations Committee (“Committee”) of the LSC Board of Directors (“Board”) requested the LSC staff to prepare an interim rule to implement § 504(a)(9), a restriction in the Corporation’s FY 1996 appropriations act, Pub. L. 104–134, 110 Stat. 1321 (1996), which prohibits LSC recipients from expending resources on activities that are outside their specific priorities. The Committee held hearings on staff proposals on July 8 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3).

Accordingly, this rule is effective upon publication. However, the Corporation also solicits public comment on the interim rule for review and consideration by the Committee. After receipt of written public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Generally, this rule is revised to prohibit any recipient from expending resources on cases or matters that are not within its written priorities. The current regulation, which has not
Because the Board would need to act on determining a recipient's priorities, the relevant factors that should be carefully appraised or studied and it is an appropriate word to use because "evaluation" may be better word to use. Because engaging in an appraisal of needs as set forth in part 1620.3(b). Paragraph (c) is largely taken from the current rule and sets out the factors a recipient should consider when setting priorities. New factors include consideration of the suggested priorities that were promulgated by the Corporation on May 29, 1996, 61 FR 26934, as well as consideration of whether there is a need to vary priorities for unique parts of the service area. A recipient may serve a diverse community each of which has distinctive characteristics. The uniqueness may arise because of geographic differences, such as rural or urban areas or because of the characteristics of the clients, such as a concentration of the elderly or immigrants. Program-wide priorities may not be suitable for all recipients, and it may be necessary to set different priorities for a particular segment of the service area. The Corporation expects recipients to have interim priorities which comply with the requirements of this rule in place 90 days from the interim rule's effective date (publication date). In order to meet this deadline, recipients will not be expected to conduct a new appraisal of needs as set forth in part 1620.3(b).

Section 1620.4 Establishing a Procedure for Emergencies
This section requires a recipient's governing body to develop procedures that the staff must follow when determining whether a particular circumstance is an emergency that falls outside of the recipient's priorities. Because the Board would need to act on a change of words in this instance, the rule remains as adopted by the Board. However, comments are requested as to whether "evaluation" would be a better term.

Paragraph (c) is largely taken from the current rule and sets out the factors a recipient should consider when setting priorities. New factors include consideration of the suggested priorities that were promulgated by the Corporation on May 29, 1996, 61 FR 26934, as well as consideration of whether there is a need to vary priorities for unique parts of the service area. A recipient may serve a diverse community each of which has distinctive characteristics. The uniqueness may arise because of geographic differences, such as rural or urban areas or because of the characteristics of the clients, such as a concentration of the elderly or immigrants. Program-wide priorities may not be suitable for all recipients, and it may be necessary to set different priorities for a particular segment of the service area. The Corporation expects recipients to have interim priorities which comply with the requirements of this rule in place 90 days from the interim rule's effective date (publication date). In order to meet this deadline, recipients will not be expected to conduct a new appraisal of needs as set forth in part 1620.3(b).

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Paragraph (c) is largely taken from the current rule and sets out the factors a recipient should consider when setting priorities. New factors include consideration of the suggested priorities that were promulgated by the Corporation on May 29, 1996, 61 FR 26934, as well as consideration of whether there is a need to vary priorities for unique parts of the service area. A recipient may serve a diverse community each of which has distinctive characteristics. The uniqueness may arise because of geographic differences, such as rural or urban areas or because of the characteristics of the clients, such as a concentration of the elderly or immigrants. Program-wide priorities may not be suitable for all recipients, and it may be necessary to set different priorities for a particular segment of the service area. The Corporation expects recipients to have interim priorities which comply with the requirements of this rule in place 90 days from the interim rule's effective date (publication date). In order to meet this deadline, recipients will not be expected to conduct a new appraisal of needs as set forth in part 1620.3(b).
Paragraph (b) reflects the requirement in § 504(9)(B) that a recipient report annually to the Corporation, on a form the Corporation provides, the non-priority emergency work in which it has engaged.

Paragraph (c) contains language from the current rule instructing the recipient to report annually to the Corporation on its priorities.

List of Subjects in 45 CFR Part 1620
Legal services.

For reasons set forth in the preamble, 45 CFR Part 1620 is revised to read as follows:

PART 1620—PRIORITIES IN USE OF RESOURCES

Sec.
1620.1 Purpose.
1620.2 Definitions.
1620.3 Establishing priorities.
1620.4 Establishing a procedure for emergencies.
1620.5 Annual review.
1620.6 Signed written agreement.
1620.7 Reporting.


§ 1620.1 Purpose.

This part is designed to provide guidance to recipients for setting priorities and to ensure that a recipient’s governing body adopts written priorities for the types of cases and matters, including emergencies, to which the staff will limit its commitment of time and resources.

§ 1620.2 Definitions.

(a) A case is a form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients, including, without limitation, providing representation in litigation, administrative proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual Private Attorney Involvement (PAI) cases.

(b) A matter is an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of one or more specific clients. Examples of matters include both direct services, such as community education presentations, operating pro se clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services, such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, intake when no case is undertaken, and tracking substantive law developments.

§ 1620.3 Establishing priorities.

(a) The governing body of a recipient must adopt procedures for establishing priorities for the use of all of its Corporation and non-Corporation resources and must adopt a written statement of priorities, pursuant to those procedures, that determines the cases and matters which are to be undertaken by the recipient.

(b) The procedures adopted must include an effective appraisal of the needs of eligible clients in the geographic area served by the recipient, and their relative importance, based on information received from potential or current eligible clients solicited in a manner reasonably calculated to obtain the views of all significant segments of the client population. The appraisal must also include and be based on information from the recipient’s employees, governing body members, the private bar, and other interested persons. The appraisal should address the need for outreach, training of the recipient’s employees, and support services.

(c) The following factors should be among those considered by the recipient in establishing priorities:

(1) Suggested priorities promulgated by the Legal Services Corporation;
(2) The appraisal described in paragraph (b) of this section;
(3) The population of eligible clients in the geographic areas served by the recipient, including all significant segments of that population with special legal problems or special difficulties of access to legal services;
(4) The resources of the recipient;
(5) The availability of another source of free or low-cost legal assistance in a particular category of cases or matters;
(6) The availability of other sources of training, support, and outreach services;
(7) The relative importance of particular legal problems of the individual clients of the recipient;
(8) The susceptibility of particular problems to solution through legal processes;
(9) Whether legal efforts by the recipient will complement other efforts to solve particular problems in the area served;
(10) Whether legal efforts will result in efficient and economic delivery of legal services; and
(11) Whether there is a need to establish different priorities in different parts of the recipient’s service area.

§ 1620.4 Establishing a procedure for emergencies.

(a) The governing body of a recipient must adopt procedures for undertaking emergency cases or matters that are not within the recipient’s established priorities. An emergency may include a case or matter requiring immediate legal action, circumstances involving the necessities of life, a significant risk to the health or safety of the client or immediate family members, or issues that arise because of new and unforeseen circumstances, such as natural disasters or unanticipated changes in the law.

(b) Pursuant to procedures adopted by the governing body, the recipient’s Executive Director or designee shall determine whether a particular case or matter not within the recipient’s established priorities constitutes an emergency that may be undertaken by the recipient. The following factors may be among those considered by the Executive Director or designee:

(1) The time period in which action must be taken to protect the client’s interest;
(2) The severity of the consequences to the client if no action is taken;
(3) The likelihood of success if urgent legal action is taken;
(4) The capacity of another source of free or low-cost legal assistance to undertake the particular case;
(5) The effect the problem presented by the emergency case or matter will have on the client community; and
(6) The consequences of diverting resources from existing priority cases or matters.

§ 1620.5 Annual review.

(a) Priorities shall be set periodically and shall be reviewed by the governing body of the recipient annually or more frequently if the recipient has accepted a significant number of emergency cases.

(b) The following factors should be among those considered in determining whether the recipient’s priorities should be changed:

(1) The extent to which the objectives of the recipient’s priorities have been accomplished;
(2) Changes in the resources of the recipient;
(3) Changes in the size, distribution, or needs of the eligible client population; and
(4) The volume of emergency cases or matters in a particular legal area since priorities were last reviewed.

§ 1620.6 Signed written agreement.

All staff who handle cases or matters, or are authorized to make decisions...
about case acceptance, must sign a simple agreement developed by the recipient which indicates that the signatory:
(a) Has read and is familiar with the priorities of the recipient;
(b) Has read and is familiar with the definition of an emergency situation and the procedures for dealing with an emergency that have been adopted by the recipient; and
(c) Will not undertake any case or matter for the recipient that is not a priority or an emergency.

§ 1620.7 Reporting.
(a) The recipient shall report to the recipient's governing body on a quarterly basis information on all emergency cases or matters undertaken that were not within the recipient's priorities, and shall include a rationale for undertaking each such case or matter.
(b) The recipient shall report annually to the Corporation in a form provided by the Corporation, information on all emergency cases or matters undertaken that were not within the recipient's priorities.
(c) The recipient shall submit to the Corporation and make available to the public an annual report summarizing the review of priorities; the date of the most recent appraisal; the timetable for the future appraisal of needs and evaluation of priorities; mechanisms which will be utilized to ensure effective client participation in priority-setting; and any changes in priorities.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations and Regulations.

[FR Doc. 96-21667 Filed 8-28-96; 8:45 am]
BILLING CODE 7050-01-P

45 CFR Part 1626
Restrictions on Legal Assistance to Aliens

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule completely revises the Legal Services Corporation's ("LSC" or "Corporation") regulation on the provision of legal assistance to aliens. The revisions are intended to implement a new restriction contained in the Corporation's FY 1996 appropriations act prohibiting LSC-funded recipients from providing legal assistance to ineligible aliens, regardless of the source of funds used to finance the legal assistance. Although this rule is effective upon publication, the Corporation solicits public comment on the interim rule in anticipation of adoption of a final rule at a later date.

DATES: The interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street, NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, at (202) 336-8910.

SUPPLEMENTARY INFORMATION: Section 504(a)(11) of the Legal Services Corporation's ("LSC") or "Corporation") appropriations act for Fiscal Year 1996, Pub. L. 104-134, 110 Stat. 1321 (1996), prohibits the Corporation from providing funds to any person or entity ("recipient") that provides legal assistance to ineligible aliens. The current rule, which expressly allows recipients to use their non-LSC funds to provide legal assistance to ineligible aliens, is inconsistent with § 504(a)(11), which effectively restricts a recipient's non-LSC funds to the same degree it restricts LSC funds.

On May 19, 1996, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement the new restriction. The Committee held public hearings on staff proposals on July 9 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation solicits public comment on the interim rule for review and consideration by the Corporation. After receipt of written public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued that will supersede this interim rule.

This rule completely revises the prior rule. In general, the revisions implement section 504(a)(11) of the Corporation's FY 1996 appropriations act, which prohibits LSC-funded recipients from providing legal assistance to ineligible aliens.

A section-by-section discussion of this interim rule is provided below.

Section 1626.1 Purpose

This section is revised to ensure that recipients refrain from providing legal assistance to ineligible aliens. In addition, language has been deleted from the prior rule that limited the requirements of the rule to LSC funds. It continues to be a purpose of this rule to assist recipients in determining the eligibility of persons seeking legal assistance. This rule deletes reference to the confidentiality of client records. Confidentiality issues will be dealt with separately when the Corporation issues regulations generally dealing with access to client records.

Section 1626.2 Definitions

The definitions of "eligible alien" and "ineligible alien" have been changed but the changes do not alter the substantive meaning of the terms. They are intended to simplify the definitions and to delete references to outdated statutory authority.

Section 1626.3 Prohibition

This section sets out the rule's general prohibition against the provision of legal assistance to ineligible aliens. All references that limit the prohibition to LSC funds have been deleted. In addition, since the prior rule's language was confusing, the prohibition has been restated more directly and simply.

Aside from expanding the prohibition to non-LSC funds, there is no substantive change of meaning intended. Accordingly, the definition of "prohibited legal assistance for an ineligible alien" has been deleted, because it simply means legal assistance to an ineligible alien and that is now clear in the prohibition.

The definition of "prohibited legal assistance on behalf of an ineligible alien" has not been deleted or revised. This definition clarifies that recipients may not become involved in the provision of legal services that would benefit an ineligible alien by naming as the client an eligible alien whose distinct legal rights or interest are not affected by the representation.

Finally, the title of the section has been shortened.
Section 1626.4 Alien Status and Eligibility

This section sets out the categories of aliens eligible for legal services. The paragraphs have been redesignated, and a new paragraph (e) has been added to cross-reference other sections of the rule which designate other categories or types of aliens eligible for legal assistance.

Section 1626.5 Verification of Citizenship and Eligible Alien Status

No revisions have been made to this section. However, if necessary, the Corporation will update this section to reflect the current documents used by the INS to verify categories of aliens. The Corporation requests comments on whether the types of documents listed in this section need revision or updating and whether there are other documents that should be included in the rule.

Section 1626.6 Change in Circumstances

The prior § 1626.6 has been deleted because it allowed the use of non-LSC funds for pending cases involving representation of ineligible aliens. Recipients may no longer use non-LSC funds for ineligible aliens, and the underlying statutory prohibition provides no basis for a waiver of the prohibition. The new § 1626.6 is a revised version of the prior § 1626.7. This new section reflects the new statutory restriction that recipients may not provide legal assistance to ineligible aliens with non-LSC funds. It provides that, if a recipient learns that an eligible alien client becomes ineligible through a change in circumstances, the recipient must discontinue representation of the client consistent with the attorney's professional responsibilities.

Section 1626.7 Special Eligibility Questions

This section was § 1626.10 in the prior rule. Only technical changes have been made to this section.

Section 1626.8 H-2 Agricultural Workers

This section was numbered § 1626.11 in the prior rule. Only technical changes have been made to this section.

Section 1626.9 Replenishment Agricultural Workers

This section was numbered § 1626.12 in the prior rule. It is redesignated as § 1626.9.

Section 1626.10 Recipient Policies, Procedures and Recordkeeping

This new section requires that recipient governing bodies establish written policies and procedures that will guide recipient staff to ensure compliance with this rule. It also requires the recipient to maintain records sufficient to document compliance with this part.

List of Subjects in 45 CFR Part 1626

Aliens, Grant programs—law, Legal services, Migrant labor, Reporting and record keeping requirements.

For reasons set forth in the preamble, 45 CFR part 1626 is revised to read as follows:

PART 1626—RESTRICTIONS ON LEGAL ASSISTANCE TO ALIENS

§ 1626.1 Purpose.

This part prohibits recipients from providing legal assistance for or on behalf of ineligible aliens. It is also designed to assist recipients in determining the eligibility and immigration status of persons who seek legal assistance and to provide guidelines for referral of ineligible persons.

§ 1626.2 Definitions.

(a) Eligible alien means a person who is not a U.S. citizen but who meets the requirements of § 1626.4.

(b) Ineligible alien means a person who is not a U.S. citizen and who does not meet the requirements of § 1626.4.

(c) Rejected refers to an application for adjustment of status that has been denied by the Immigration and Naturalization Service (INS) and is not subject to further administrative appeal.

(d) To provide legal assistance on behalf of an ineligible alien is to render legal assistance to an eligible client who benefits an ineligible alien and does not affect a specific legal right or interest of the eligible client.

§ 1626.3 Prohibition.

Recipient may not provide legal services for or on behalf of an ineligible alien beyond normal intake and referral services.

§ 1626.4 Alien status and eligibility.

Subject to all other eligibility requirements and restrictions of the LSC Act and regulations and other applicable law, a recipient may provide legal assistance to an alien who is present in the United States and who is within one of the following categories:

(a) An alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(20) of the Immigration and Nationality Act (INA) (8 U.S.C. 1101(a)(20));

(b) An alien who is either married to a United States citizen or is a parent or an unmarried child under the age of 21 of such a citizen and who has filed an application for adjustment of status to permanent resident under the Immigration and Nationality Act, and such application has not been rejected;

(c) An alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157 relating to refugee admissions) or who has been granted asylum by the Attorney General under section 208 of the Immigration and Nationality Act (8 U.S.C. 1158), or who is lawfully present in the United States as a result of being granted conditional entry pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)) before April 1, 1980, because of persecution or fear of persecution on account of race, religion, or political opinion or because of being uprooted by catastrophic natural calamity;

(d) An alien who is lawfully present in the United States as a result of the Attorney General's withholding of deportation pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)); or

(e) An alien who meets the requirements of § 1626.7, 1626.8 or 1626.9.

§ 1626.5 Verification of citizenship and eligible alien status.

(a) A citizen seeking representation shall attest in writing in a form approved by the Corporation to the fact of his or her United States citizenship. Verification of citizenship shall not be required unless a recipient has reason to doubt that a person is a United States citizen.

(1) If verification is required, a recipient shall accept the original or a certified copy of any of the following documents as evidence of citizenship:

(i) United States passport;

(ii) Birth certificate;

(iii) Naturalization certificate;

(iv) United States Citizenship Identification Card (INS Form 1–197); and

(v) Baptismal certificate showing place of birth within the United States.
that such form was filed with INS.

(2) An alien is related to such a United States citizen; or in lieu of the above, a proof that the alien's parent is a United States citizen; or in lieu of the above, a proof that the alien is a child under the age of 21; a copy of the alien's United States birth certificate, baptismal certificate, adoption decree, or other documents demonstrating that the alien is a child under the age of 21; a copy of the alien's birth certificate, baptismal certificate, adoption decree, or other documents demonstrating that the alien is a child under the age of 21; a copy of the alien's marriage certificate accompanied by proof of the spouse's U.S. citizenship; a copy of the United States birth certificate, baptismal certificate, adoption decree or other documents demonstrating that the alien is the parent of a United States citizen under the age of 21; a copy of the alien's birth certificate, baptismal certificate, adoption decree, or other documents demonstrating that the alien is a child under the age of 21, accompanied by proof that the alien's parent is a United States citizen; or in lieu of the above, a copy of the Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa (INS Form 1–130) containing information that demonstrates that the alien is related to such a United States citizen spouse, parent, or child, accompanied by a notarized statement that such form was filed with INS. (3) An alien in the category specified in §1626.4(c) shall present an Arrival-Departure Record (INS Form 1–94) marked “section 207” or “Refugee” (if claiming refugee status), “section 208” or “Asylum” (if claiming asylum status), or “section 203(a)(7)” or “conditional entry” (if claiming conditional entrant status). (4) An alien in the category specified in §1626.4(d) shall present an Arrival-Departure Record (INS Form 1–94) marked “section 243(h),” or a court order or letter signed by an immigration judge stating that the Attorney General is withholding deportation of the alien. (5) A recipient may also accept any other authoritative document issued by INS that provides evidence of alien status for the categories of aliens listed in paragraph (b) of this section.

(c) A Temporary Resident Card (INS Form 1–688) shall be considered evidence of eligible alien status in the case of an alien who has obtained an adjustment in status under the General Amnesty provisions of Immigration Reform and Control Act (IRCA), 8 U.S.C. 1255a, unless the alien can qualify independently under another exception to the general restriction as stated in §1626.4(a), (b), (c), or (d). (d) A recipient shall upon request furnish each person seeking legal assistance with a list of the documents described in this section. Persons applying for legal assistance are responsible for producing the appropriate documents to verify eligibility.

(e) In an emergency, legal services may be provided prior to compliance with all the requirements of §1626.5(a) through (d) if: (1) It is not feasible for a citizen or an alien to come to the recipient's office or otherwise physically transmit documentation to the recipient before commencement of representation, such required information as can be obtained orally shall be recorded by the recipient and written documentation shall be submitted as soon as possible; (2) An alien is physically present, but cannot produce required documentation, he or she shall make a written statement identifying the category listed in §1626.4 under which he or she claims eligibility and the documents that will be produced to verify that status; this documentation shall be submitted as soon as possible; (3) The alien is strictly to the same criteria for emergency assistance used in their general determination of priorities and uses the procedures of §1626.5(e) only in cases meeting these criteria; and (4) The recipient informs clients accepted under these procedures that only limited emergency legal assistance may be provided without satisfactory documentation and that failure or inability to produce satisfactory documentation will compel the recipient to discontinue representation consistent with the recipient's professional responsibilities as soon as the emergency no longer exists.

(f) No written verification is required when the only service provided for an eligible alien or citizen is brief advice and consultation by telephone. The term “brief advice” is limited to advice provided by telephone and does not include a continuous representation of a client.

§1626.6 Change in circumstances.

If, to the knowledge of the recipient, a client who was an eligible alien becomes ineligible through a change in circumstances, a recipient must discontinue representation of the client consistent with the applicable rules of professional responsibility.

§1626.7 Special eligibility questions.

(a) The alien restriction in §1626.3 is not applicable to the following: (1) Citizens of the following Pacific Island entities: (i) Commonwealth of the Northern Marinas; (ii) Republic of Palau; (iii) Federated States of Micronesia; (iv) Republic of the Marshall Islands; (2) All Canadian-born American Indians at least 50% Indian by blood; (3) Members of the Texas Band of Kickapoo.

(b) An alien who qualified as a special agricultural worker and whose status is adjusted to that of temporary resident alien under the provisions of IRCA is considered a permanent resident alien for all purposes except immigration under the provisions of section 302 of Pub. L. 99–603, 100 Stat. 3422, 8 U.S.C. 1160(g). Since the status of these aliens is that of permanent resident aliens under section 1101(a)(20) of Title 8, these workers may be provided legal assistance. These workers are ineligible for legal assistance in order to obtain the adjustment of status of temporary resident under IRCA, but are eligible for legal assistance after the application for adjustment of status to that of temporary resident has been filed, as long as such application has not been rejected and the applicant is eligible for services under §1626.4(b).
§ 1626.8 H–2 Agricultural workers.
(b) The following matters which arise under the provisions of the worker’s specific employment contract may be the subject of legal assistance by an LSC-funded program:

(1) Wages;

(2) Housing;

(3) Transportation; and

(4) Other employment rights as provided in the worker’s specific contract under which the nonimmigrant worker was admitted.

§ 1626.9 Replenishment agricultural workers.
Aliens who acquire the status of aliens lawfully admitted for temporary residence as replenishment agricultural workers under section 210A(c) of the Immigration and Nationality Act, such status not having changed, are considered to be aliens described in 8 U.S.C. 1101(a)(20) and thus may receive legal assistance, if otherwise eligible.

§ 1626.10 Recipient policies, procedures and recordkeeping.
Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient’s compliance with this part.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.

45 CFR Part 1627
Subgrants and Dues

AGENCY: Legal Services Corporation.
ACTION: Interim rule with request for comments.

SUMMARY: This interim rule amends the fees and dues provisions of the Legal Services Corporation’s (“Corporation” or “LSC”) regulation concerning subgrants, fees and dues. The revisions are intended to implement a restriction contained in the Corporation’s FY 1996 appropriations act which prohibits the use of LSC funds to pay membership dues to any private or nonprofit organization. Although this rule is effective upon publication, the Corporation also solicits public comment in anticipation of adoption of a final rule at a later time. The provisions of the rule regarding subgrants have not been revised.

DATES: This interim rule is effective August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, DC 20002–4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336–8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee (“Committee”) of the LSC Board of Directors (“Board”) requested the LSC staff to prepare an interim rule to implement § 505, a restriction in the Corporation’s FY 1996 appropriations act, Pub. L. 104–134, 110 Stat. 1321 (1996), which prohibits use of LSC funds to pay dues to any private or nonprofit organization. The Committee held public hearings on July 9 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the interim rule for review and consideration by the Committee. After receipt of public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued that will supersede this interim rule.

This interim rule revises only provisions relating to “fees and dues”: §§ 1627.2, 1627.4, 1627.7, and 1627.8. In § 1627.2, the definition of “fees and dues” has been replaced by a definition of “dues.” Section 1627.4 has been completely revised. Section 1627.7 has been deleted, because it duplicates 45 CFR § 1612.9. Section 1627.8 of the prior rule has been renumbered as § 1627.7, and a new § 1627.8 is added regarding policies, procedures, and recordkeeping. Also, the title of this rule has been revised to “Subgrants and dues.”

Generally, the revisions prohibit any use of LSC funds to pay membership dues to any private or nonprofit organization. The prior provisions allowed recipients to pay such dues, subject to certain limitations as to type of organization and amount of dues. Payment of dues with non-LSC funds continues to be permitted.

Finally, §§ 1627.1, 1627.3, 1627.5 and 1627.7 are not revised or reprinted here, because they deal exclusively with subgrants.

A section-by-section discussion of this interim rule is provided below.

Section 1627.2 Definitions
The definition of “Fees and dues” in § 1627.2(c) is revised and retitled “Dues.” Only “dues” is defined. “Fees” is not separately defined, because the statutory provision in § 505 of the Corporation’s appropriations act refers only to “dues” and there is no statutory restriction on “fees.” Moreover, even though the prior rule defined “fees and dues” together, the definition only related to “dues.” Consequently, although the definition in the revised rule is basically the same as in the prior rule, it omits the term “fees.”

Dues are defined as payments for membership or to acquire voting or participatory rights in an organization. This definition does not include payments for training sessions, goods, research materials and other such services. LSC funds may be expended for such services, provided the expenditures are made in accordance with applicable regulations, including 45 CFR Part 1630.

Section 1627.4 Dues
This section is entirely revised to prohibit any use of LSC funds for payment of dues to private or nonprofit organizations. This prohibition includes payment of dues for employees and volunteer attorneys to voluntary bar associations that are private or nonprofit organizations.

The prohibition does not extend to the payment of dues to governmental bodies. Thus, payment of dues to a State Supreme Court or to a bar association acting as an administrative arm of the court or in some other governmental capacity in collecting dues that are a requirement for an attorney to practice in that State is deemed to be payment...
of dues to a governmental body, and is not prohibited by this part.

Finally, this section expressly states that these new limitations on payment of dues apply only to the use of LSC funds.

Several provisions in the prior rule have been deleted because they are inconsistent with the new statutory prohibition. Thus, all references to the circumstances under which recipients could use LSC funds to pay for dues, and all references to procedures required of recipients before they could expend funds for certain payments of dues, are no longer applicable, because the new legislation prohibits the use of any LSC funds to pay dues. Thus, the provisions are no longer relevant.

Section 1627.7 Tax Sheltered Annuities, Retirement Accounts and Pensions

Section 1627.8 of the prior rule is now renumbered as § 1627.7.

Section 1627.8 Recipient Policies, Procedures and Recordkeeping

This new section requires recipients to establish policies and procedures and to maintain records to document compliance with the requirements of this part.

List of subjects in 45 CFR part 1627

Grant programs—law, Legal services. For reasons set forth in the preamble, 45 CFR part 1627 is amended as follows:

PART 1627—SUBGRANTS AND DUES

1. The heading of part 1627 is revised to read as set forth above.

2. The authority citation for part 1627 is revised to read as follows:


3. Section 1627.2(c) is revised to read as follows:

§ 1627.2 Definitions.

(c) Dues as used in this part means payments to an organization on behalf of a program or individual to be a member thereof, or to acquire voting or participatory rights therein.

4. Section 1627.4 is revised to read as follows:

§ 1627.4 Dues.

(a) Corporation funds may not be used to pay dues to any private or nonprofit organization, whether on behalf of a recipient or an individual.

(b) Paragraph (a) of this section does not apply to the payment of dues mandated as a requirement of practice by a governmental organization or to the payment of dues from non-LSC funds.

5. Section 1627.7 is revised to read as follows:

§ 1627.7 Tax sheltered annuities, retirement accounts and pensions.

No provision contained in this part shall be construed to affect any payment by a recipient on behalf of its employees for the purpose of contributing to or funding a tax sheltered annuity, retirement account, or pension fund.

6. Section 1627.8 is revised to read as follows:

§ 1627.8 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient’s compliance with this part.

Dated: August 20, 1996.

Suzanne B. Glasow, Senior Counsel for Operations & Regulations.

[FR Doc. 96–21665 Filed 8–28–96; 8:45 am]
BILLING CODE 7000–01–P

45 CFR Part 1637

Representation of Prisoners

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule implements a restriction in the Legal Services Corporation’s (“LSC” or “Corporation”) FY 1996 appropriations act which prohibits recipients from participating in any litigation on behalf of prisoners. Although this interim rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St, NE., 11th Floor, Washington, DC 20002–4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336–8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee (“Committee”) of the LSC Board of Directors (“Board”) requested the LSC staff to prepare an interim rule to implement § 504(a)(15), a restriction in the Corporation’s FY 1996 appropriations act, Public Law 104–134, 110 Stat. 1321 (1996), which prohibits participation of LSC recipients in any litigation on behalf of a person incarcerated in a Federal, State or local prison. The Committee held hearings on staff proposals on July 9 and 19 and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the interim rule for review and consideration by the Committee. After receipt of public comment, the Committee intends to hold public hearings to discuss the written comments and to hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Generally, this rule prohibits any recipient involvement in litigation on behalf of persons who are incarcerated in a Federal, State or local prison. A section-by-section discussion of this interim rule is provided below.

Section 1637.1 Purpose

This rule is intended to ensure that LSC recipients do not litigate on behalf of any person who is incarcerated in a Federal, State or local prison.

Section 1637.2 Definitions

The statutory restriction prohibits LSC recipients from participating in any litigation on behalf of a person who is incarcerated in a Federal, State or local prison. To provide guidance regarding the reach of this restriction, the definition section defines the terms “incarcerated” and “Federal, State or local prison.”

“Incarcerated” is defined as the involuntary physical restraint in a facility dedicated to such restraint of a person who has been arrested for or convicted of a crime. The term “Federal, State or local prison” refers to any facility maintained by a governmental authority for purposes of housing persons who are incarcerated.

The definition section also provides that pretrial detainees even though they are persons who have not been convicted of a crime.
Conversely, it does not apply to parolees and probationers, even though they are persons who have been convicted of a crime and who are still under the jurisdiction of the corrections department, because they are no longer physically held in custody in a prison. The definitions would include persons who are held involuntarily in a mental health facility if they were committed as a result of their arrest for a crime. On the other hand, a person held in a mental health facility because of a civil commitment would not be incarcerated and could be represented. The term would also not include juvenile offenders who have not been charged as adults because charges against juveniles are generally considered to be civil in nature.

Intermittent imprisonment poses close questions, which would be resolved on a case-by-case basis, determined by whether the person is predominantly incarcerated or free. For example, persons on furlough or on daytime work release should be considered to be incarcerated; however, persons serving a term of successive weekends in prison would be considered not to be incarcerated.

"Federal, State or local prison" is defined as a facility that is maintained under governmental authority for purposes of housing persons who are incarcerated. It includes private facilities under contract with State corrections departments to house convicted criminals. It also includes local jails.

Section 1637.3 Prohibition
This section states the prohibition on participation in litigation or administrative proceedings challenging the conditions of incarceration on behalf of a person who is incarcerated. It includes private facilities under contract with State corrections departments to house convicted criminals. It also includes local jails.

Section 1637.4 Change in Circumstances
This section addresses the situation where there is a change of circumstances after litigation is undertaken on behalf of an eligible client and the individual becomes incarcerated. Such a change poses a practical problem on which the regulation seeks to provide guidance. When a program learns that its client has become incarcerated in a prison, it must use its best efforts to discontinue representation of the individual. Incarceration, however, may be of short duration and, in some circumstances, by the time the recipient has succeeded in withdrawing from the matter consistent with its ethical duty to the client, the incarceration may have ended and with it the basis for the prohibition. To address such a situation, the rule provides an exception to the general prohibition. The exception would allow the recipient's attorney to continue representation when the anticipated duration of the incarceration is likely to be brief and the litigation will outlast the period of the incarceration. As a guideline, the recipient should consider incarceration which is expected to last less than 3 months to be brief.

When incarceration has occurred after litigation has begun and its duration is uncertain, there may be circumstances where a court will not permit withdrawal in spite of the recipient's best efforts to do so, generally because withdrawal would prejudice the client and is found to be inconsistent with the recipient's professional responsibilities. Whether continued representation in such circumstances would be deemed to violate the regulation will be determined on a case-by-case basis. Recipients should, however, document their efforts to withdraw and renew the effort if it appears that the incarceration will be of longer duration than originally anticipated.

During the period in which the recipient is seeking alternate counsel or other proper ways to conclude its involvement in such litigation, it may file such motions as are necessary to preserve its client's rights in the matter under litigation. The recipient may not file any additional, related claims on behalf of that client, however, unless failure to do so would jeopardize an existing claim or right of the client.

Section 1637.5 Recipient Policies, Procedures and Recordkeeping
This section requires recipients to establish written policies and procedures to ensure compliance with this part. Recipients are also required to maintain documentation adequate to demonstrate compliance with this part.

List of Subjects in 45 CFR Part 1637
Grants-programs-law; Legal Services; Prisoner litigation.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1637 as follows:

PART 1637—RESTRICTION ON LITIGATION ON BEHALF OF PRISONERS

Sec. 1637.1 Purpose.
1637.2 Definitions.
1637.3 Prohibition.
1637.4 Change in circumstances.
1637.5 Recipient policies, procedures and recordkeeping.


§ 1637.1 Purpose.
This part is intended to ensure that recipients do not participate in any litigation on behalf of persons incarcerated in Federal, State or local prisons.

§ 1637.2 Definitions.
(a) Incarcerated means the involuntary physical restraint, in a facility dedicated to such restraint, of a person who has been arrested for or convicted of a crime.
(b) Federal, State or local prison means any facility maintained under governmental authority for purposes of housing persons who are incarcerated.

§ 1637.3 Prohibition.
A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

§ 1637.4 Change in circumstances.
If, to the knowledge of the recipient, a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration.

§ 1637.5 Recipient policies, procedures and recordkeeping.
Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: August 20, 1996.
Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.
[FR Doc. 96–21663 Filed 8–28–96; 8:45 am]
BILLING CODE 7050–01–P

45 CFR Part 1638

Restriction on Solicitation

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a restriction contained in the Legal Services Corporation’s (“LSC” or “Corporation”) FY 1996
A section-by-section discussion of this interim rule is provided below.

Section 1638.1 Purpose
The purpose of this new rule is to ensure that recipients do not obtain clients through in-person unsolicited advice to seek legal representation or to take legal action.

Section 1638.2 Definitions
This section defines "in-person" to include a face-to-face conversation and other personal contacts such as a personal letter or telephone call. While the ordinary meaning of "in-person" is limited to "face-to-face" contacts, for the purposes of this part, a personal letter or phone call from a recipient or a recipient's employee to an individual advising that individual to obtain counsel or take legal action would constitute "in person" advice.

"Unsolicited advice" is defined as advice to obtain counsel or take legal action given by a recipient or employee to an individual with whom the recipient does not have an attorney-client relationship or who did not seek legal advice or assistance from the recipient. It does not include advice to obtain counsel or take legal action that an individual receives from others such as social workers, judges or neighbors.

Section 1638.3 Prohibition
This section prohibits LSC recipients and their employees from representing any individuals to whom they have given in-person unsolicited advice. It also prohibits recipients and their employees who have given such advice from referring the person receiving the advice to another LSC recipient. A recipient may, however, refer a person who has received unsolicited advice from one of the recipient's employees to a private attorney who takes the case pro bono, but the recipient may not count the case toward its private attorney involvement requirement as set out in 45 CFR Part 1614.

Section 1638.4 Permissible Activities
While recipients are prohibited from soliciting clients, there is a continuing need for community legal education about laws that affect clients and about the service provided by the program. This section explicitly notes, therefore, that it is permissible to participate in community legal education activities such as outreach activities, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications and giving presentations to groups that request it. These activities may include descriptions of legal rights and responsibilities, and descriptions of the recipient's services as well as ways to access the services. An individual who seeks assistance from the recipient after these activities may be represented provided that the request did not result from in-person unsolicited advice.

Section 1638.5 Recipient Policies
This section requires that recipients establish written policies to implement the requirements of this part.

List of Subjects in 45 CFR Part 1638
Grant programs; Law; Legal services; Solicitation.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1637 as follows:

45 CFR PART 1638—RESTRICTION ON SOLICITATION

Sec. 1638.1 Purpose.
This part is designed to ensure that recipients and their employees do not solicit clients.

1638.2 Definitions.
(a) In-person means a face-to-face encounter or a personal encounter via other means of communication such as a personal letter or telephone call.
(b) Unsolicited advice means advice to obtain counsel or take legal action given by a recipient or its employee to an individual who did not seek the advice or with whom the recipient does not have an attorney-client relationship.

1638.3 Prohibition.
(a) Recipients and their employees are prohibited from representing a client as a result of in-person unsolicited advice.
(b) Recipients and their employees are also prohibited from referring to other recipients individuals to whom they have given in-person unsolicited advice.

1638.4 Permissible activities.
(a) This part does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services and intake procedures through community legal education activities such as outreach, public service
announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request it. 

(b) A recipient may represent an otherwise eligible individual seeking legal assistance from the recipient as a result of information provided as described in § 1638.4(a), provided that the request has not resulted from in-person unsolicited advice.

§ 1638.5 Recipient policies.

Each recipient shall adopt written policies to implement the requirements of this part.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.

5 U.S.C. §§ 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the rule for review and consideration by the Committee. After receipt of public comments, the Committee intends to hold public hearings to discuss written comments and hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

A section-by-section discussion of this interim rule is provided below.

Section 1639.1 Purpose

The purpose of this new rule is to ensure that LSC recipients do not initiate litigation or challenge or participate in any effort to reform a Federal or State welfare system. Although this rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, DC 20002–4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel (202) 336–8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee (“Committee”) of the LSC Board of Directors (“Board”) requested the LSC staff to prepare an interim rule to implement § 504(a)(16) of the Corporation’s FY 1996 appropriations act, Pub. L. 104–134, 110 Stat. 1321 (1996), which restricts recipients of LSC funds from initiating legal representation or participating in any other way involving efforts to reform a Federal or State welfare system. The Committee held hearings on July 10 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. §§ 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

Finally, the definition would include State General Assistance, General Relief, Direct Relief, Home Relief or similar state means-tested programs for basic subsistence, State means-tested programs with substantially revised legislative or administrative officials. Federal or State welfare system does not include other Federal programs such as: the Job Training Partnership Act and pending legislation that would revise and consolidate job training, vocational education, and other training programs such as the Workforce Development Act; the Food Stamp Program, adult nutrition programs, child nutrition programs, Women and Infants Care (WIC) program, and the school lunch program; Social Security and Supplemental Security Income; Medicare; Medicaid; Workforce Development Insurance; Veterans Benefits; Child Support Enforcement; and child welfare programs including adoption assistance, foster care and termination of parental rights.

Reform of a Federal or State welfare system means an effort or action initiated or undertaken to effect legislative or regulatory proposals for changes in key components of the Federal or State welfare system. For example, Federal legislative proposals to block grant the AFDC program and State legislative or regulatory proposals which implement any new Federal
block grant would be a reform of the Federal or State welfare system. State legislative or regulatory efforts to develop AFDC demonstration programs under Federal waiver authority and State efforts to eliminate or modify a State General Assistance program would also be reform.

The regulation focuses on "key" components of a Federal or State welfare system because the statute references the "welfare system," as distinguished from any particular provision of a welfare law or regulation. A change to a "key component" would cause a fundamental restructuring of the AFDC or General Assistance program such as the Federal proposals to block grant the AFDC program or waiver proposals to eliminate the AFDC programs and replace them with a new program that offers eligible families a subsidized job or a position in a work program. A "key component" would also include changes that would not fundamentally restructure the welfare system but would make significant changes in how the system operates, such as proposals or enactments in recent welfare reform waivers which: (1) impose time limits on the receipt of AFDC or General Assistance; (2) require work in exchange for receipt of assistance; (3) deny benefits increases for additional children ("family cap"); or (4) require teen parents to reside at home or to regularly attend school. Recipients may not initiate litigation challenging regulations or legislation incorporating these policies.

A "key component" would not include technical or isolated changes in Federal or State welfare laws or regulations that are not made as part of an effort to change the basic structure of a welfare system or how a welfare system functions. For example, a change in an agency's child care reimbursement policy or a change in what assets are used to determine eligibility would not be a "key component" of a Federal or State welfare reform effort. A key component would also not include minor changes in policy that are not necessary to a State effort to reform the welfare system. Several examples from recent State activity illustrate changes that are not key components of a welfare reform effort.

Thus, for example, a change in the definition of which costs associated with a required search for employment qualifies for reimbursement would not be considered a key component.

Similarly, a policy changing the allowed value of an automobile which an applicant must own and remain eligible for AFDC, or the use to which the automobile must be put to qualify, would not be considered a key component.

The term existing law is defined to mean Federal, State or local statutory law or ordinances.

The definitions of Federal or State welfare system, reform and existing law all are consistent with the legislative history which led to the enactment of this new restriction. This legislative history included: debate around an amendment by Senator Gramm during consideration of the FY 1995 Commerce, Justice and State, the Judiciary and Related Agencies Appropriations bill in July of 1994 (140 Cong. Rec., S. 9402 (July 31, 1994)); debate around an amendment by Senator Gramm during consideration of the Senate Welfare Reform bill on September 15, 1995 (141 Cong. Rec., S., 13640 (Sept. 15, 1995)); brief references made to the welfare reform prohibition during the debate on the Domenici Amendment in late September of 1995 (141 Cong. Rec., S. 14671 (Sept. 29, 1995)) and during debate on the Cohen-Bumpers Amendment on March 14, 1996 (142 Cong. Rec., S., 2055 (March 14, 1996)). The committee reports that accompanied the House appropriations legislation and the two conference committee reports accompanying H.R. 2076 and H.R. 3019 also made brief reference to "welfare reform" advocacy and are part of the legislative history. The cases that are mentioned in these debates as objectionable are cases challenging specific new policies which eliminated State general assistance programs made changes in key components of State AFDC programs that were enacted as part of an overall State welfare reform effort. For example, Members of Congress specifically referenced new state laws which imposed time limits on the receipt of benefits and "family cap" laws which denied benefits to a family for additional children. In addition, a major concern throughout these debates was the fear that legal services programs would challenge Federal block grant legislation or the AFDC program or State legislation or regulations created pursuant to the block grant authority. However, at no time during the debates did any Member of Congress mention cases challenging child support, Food Stamps, Medicaid, foster care, child welfare, SSI, Veterans benefits, Job Training or other programs, including other means-tested benefit programs.

Language identical to that in 110 Stat. 1321 first appeared in Section 21 of H.R. 1806, the bill passed by Representatives McCollum and Stenholm to reform the legal services program. Neither of these representatives provided any description of this new provision when the legislation was introduced. The only discussion by either co-sponsor about the meaning of the provision was a statement made by Rep. Bill McCollum during the House Reauthorization hearing in May 1995, in which he stated that legal services:

Should be prohibited and restricted from being engaged in trying to change or reform the welfare systems that are undergoing changes in the States or at the Federal level, that is not their role, that they be able to represent individuals and do the bread-and-butter work, landlord-tenant problems, perhaps the welfare laws, making claims for people, and so forth, but not trying to reform the system. (See, Transcript, Reauthorization of Legal Services Corporation, Tuesday, May 16, 1995, House of Representatives, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, Washington, D.C., p. 31)

Section 1639.3 Prohibition

This section prohibits any involvement by a recipient in initiating legal representation or challenging or participating in efforts to reform a Federal or State welfare system. The prohibition includes, but is not limited to, litigation challenging laws or regulations enacted as part of a reform of a Federal or State welfare system; participating in rulemaking involving proposals that are being considered as part of a reform of a Federal or State welfare system; and lobbying or other advocacy before legislative or administrative bodies involving pending or proposed legislation that is part of a reform of a Federal or State welfare system. The prohibition also precludes litigation or other advocacy with regard to the granting or denying of State requests for Federal waivers or Federal requirements for AFDC including: (1) Participation at the State level before administrative agencies, the legislature or the Executive when waivers are under consideration; (2) commenting upon or engaging in other advocacy on waivers that are being considered by the Department of Health and Human Services; and (3) engaging in advocacy before Congress if Congress undertakes to adopt a State waiver request.

Section 1639.4 Permissible Representation of Eligible Clients

This section incorporates the statutory language which permits a recipient to represent "an individual eligible client whose legal situation is being sought assistance in dealing with a welfare agency, if such relief does not involve an effort to amend or otherwise
challenge existing law in effect on the date of the initiation of the representation." Pursuant to this provision, an action to enforce existing law would not be proscribed. Thus, when representing an eligible client seeking individual relief, a recipient may challenge a regulation or policy on the basis that it violates a higher State or Federal law. In addition, such representation might also challenge the agency's interpretation of the law or challenge the application of an agency's regulation or policy, or the law on which it is based, to the individual seeking relief.

Section 1639.5 Exception for Public Rulemaking and Responding to Requests With Non-LSC Funds

The 1996 appropriations act includes a provision, § 504(e) of 110 Stat. 1321, which provides that nothing in § 504—

shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made.

This exception applies to the prohibition on welfare reform lobbying and rulemaking in § 504(a)(16).

Therefore, recipients may use non-LSC funds to make oral or written comments in a public rulemaking proceeding involving an effort to reform a Federal or State welfare system or to respond to a written request from a government agency or official thereof, elected official, legislative body, committee or member thereof, made to the employee or to a recipient, to testify or provide information regarding an effort to reform a State or Federal welfare system, provided that the response by the recipient is made only to the party making the request and the recipient does not arrange for the request to be made.

Section 1639.6 Recipient Policies and Procedures

In order to ensure that the recipient’s staff are fully aware of the restriction on welfare reform activity and to ensure that staff receive appropriate guidance, this section requires that recipients adopt written policies and procedures to guide its staff in complying with this part.

List of Subjects in 45 CFR Part 1639

Grant programs-law; Legal services; Welfare reform.

For reasons set forth in the preamble, Chapter XVI is amended by adding part 1639 as follows:

PART 1639—WELFARE REFORM

Sec.

1639.1 Purpose.

1639.2 Definitions.

1639.3 Prohibition.

1639.4 Permissible representation of eligible clients.

1639.5 Exceptions for public rulemaking and responding to requests with non-LSC funds.

1639.6 Recipient policies and procedures.


§ 1639.1 Purpose.

The purpose of this rule is to ensure that LSC recipients do not initiate litigation, challenge or participate in efforts to reform a Federal or State welfare system. The rule also clarifies when recipients may engage in representation on behalf of an individual client seeking specific relief from a welfare agency and under what circumstances recipients may use funds from sources other than the Corporation to comment on public rulemaking or respond to requests from legislative or administrative officials involving a reform of a Federal or State welfare system.

§ 1639.2 Definitions.

(a)(1) Federal or State welfare system as used in this Part means:

(i) The Federal and State AFDC program under Title IV-A of the Social Security Act and new programs or provisions enacted by Congress or the States to replace or modify these programs, including State AFDC programs conducted under Federal waiver authority.

(ii) General Assistance or similar state means-tested programs conducted by States or by counties with State funding or under State mandates, and new programs or provisions enacted by States to replace or modify these programs.

(2) Federal or State welfare system does not include other public benefit programs unless changes to such programs are part of a reform of the AFDC or General Assistance programs.

(b) Reform of Federal or State Welfare Systems as used in this Part means a legislative or administrative effort to change key components of the Federal or State welfare system, including laws and regulations that implement the changes.

(c) Existing law as used in this part means Federal, State or local statutory laws or ordinances.

§ 1639.3 Prohibition.

Except as provided in §§ 1639.4 and 1639.5, recipients may not initiate legal representation, challenge or participate in any other way in efforts to reform a Federal or State welfare system. Prohibited activities include participation in:

(a) Litigation challenging laws or regulations enacted as part of a reform of a Federal or State welfare system;

(b) Rulemaking involving proposals that are being considered to implement a reform of a Federal or State welfare system;

(c) Lobbying or other advocacy before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of a reform of a Federal or State welfare system;

(d) Litigation or other advocacy undertaken with regard to the granting or denying of State requests for Federal waivers of Federal requirements for AFDC.

§ 1639.4 Permissible representation of eligible clients.

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

§ 1639.5 Exceptions for public rulemaking and responding to requests with non-LSC funds.

Consistent with the provisions of § 1612.6 (a)–(e), recipients may use non-LSC funds to comment in a public rulemaking proceeding or respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee, or a member thereof, regarding an effort to reform a Federal or State welfare system.

§ 1639.6 Recipient policies and procedures.

Each recipient shall adopt written polices and procedures to guide its staff in complying with this part.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.

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45 CFR Part 1640

Application of Federal Law to LSC Recipients

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule implements a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act which subjects LSC recipients to Federal law relating to the proper use of Federal funds. This rule identifies applicable Federal law and sets out the mechanism by which recipients must agree to be subject to such law and the consequences of a violation of the law. Although this rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement § 504(a)(19) of Public Law 104-134, 110 Stat. 1321(1996), the Corporation's FY 1996 appropriations act, which requires LSC-funded recipients to agree by contract to be subject to Federal law related to the proper use of Federal funds. The Committee held hearings on staff proposals on July 9 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation which is already effective and which carries strong penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B) and 553(d)(3).

Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comment on the rule for review and consideration by the Committee. The Committee intends to hold public hearings to discuss written comments and hear oral comments. It is anticipated that a final rule will be issued which will supersede this interim rule.

Briefly, this rule requires LSC recipients to agree to be subject to "Federal laws relating to the proper use of Federal funds" in their use of LSC funds. This rule puts recipients and their employees on notice that LSC funds are Federal funds for the purposes of the applicable Federal laws cited in this rule and that a violation of such laws would subject the recipient or individual employee to potentially serious sanctions.

A section by section analysis of this interim rule is provided below:

Section 1640.1 Purpose

The purpose of this rule is to ensure that recipients' LSC funds are considered Federal funds for the purposes of Federal law relating to the proper use of Federal funds. This rule also identifies applicable Federal laws and delineates the consequences to the recipient of violations of such law.

Section 1640.2 Definitions

The statutory restriction provides that recipients must contractually agree to be subject to "all provisions of Federal law relating to the proper use of Federal funds" with regard to their use of LSC funds. The regulation interprets this to mean that, with respect to their LSC funds, all programs should be subject to Federal laws which address issues of waste, fraud and abuse of Federal funds. The legislative history limits the applicable laws to those dealing with waste, fraud and abuse and specifically names the laws which apply. The House Report for H.R. 2076, an earlier unsuccessful effort to enact a provision similar to the provision that was ultimately enacted, states:

[S]ection 504(2) requires all programs receiving Federal funds to comply with Federal statutes and regulations governing waste, fraud, and abuse of Federal funds.

H. Rep. No. 104th Cong., 1st Sess. 116 (July 1995). See also the McCollum/Stenholm bill (HR 1806), a recent effort to amend the LSC Act, which expressly cites most of the laws included in this part. Other laws have been added after consultation with the Corporation's Office of the Inspector General, one of whose statutory mandates is to prevent the misuse of LSC funds.

The relevant laws are listed in the definition of "Federal law relating to the proper use of Federal funds" in paragraph (a)(1) of this section. Generally, such laws deal with the bribery of public officials or witnesses; the embezzlement or theft of federal funds; attempts to defraud the government; the obstruction of federal audits; and making false statements and claims to the Federal government. One exception makes it clear that qui tam actions authorized by section 3730(b) of Title 31 may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or any employee thereof.

Paragraph (a)(2) clarifies that for the purposes of the laws cited in paragraph (a)(1), the Corporation shall be considered a Federal agency and its funds shall be considered to be Federal funds provided by grant or contract.

Paragraph (b) of this section defines the meaning of "violation of the agreement." A violation of a recipient's agreement to be subject to Federal law related to the proper use of Federal funds could occur in either of two ways. First, there would be a violation if the recipient were convicted or judgment were entered against it for a violation of any of the relevant Federal laws by the Federal court having jurisdiction of the matter, and all appeals were final or the time to file for an appeal had expired.

Second, there would be a violation if an employee of the Board or member of the recipient were convicted of a violation of the enumerated laws and the Corporation found that responsibility for the offense should be imputed to the recipient because the recipient had knowingly or through gross negligence allowed the illegal activities to occur.

Section 1640.3 Contractual Agreement

This section implements the statutory requirement that, as a condition of receiving a grant or contract with the Corporation, recipients must enter into a contractual agreement that, in regard to LSC funds, they will be subject to Federal law relating to the proper use of Federal funds in regard to LSC funds. The Federal laws in question normally apply to Federal agencies and Federal funds. Because the Corporation is not a Federal agency, it was necessary for Congress to provide in § 504(a)(19) of its FY 1996 appropriations act that, for purposes of the application of these laws to recipients, the Corporation shall be considered to be a Federal agency and its funds provided by grant or contract. This Corporation shall be Federal funds provided by grant or contract. This
Section 1640.5 Reporting Requirement

This section requires a recipient to give telephonic or other actual notice to the Corporation within two (2) working days when the recipient or any of its employees or board members have been charged with a violation of any of the Federal laws listed in §1640.2(a). It also clarifies that “charged with a violation” means that an individual or governmental entity having authority to initiate such proceedings has initiated action against the recipient or its employees or board members and the proceeding is pending. A recipient must also give the Corporation notice within two (2) days if it has reason to believe that any of its employees or board members have misused LSC funds under this part. Finally, this section requires a recipient to follow up the telephonic or other actual notice with a written notice within ten (10) calendar days.

List of Subjects in 45 CFR Part 1640.

Fraud; Grant programs-law; Legal services.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1640 as follows:

PART 1640—APPLICATION OF FEDERAL LAW TO LSC RECIPIENTS

Sec. 1640.1 Purpose.

1640.2 Definitions.

1640.3 Contractual agreement.

1640.4 Violation of agreement.

1640.5 Reporting requirement.


§1640.1 Purpose.

The purpose of this rule is to ensure that recipients use their LSC funds in accordance with Federal law related to the proper use of Federal funds. This rule also identifies the Federal laws which apply and provides notice of the consequences to a recipient of a violation of such Federal laws by recipients, their employees or board members.

§1640.2 Definitions.

(a) (1) Federal law relating to the proper use of Federal funds means:

(i) 18 U.S.C. 201 (Bribery of Public Officials and Witnesses);

(ii) 18 U.S.C. 286 (Conspiracy to Defraud the Government With Respect to Claims);

(iii) 18 U.S.C. 287 (False, Fictitious or Fraudulent Claims);

(iv) 18 U.S.C. 371 (Conspiracy to Commit Offense or Defraud the United States);

(v) 18 U.S.C. 641 (Public Money, Property or Records);
both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) A violation of the agreement under § 1640.2(b)(1) shall result in the recipient's LSC grant or contract being terminated by the Corporation without need for a termination hearing. During the pendency of any appeal of a conviction or judgment, the Corporation may take such steps as it determines necessary to safeguard its funds.

(b) A violation of the agreement under § 1640.2(b)(2) shall result in the recipient's LSC grant or contract being terminated by the Corporation. Prior to such termination, the Corporation shall provide notice and an opportunity to be heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities which led to the conviction or judgment. During the pendency of any appeal of a conviction or judgment or during the pendency of a termination hearing, the Corporation may take such steps as it determines necessary to safeguard its funds.

§ 1640.5 Reporting requirement.

(a) The recipient shall give telephonic or other actual notice to the Corporation within two (2) working days of the date that:

(1) The recipient or any of the recipient's employees has been charged with a violation of any of the Federal laws listed in § 1640.2(a) with respect to its LSC funds; or

(2) It has reason to believe that any of its employees or board members have misused the recipient's LSC funds in violation of any of the Federal laws listed in § 1640.2(a).

(b) The notice required in paragraph (a) of this section shall be followed by written notice within ten (10) calendar days.

(c) A recipient or an employee or board member of the recipient has been "charged with a violation" when a governmental entity having authority to initiate such a proceeding has instituted action against the recipient or the recipient's employee and the proceeding is pending.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.

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BILLING CODE 7050-01-P

45 CFR Part 1642

Attorneys' Fees

AGENCY: Legal Services Corporation.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule is intended to implement a provision in the Legal Services Corporation's ("Corporation" or "LSC") FY 1996 appropriations act that prohibits LSC recipients from seeking attorneys' fees in cases filed after the date of enactment of the appropriation. Although this interim rule is effective upon publication, the Corporation also solicits public comment on the interim rule in anticipation of adoption of a final rule at a later time.

DATES: This interim rule is effective on August 29, 1996. Comments must be submitted on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of General Counsel, Legal Services Corporation, 750 First Street, N.E., 11th Floor, Washington, D.C. 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: On May 19, 1996, the Operations and Regulations Committee ("Committee") of the Legal Services Corporation ("LSC" or "the Corporation") Board of Directors ("Board") requested the LSC staff to prepare interim rules to implement § 504(a)(13) of the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), prohibiting LSC recipients and their employees from claiming, or collecting and retaining attorneys' fees. The Committee held hearings on July 10 and 19, and the Board adopted this interim rule on July 20 for publication in the Federal Register. The Committee recommended and the Board agreed to publish this rule as an interim rule. An interim rule is necessary in order to provide prompt and critically necessary guidance to LSC recipients on legislation that is already in effect and which carries severe penalties for noncompliance. Because of the great need for guidance on how to comply with substantially revised legislative requirements, prior notice and public comment are impracticable, unnecessary, and contrary to the public interest. 5 U.S.C. 553(b)(3)(B) and 553(d)(3). Accordingly, this rule is effective upon publication.

However, the Corporation also solicits public comments on the rule for review and consideration by the Committee. After receipt of written public comment, the Committee intends to hold public hearings to consider the written comments and to hear oral comments. The Committee anticipates that a final rule will be issued which will supersede this interim rule.

This rule is based, in part, on provisions in 45 CFR Part 1609, the Corporation's regulation dealing with attorneys' fees in relation to fee-generating cases. The Corporation has determined that, although related, the issues of fee-generating cases and attorneys' fees are sufficiently separate to warrant separate rules. Accordingly, the provisions on attorneys' fees and acceptance of reimbursement for costs and expenses in this part supersedes the comparable provisions in Part 1609. A revised version of Part 1609 is also published in this publication of the Federal Register as a proposed rule.

A section-by-section discussion of this interim rule is provided below.

Section 1642.1 Purpose

The purpose of this rule is to ensure that LSC recipients and their employees do not seek or retain attorneys' fees awarded pursuant to Federal or State law, including common law, permitting or requiring such fees.

Section 1642.2 Definitions

This section defines "attorneys' fees" as an award that is intended to compensate an attorney of the prevailing party as permitted or required by Federal or State law. An "award" is defined as an order of a court or administrative agency that an unsuccessful party pay the attorneys' fees of the prevailing party. The definition makes clear that the term includes attorneys' fees that are awarded as part of a court or agency approved settlement agreement. The Corporation has received a number of comments arguing that the restriction was not intended to apply to attorneys' fees in Social Security cases, because such fees are paid pursuant to an agreement by the client to pay the fees out of the client's back benefits. The court or administrative agency merely approves the agreement, but does not "award" the fees. The definition of "award" reflects this interpretation.

Programs which seek fees out of favorable awards to clients should be aware that the Corporation's interpretation of the statute reflected in this interim rule may change following receipt of public comment and any such change could affect a recipient's practices.
Section 1642.3 Prohibition.
This section states the restriction on attorneys’ fees contained in § 504(a)(13) of the Corporation’s FY 1996 appropriations act, which prohibits LSC recipients from claiming, or collecting and retaining attorneys’ fees in any cases. This rule uses the term “cases” and does not refer to “matters,” as does the underlying statute, because attorneys’ fees may only be derived from cases. Paragraph (a) prohibits recipients or their employees from claiming, or collecting and retaining attorneys’ fees in any case, unless allowed under paragraph (c). Paragraph (b) provides that private attorneys who are paid by LSC recipients to handle cases for eligible clients as part of a recipient’s PAI program, under a contract or judicare program, may not seek fees in those cases unless allowed under paragraph (c). The prohibition applies to those private attorneys who receive funds from a recipient, because they are persons receiving financial assistance under the appropriations bill and are thus subject to the prohibition on attorneys’ fees. This would not include pro bono attorneys who receive no compensation from a recipient to handle cases, because they are not receiving financial assistance to provide the services.

Paragraph (c) clarifies that the prohibitions in paragraphs (a) and (b) do not apply to four situations. First, the statute expressly allows programs to seek and retain attorneys’ fees for cases filed prior to April 26, 1996, but this exception does not extend to any additional claims for the client filed after April 26, 1996, in any pending case.

Second, the prohibitions in paragraphs (a) and (b) do not apply to activity allowed pursuant to 42 U.S.C. 2996e(d)(6) of the LSC Act, which permits recipient attorneys to accept compensation for legal services that they provide as officers of the court, i.e., court appointments.

Third, paragraph (c) clarifies that sanctions imposed by courts on parties in litigation for behavior that violates court rules may be accepted by recipients because they are considered to be sanctions rather than attorneys’ fees. Such sanctions often include compensation for the time spent by the opposing lawyer in litigating against the sanctioned behavior.

Finally, the restrictions do not apply to the reimbursement of costs and expenses made by an opposing party.

Section 1642.4 Accounting for and use of Attorneys’ Fees.
This section is a revised version of § 1609.6, which is superseded by this interim rule. It includes an accounting requirement for attorneys’ fees that are permitted under § 1642.3(c) of this part that are received by a recipient. Recipients are required to allocate such fees that are received from cases or matters supported in whole or in part with LSC funds to the LSC fund in the same proportion that the case or matter was funded with LSC funds. Thus, if a particular case was funded 60% by LSC funds and 40% from non-LSC funds, a recipient would be required to allocate 60% of the fees received to the LSC account. There is no requirement that the program allocate the remaining 40% to any particular account. This is a change from current law that required allocation to the same fund to which expenses had been charged. The change is based on a policy that, if a non-LSC funder does not require that its fund be reimbursed from attorneys’ fees awarded in litigation supported with its funds, LSC should not dictate how those funds are to be allocated.

Section 1642.5 Acceptance of Reimbursement From a Client.
This section allows recipients to accept reimbursement from clients for out-of-pocket costs and expenses incurred in connection with cases where the client recovers damages or statutory benefits, provided that the client has agreed in writing to reimburse the recipient for such costs and expenses out of any recovery. This section also authorizes recipients to require clients who do not qualify for in forma pauperis to pay court costs.

Section 1642.6 Recipient Policies, Procedures and Recordkeeping.
This section requires the recipient to establish written policies and procedures to guide the recipient’s staff to ensure compliance with this rule. Recipients are also required to maintain sufficient documentation to demonstrate compliance with this part.

List of Subjects in 45 CFR Part 1642.
Attorneys’ fees; Grant programs—law; Legal services.

For reasons set forth in the preamble, 45 CFR Chapter XVI is amended by adding part 1642 as follows:

PART 1642—ATTORNEYS’ FEES
Sec.
1642.1 Purpose.
1642.2 Definitions.
1642.3 Prohibition.
court in which the appointment is made;

(3) Sanctions imposed by a court for violations of court rules, including Rule 11 or discovery rules of the Federal Rules of Civil Procedure, or similar State court rules; or

(4) Reimbursement of costs and expenses from an opposing party.

§ 1642.4 Accounting for and use of attorneys' fees.

(a) Attorneys' fees received by a recipient pursuant to § 1642.3(c) for work supported in whole or in part with funds provided by the Corporation shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of Corporation funds expended bears to the total amount expended by the recipient to support the work.

(b) Attorneys' fees shall be recorded during the accounting period in which the money from the fee award is actually received by the recipient and may be expended for any purpose permitted by the LSC Act, regulations and other law applicable at the time the money is received.

§ 1642.5 Acceptance of reimbursement from a client.

(a) When a case results in a recovery of damages or statutory benefits, a recipient may accept reimbursement from the client for out-of-pocket costs and expenses incurred in connection with the case, if the client has agreed in writing to reimburse the recipient for such costs and expenses out of any such recovery.

(b) A recipient may require a client to pay court costs when the client does not qualify to proceed in forma pauperis under the rules of the jurisdiction.

§ 1642.6 Recipient policies, procedures and recordkeeping.

The recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: August 20, 1996.
Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.
[FR Doc. 96–21660 Filed 8–28–96; 8:45 am]
LEGAL SERVICES CORPORATION

45 CFR Part 1609

Fee-Generating Cases

AGENCY: Legal Services Corporation.

ACTION: Proposed rule.

SUMMARY: This proposed regulation would completely revise the Legal Services Corporation's ("Corporation" or "LSC") regulation relating to fee-generating cases. A major revision is the removal of the current regulation's provisions on attorneys' fees. Attorneys' fees are addressed in part 1642 of the Corporation's regulations, which is also being published as an interim rule in this publication of the Federal Register. This proposed rule also makes substantive and clarifying revisions to several sections. In addition, some sections have been merged and unnecessary provisions have been eliminated.

DATES: Comments should be received on or before October 28, 1996.

ADDRESSES: Comments should be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-2010.

SUPPLEMENTARY INFORMATION: This rule has been under review by the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") since September 1994. The Committee held public hearings on September 17 and October 28, 1994, and February 17, 1995, on proposed revisions. When it became apparent that Congress was considering substantially revised legislation related to this rule, the Committee suspended consideration until the new legislation became law. Public Law 104-134, 110 Stat. 1321 (1996), the Corporation's FY 1996 appropriations act, became law on April 26, 1996. The new legislation did not contain any restrictions on taking of fee-generating cases, but it did prohibit recipients from claiming, or collecting and retaining, any attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees. See § 504(a)(13) of Pub. L. 104-134. On May 19, 1996, the Committee directed LSC staff to prepare an interim rule to implement a new legislative restriction on the taking of attorneys' fees by LSC recipients, an issue implicated in the current version of this rule.

LSC staff recommended and the Committee decided to promulgate a separate rule. 45 CFR Part 1642, to address the attorneys' fees issue which is also published as an interim rule in this volume of the Federal Register. The Committee met on July 10 and 19, 1996, to consider a draft of a revised Part 1609 prepared by LSC staff and, after making some changes, made a recommendation to the Board and the Board voted to publish this proposed rule in the Federal Register for public notice and comment.

This proposed rule would revise the current rule entirely. It deletes the attorneys' fees provisions in order to address, in a separate part, provisions responsive to the Corporation's FY 1996 appropriations. The other changes made to the rule were under consideration by the Committee last year. Recipients should note that, upon publication of an interim rule on attorneys' fees, the attorneys' fees provisions in the current part 1609 will no longer have the force and effect of law, regardless of whether any revisions to this proposed rule are adopted and published as final by the LSC Board.

A section-by-section analysis of this proposed rule is provided below.

Section 1609.1 Purpose

This section is revised to state more clearly the purposes of this regulation, which are: (1) To ensure that recipients do not use scarce resources for cases where private attorneys are available to provide effective representation, and (2) to assist eligible clients to obtain appropriate and effective legal assistance.

Section 1609.2 Definition

This section defines "fee-generating case." A technical numerical change is made to clarify that the definition includes fees from three sources: an award (1) to a client, (2) from public funds, or (3) from the opposing party. The definition is also revised to explain what is not a "fee-generating case." The revision makes it clear that court appointments are not to be considered fee-generating cases, even where fees are paid, since such cases are a professional obligation of all attorneys. The definition also does not include situations where recipients undertake representation under a contract with a government agency or other entity. Acceptance of a payment under a contract arrangement in such a situation does not constitute a fee-generating case, because a contract payment does not constitute fees that come from an award to a client or attorneys' fees that come from public funds or the losing party in a case.

Section 1609.3 General Requirements

This section defines the limits within which recipients may undertake fee-generating cases. This new section reorganizes and replaces §§ 1609.3 and 1609.4 of the current rule in order to make them easier to understand. It is also retitled. The provision requiring recipients to establish procedures for the referral of fee-generating cases is deleted, and a new section on policies and procedures is added to the rule.

Paragraph (a) provides that, except as provided in paragraph (b) of this section, a recipient may undertake a fee-generating case only after the case has been rejected by the local lawyer referral service or by two private attorneys, or when neither the referral service nor two attorneys will take the case without a consultation fee. The current rule states that "neither the referral service nor any attorney will consider the case without payment of a consultation fee." [emphasis added] The current rule sets up an impossible burden for a recipient to meet, and the Committee has decided that the proposed new standard is reasonable and consistent with the purposes of this rule.

Paragraph (b) clarifies those circumstances under which a recipient may undertake a fee-generating case without first attempting to refer the case to the private bar. The first situation is delineated in § 1609.3(b)(1) and is based on § 1609.4(d) of the current regulation. This provision is revised to include any cases which, like Social Security cases, meet the terms of the underlying statutory provision. A 1977 amendment to § 1007(b)(1) of the Legal Services Corporation Act, 42 U.S.C. 2996, prohibits the Corporation from issuing guidelines on fee-generating cases that would preclude recipients from taking "cases in which a client seeks only statutory benefits and appropriate private representation is not available." 42 U.S.C. 2996(b)(1). The legislative history of this amendment clearly indicates that Congress intended the provision to apply to the Social Security Act ("SSA") and Supplemental Security Income ("SSI") cases that are covered by both the current and the proposed rules, and to "such other cases as the Corporation deems appropriate because the only recovery sought by the eligible client is the amount of subsistence benefits to which he or she is statutorily entitled." S. Rep. No. 172, 95th Cong., 1st Sess. 15 (1977). The Committee has decided to add language to the rule that would include not only Social Security cases but also any other similar statutory benefits cases. The Committee is aware that, since the 1977...
amendments to the LSC Act, the rules governing fees in veterans' benefits appeals, for example, have been changed and seeks comments on whether those cases or other similar cases should be treated in the same manner as Social Security cases.

Another circumstance under which a recipient may undertake a fee-generating case without first attempting to refer the case to the private bar is set out in §1609.3(b)(2). This provision is based, in part, on a provision that appeared in the original LSC regulation adopted in 1976 that allowed a recipient to determine that the case was of the type that private attorneys did not accept or did not accept without a fee.

LSC removed that provision as part of its 1984 revision, in part because of concern that it gave too much discretion to project directors. This proposal suggests a middle ground between the two positions. It restores to the discretion of the recipient the decision about what kinds of cases would qualify, but requires that the recipient consult with appropriate representatives of the private bar in making that determination. The recipient has the authority to determine the appropriate representatives, which could include representatives of the organized bar, the local referral service or private attorneys who handle plaintiffs' tort cases, depending on the make-up of the local bar and the kind of cases being considered. The provision does not specify whether the governing body or the director of the recipient is authorized to require consultation and make the determination, leaving that judgment to the local decision-making process.

Numerous revisions are proposed to be made in the language and organization of §1609.3(b)(3), which is based on the remaining provisions of §1609.4 of the current regulation. The current regulation uses the term “free referral” instead of “referral to the private bar.” The Committee decided that the term “fee-referral” was too vague and has substituted “referral of the case to the private bar” which is more descriptive. This provision makes it clear that the director of the recipient (or the director’s designee) has the express authority, subject to policies adopted by the recipient, to make the determinations listed.

Section 1609.3(b)(3)(i) is a new proposal. It recognizes that, in certain cases, past experience in trying to refer out similar cases has shown that referral efforts would be futile. The Corporation does not wish scarce resources to be expended for efforts that the recipient knows will prove useless. This provision, which is intended to address the specific circumstances in a particular case, differs from §1609.3(b)(2), which deals with categories of case types.

Section 1609.3(b)(3)(ii) is essentially the same as the comparable provision in the current regulation. It allows a recipient to take a case if emergency circumstances require immediate action before referral procedures can be undertaken.

Section 1609.3(b)(3)(iii) is a revised version of the current §1609.4(b). It is included under the category of cases where the recipient's director or designee needs to make a case-by-case determination of the appropriate treatment of the case. The Committee also added the language on statutory fees to make it clear that if adequate statutory fees were available to attract private counsel, the recipient should try to refer the case out to the private bar, regardless of whether recovery of damages is a principal object of the client's case. This is not clear under the current regulation. Thus, for such cases, the Committee wished to clarify that if substantial fees might be available and the cases did not fall under any of the other categories authorizing representation, then the program was obligated to attempt referral in accordance with §1609.3(a).

The language in the current rule relating to ancillary relief and counterclaims is proposed to be deleted because it is confusing and unnecessarily complicated, and the Committee wanted the commentary to include examples of the kinds of circumstances under which the recipient's director could determine that the recovery of damages was not the principal object of the case. For example, if the principal relief sought is equitable or a declaratory judgement, inclusion of a prayer for damages would not turn the matter into a fee-generating case. Similarly, if the recipient is representing the defendant in a case, the inclusion of a counterclaim for damages to protect the defendant's rights would not make the matter a fee-generating case.

Finally, because this proposed rule has deleted provisions on attorneys' fees, paragraph (c) directs recipients to refer to the Corporation's new rule on attorneys' fees, 45 CFR Part 1642.

Section 1609.4 Recipient Policies, Procedures and Recordkeeping

This new section requires that recipients establish written policies, procedures and recordkeeping requirements that will guide recipient staff to ensure compliance with this rule.

Miscellaneous Changes

Sections 1609.5 through 1609.7 of the current regulation are proposed to be deleted and are superseded by a new interim regulation, 45 CFR Part 1642, also published in this publication of the Federal Register. Accordingly, §§ 1609.5 through 1609.7 no longer have the force of law.

List of Subjects in 45 CFR Part 1609

For reasons set forth in the preamble, 45 CFR Part 1609 is proposed to be revised to read as follows:

PART 1609—FEE-GENERATING CASES

Sec. 1609.1 Purpose.
1609.2 Definition.
1609.3 General requirements.
1609.4 Recipient policies, procedures and recordkeeping.
Authority: 42 U.S.C. 2996f(b)(1) and 2996e(c)(6).

§1609.1 Purpose.

This part is designed (1) to ensure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation and (2) to assist eligible clients to obtain appropriate and effective legal assistance.

§1609.2 Definition.

(a) As used in this part, “fee-generating case” means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award (1) to a client, (2) from public funds or (3) from the opposing party.

(b) “Fee-generating case” does not include a case where (1) a court appoints a recipient or an employee of a recipient to provide representation in a case pursuant to a statute or a court rule or practice equally applicable to all attorneys in the jurisdiction, or (2) a recipient undertakes representation under a contract with a government agency or other entity.

§1609.3 General Requirements.

(a) Except as provided in paragraph (b) of this section, a recipient may provide legal assistance in a fee-generating case only if:

(1) The case has been rejected by the local lawyer referral service, or by two private attorneys;

(2) Neither the referral service nor two private attorneys will consider the case without payment of a consultation fee.
(b) A recipient may provide legal assistance in a fee-generating case without first attempting to refer the case pursuant to paragraph (a) of this section only when:

(1) An eligible client is seeking only statutory benefits, including but not limited to, subsistence benefits under Subchapter II of the Social Security Act, 42 U.S.C. 401 et seq., as amended, Federal Old Age, Survivors, and Disability Insurance Benefits; or Subchapter XVI of the Social Security Act, 42 U.S.C. 1381 et seq., as amended, Supplemental Security Income for Aged, Blind, and Disabled;

(2) The recipient, after consultation with appropriate representatives of the private bar, has determined that the type of case is one that private attorneys in the area served by the recipient ordinarily do not accept, or do not accept without prepayment of a fee; or

(3) The director of the recipient, or the director's designee, has determined that referral of the case to the private bar is not possible because:
   (i) Documented attempts to refer similar cases in the past generally have been futile;
   (ii) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time; or
   (iii) Recovery of damages is not the principal object of the recipient's client's case and substantial statutory attorneys' fees are not likely to be available.

(c) Recipients should refer to 45 CFR Part 1642 for restrictions on claiming, or collecting and retaining attorneys' fees.

§ 1609.4 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: August 20, 1996.

Suzanne B. Glasow,
Senior Counsel for Operations & Regulations.
[FR Doc. 96–21669 Filed 8–28–96; 8:45 am]
BILLING CODE 7050–01–P
Thursday
August 29, 1996

Part X

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Ch. 1, et al.
Federal Acquisition Regulation; Payment by Electronic Funds Transfer and Small Entity Compliance Guide; Rules
SUPPLEMENTARY INFORMATION:

A. Background

Public Law 104–134, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, contained a separate chapter 10 entitled Debt Collection Improvements. Subsection (x)(1) of Section 31001, the Debt Collection Improvement Act of 1996, amended Section 3332 of title 31, United States Code, by adding the following new statutory requirement: "(x) Notwithstanding subsections (a) through (d) of this section, sections 5120(a) and (d) of title 38, and any other provision of law, all Federal payments to a recipient who becomes eligible for that type of payment after 90 days after the date of enactment of the Debt Collection Improvement Act of 1996 shall be made by electronic funds transfer." The statute further defines Federal payments to include vendor payments and expense reimbursements, as well as providing exemption for payments to certain recipients. The effective date of this provision is July 26, 1996.

Public Law 104–134 also contained provisions for payments by EFT which become applicable after January 1, 1999. Under this statute, the Department of the Treasury is responsible for issuing regulations necessary for carrying out the statute. On July 26, 1996, the Financial Management Service issued an interim rule (61 FR 39254) which added Part 208 to Title 31, Code of Federal Regulations, to provide a regulation for payments through EFT. This interim rule reflects the provisions of the Treasury interim rule with respect to vendor payments.

The Councils are committed to advancing the use of EFT as the standard method of payment under Federal contracts, and believe that the use of EFT will ultimately reduce the administrative burden currently associated with contract invoice or financing payments made by check for both the Government and contractors. The rule, therefore, provides a contract clause which requires contractor submission of the information needed for payment by EFT as a condition of payment. With certain limited exceptions, this is the clause that will normally be used. However, some Government offices involved in certifying invoices and disbursing contract payments are not currently capable of using EFT as the standard method of payment. The rule provides a contract clause for contractor optional submission of EFT information where that is appropriate and consistent with the statute. The determination whether a particular payment must be made by EFT is that of the payment official.

The rule recognizes that contracts using non-United States currency and contracts issued outside the United States and Puerto Rico are currently not capable of being paid by EFT through the domestic banking system of the United States. In addition, certain classified contracts and certain contracts related to military operations and emergency situations will not be appropriate for payment by EFT. In accordance with the Treasury interim rule, these contracts have been excepted from the requirement for payment by EFT.

The Treasury Department has stated that a credit card transaction is an electronic payment. The rule, therefore, directs that contracts to be paid through use of a Governmentwide commercial purchase card will not include either EFT clause.

The statute provides that until January 1, 1999, recipients of payments who certify they do not have an account with a financial institution or an authorized payment agent shall be paid by other than EFT. To implement this statutory right, the clause at 52.232–33 (the mandatory EFT information clause) provides for non-EFT payment upon receipt of a contractor certification. Note that the certification is an explicit statutory requirement of 31 U.S.C. 3332(e)(2).

In addition to the provisions taking effect on July 26, 1996 (31 U.S.C. 3332(e)), Public Law 104–134 contained provisions which take effect after January 1, 1999 (31 U.S.C. 3332(f), et al.).

The most significant is a requirement that all payments after that date be made by EFT. While the statute provides for waivers of the applicable subsection by the Secretary of the Treasury after January 1, 1999, detailed regulations regarding these waivers have not been established. Therefore, both contract clauses provide that, after January 1, 1999, contractors shall provide EFT information for the contracts containing the clauses established in this rule.

A significant difference between EFT contract payments and EFT beneficiary or payroll payments is the additional information which must be provided by the Government to contractor recipients for contract payments. In order for a business receiving a contract payment to maintain its accounting books and records, it must obtain information such as invoice numbers, discounts taken, interest paid, and other payment adjustments with the payment. With paper checks, this information has normally been provided as an “advice of
payment”, or other paper notice forwarded with the check. However, if this information is provided electronically, using appropriate formats, contractors can use more advanced accounting systems which do not require manual entry and processing of payment information. The contract clauses in this interim rule authorize the Government, at its option, to forward this information electronically, with the EFT payment, as provided for in the domestic banking system. However, the Government is aware that many banks and financial institutions do not yet provide their customers with this information electronically. In response to the proposed rule published in the Federal Register on October 3, 1995 (60 FR 51766), a significant issue raised was the desire to receive this remittance information electronically. The particular methods used for forwarding this information are specific to individual agencies and payment offices. Companies desiring payment information in specific formats should express their preferences to the agencies concerned, and their banks or financial institutions.

The rule adds a new FAR Subpart 32.11, Electronic Funds Transfer, which provides policy and procedures for Government payment by EFT. The rule replaces the contract clause at 52.232-28, Electronic Funds Transfer Payment Methods, with two new clauses at 52.232-33, Mandatory Information for Electronic Funds Transfer Payment, and 52.232-34, Optional Information for Electronic Funds Transfer Payment. Under the clause at 52.232-33, the contractor is required to provide the EFT information, prior to the submission of the first request for payment, as a condition of payment under the contract. The clause at 52.232-34 is used if EFT may become a viable method of payment during the period of contract performance, and the clause becomes effective if the Government and contractor agree to commence EFT.

Three sources submitted public comments in response to the proposed rule published on October 3, 1995. All comments were considered in developing this interim rule.

B. Regulatory Flexibility Act

An Initial Regulatory Flexibility Analysis has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Analysis may be obtained from the FAR Secretariat at the General Services Administration, 18th & F Streets, NW., Room 4035, Washington, DC 20405. The Analysis is summarized as follows:

This interim rule amends the Federal Acquisition Regulation (FAR) to address the use of electronic funds transfer (EFT) for payments to contractors under Government contracts. When fully implemented, it is expected that the use of EFT for contract payments will reduce the administrative burden that is currently associated with contract invoice or financing payments made by check. The objective of the rule is to facilitate implementation of Section 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). Section 31001(x)(1) amends 31 U.S.C. 3332 to require that, effective July 20, 1996, payment to newly eligible vendors must be made by EFT. The rule will apply to all small businesses who enter into Government contracts that (1) Will not be paid through use of the Governmentwide commercial purchase card; (2) are issued by a contracting officer within the United States or Puerto Rico; (3) are classified and paid in U.S. dollars; and (4) do not involve certain classified information or military or emergency operations. To date, no supporting data has been collected; therefore, there is no available estimate of the number of small businesses that will be subject to the rule.

The Councils considered several alternatives which include permitting a transition period before requiring contractors to receive payment by EFT, and excluding, or making voluntary, EFT payments for certain types of contracts. The Councils selected the alternative that, within the constraints and objectives of the Debt Collection Improvement Act and the Treasury regulations, allows small businesses to take advantage of the benefits of the EFT method of payment but also provides flexibility with regard to the needs of small entities. In accordance with 31 U.S.C. 3332, the rule provides for exemption of EFT requirements until January 1, 1999, for contractors who certify that they have an account with a financial institution or an authorized payment agent. As indicated above, the rule also exempts certain classes of contracts. The mandatory information clause contained in the rule requires contractors to submit identification and account number information, prior to the submission of the first request for payment, as a condition of payment under the contract. This clause permits a Contractor who does not wish to receive payment by EFT methods to submit a request to the payment office. The decision to grant the request, however, is solely at the discretion of the Government. The rule also contains an optional information clause which, if included in a contract, would permit a contractor to request EFT payment after award of the contract. However, in accordance with the EFT statute, under the optional clause, the contractor is required to furnish EFT information for any payment to be made after January 1, 1999. The Federal Register notice containing the Treasury interim rule states that, after this date, the Secretary is authorized to waive the EFT requirement for individuals or classes of individuals for whom compliance imposes a hardship, for certain categories of checks, and in other circumstances deemed necessary.

Comments are invited. Comments from small entities concerning the affected FAR subparts will also be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite FAR Case 91-118 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies because the interim rule contains information collection requirements. Accordingly, a request for approval of an information collection concerning Electronic Funds Transfer (9000-0144) has been submitted to the Office of Management and Budget (OMB) and approved through August 31, 1999.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This rule is necessary for effective implementation of Section 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134), which requires that beginning 90 days (July 26, 1996) after the enactment of the Act (April 26, 1996), payments to newly eligible vendors must be made by electronic funds transfer. Comments received in response to the publication of this interim rule will be considered in formulating the final rule.

E. Determination of Applicability of Section 31001(x)(1) of Public Law 104-134 to Contracts Not Greater Than the Simplified Acquisition Threshold and Procurements of Commercial Items

In accordance with 41 U.S.C. 429 and 41 U.S.C. 430, the Federal Acquisition
Regulatory Council has determined that it would not be in the best interest of the Federal Government to exempt contracts in amounts not greater than the simplified acquisition threshold, or contracts for the procurement of commercial items, from the applicability of Section 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134). Section 31001(x)(1) amends 31 U.S.C. 3332 to require that, beginning July 26, 1996, payments to newly eligible vendors must be made by electronic funds transfer. Electronic funds transfer payment methods, when fully implemented, are expected to significantly reduce the administrative burden that is currently associated with contract payments made by check and, therefore, should apply to all Federal contracts.

List of Subjects in 48 CFR Parts 12, 13, 32, and 52

Government procurement.

Dated: August 23, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR parts 12, 13, 32, and 52 are amended as set forth below:

1. The authority citation for 48 CFR parts 12, 13, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.302 [Amended]

2. Section 12.302 is amended in paragraph (b)(3) by adding "(except as provided in subpart 32.11)" after "Payment".

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

3. Section 13.501 is amended by adding paragraph (i) to read as follows:

13.501 General.

(i) In accordance with 31 U.S.C. 3332, payment under contracts may be required to be made by electronic funds transfer (EFT). See 32.1103 for instructions for use of the appropriate clause in purchase orders. When obtaining verbal quotes, the contracting officer shall inform the offeror of the EFT clause that will be in any resulting purchase order. Contracting officers shall not accept EFT payment data. All such data shall be provided by the contractor directly to the payment office.

PART 32—CONTRACT FINANCING

4. Section 32.000 is amended in paragraph (g) by removing the word "and"; in paragraph (h) by removing the period and inserting ";", and "in its place; and adding paragraph (i) to read as follows:

32.000 Scope of part.

(i) Electronic funds transfer payments.

5. Section 32.002 is amended by adding paragraph (a)(7) to read as follows:

32.002 Applicability of subparts.

(a) * * *

(7) Subpart 32.11, Electronic Funds Transfer.

* * * * *

6. Section 32.902 is amended by revising the definition "Payment date" and adding, in alphabetical order, the definition "Specified payment date" to read as follows:

32.902 Definitions.

* * * * *

Payment date means the date on which a check for payment is dated or, for an electronic funds transfer, the specified payment date.

* * * * *

Specified payment date, as it applies to electronic funds transfer (EFT), means the date which the Government has placed in the EFT payment transaction instruction given to the Federal Reserve System as the date on which the funds are to be transferred to the contractor's account by the financial agent. If no date has been specified in the instruction, the specified payment date is 3 business days after the payment office releases the EFT payment transaction instruction.

7. Section 32.903 is amended by adding the following three sentences at the end of the section:

32.903 Policy.

* * *

For payments made by electronic funds transfer, the specified payment date, included in the Government's order to pay the contractor, is the date of payment for prompt payment purposes, whether or not the Federal Reserve System actually makes the payment by that date, and whether or not the contractor's financial agent credits the contractor's account on that date. However, a specified payment date must be a valid date under the rules of the Federal Reserve System. For example, if the Federal Reserve System requires 2 days' notice before a specified payment date to process a transaction, release of a payment transaction instruction to the Federal Reserve Bank 1 day before the specified payment date could not constitute a valid date under the rules of the Federal Reserve System.

32.908 [Amended]

8. Section 32.908 is amended by removing paragraph (d).

9. Subpart 32.11, consisting of sections 32.1100 through 32.1103, is added to read as follows:

SUBPART 32.11—ELECTRONIC FUNDS TRANSFER

Sec.

32.1100 Scope of subpart.

32.1101 Policy.

32.1102 Assignment of claims.

32.1103 Contract clauses.

32.1100 Scope of subpart.

This subpart provides policy and procedures for Government payment by electronic funds transfer (EFT).

32.1101 Policy.

(a) 31 U.S.C. 3332(e) requires payment by EFT in certain situations. The payment office, not the contracting officer, determines if payment is to be made by EFT. The payment office may determine not to require submission of EFT information in accordance with paragraph (i) of the contract clauses at 52.232–33 and 52.232–34.

(b) The Government will protect against improper disclosure of a contractor's EFT information. The clauses at 52.232–33 and 52.232–34 require the contractor to submit such information directly to the payment office.

(c) Contractors that do not have an account at a domestic United States financial institution or an authorized payment agent are exempted by 31 U.S.C. 3332 until January 1, 1999, from the requirement to be paid by EFT. The clause at 52.232–33 provides for the contractor to submit a certification to that effect directly to the payment office in lieu of the EFT information otherwise required by the clause.

(d) Payment by EFT is the preferred method of contract payment in normal contracting situations. However, in accordance with 31 CFR 208.3(c), certain classes of contracts have been authorized specific limited exceptions as listed in paragraphs (d)(1) through (4) of this section. In these situations, the method of payment shall be specified by the payment office, either through agency regulations or by specific agreement.

(1) Contracts awarded by contracting officers outside the United States and Puerto Rico shall provide for payment by other than EFT. However, payment
by EFT is acceptable for this type of contract if the contractor agrees and the payment office concurs.

(2) Contracts denominated or paid in other than United States dollars shall provide for payment by other than EFT.

(3) Classified contracts (see 4.401) shall provide for payment by other than EFT where payment by EFT could compromise the safeguarding of classified information or national security, or where arrangements for appropriate EFT payments would be impractical due to security considerations.

(4) Contracts executed by deployed contracting officers in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13), or contracts executed by any contracting officer in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, shall provide for payment by other than EFT where (i) EFT payment is not known to be possible, or (ii) EFT payment would not support the objectives of the operation. Contracting officers predesignated to perform contracting duties in the event of these operations shall include coordinated plans for payment arrangements as part of the pre-contingency contract operations planning.

32.1102 Assignment of claims.

The use of EFT payment methods is not a substitute for a properly executed assignment of claims in accordance with subpart 32.8. EFT information which shows the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information within the meaning of the “Suspension of Payment” paragraphs of the EFT clauses at 52.232–33 and 52.232–34.

32.1103 Contract clauses.

(a) Unless instructed otherwise by the cognizant payment office or agency guidance, the contracting officer shall insert the clause at 52.232–33, Mandatory Information for Electronic Funds Transfer Payment, in all solicitations and resulting contracts which (1) Do not contain the clause at 52.232–33; (2) Will not be paid through use of the Governmentwide commercial purchase card (see 13.103(e)); and (2) Are not otherwise excepted in accordance with 32.1101(d).

(b) Optional Information for Electronic Funds Transfer Payment, in the contract; or

(c) For contracts containing the clause at 52.212–4, Contract Terms and Conditions—Commercial Items, if the clause at 52.232–33, Mandatory Information for Electronic Funds Transfer Payment, will not be included in the contract in accordance with paragraph (a) of this section, the contracting officer shall attach an addendum to the contract that deletes the clause at 52.232–33 and—

(1) If required by paragraph (b) of this section, incorporates the clause at 52.232–34, Optional Information for Electronic Funds Transfer Payment, in the contract; or

(2) If the clause at 52.232–34 is not required, specifies that the Government will make payment under the contract by check.

(d) If more than one disbursing office will make payment under a contract, the contracting officer shall include the EFT clause appropriate for each office and shall identify the applicability by disbursing office and contract line item.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Section 52.212–4 is amended by revising the date of the clause; and in paragraph (i) by revising the third and fifth sentences to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (AUG 1996)

* * * * *

(i) * * * Unless otherwise provided by an addendum to this contract, the Government shall make payment in accordance with the clause at FAR 52.232–33, Mandatory Information for Electronic Funds Transfer Payment, which is incorporated herein by reference. * * * For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

* * * * *

52.232–28 [Reserved]

11. Section 52.232–28 is removed and reserved.

12. Section 52.232–33 and 52.232–34 are added to read as follows:

52.232–33 Mandatory Information for Electronic Funds Transfer Payment.

As prescribed in 32.1103(a) and (c), insert the following clause:

MANDATORY INFORMATION FOR ELECTRONIC FUNDS TRANSFER PAYMENT (AUG 1996)

(a) Method of payment. Payments by the Government under this contract, including invoice and contract financing payments, may be made by check or electronic funds transfer (EFT) at the option of the Government. If payment is made by EFT, the Government may, at its option, also forward the associated payment information by electronic transfer. As used in this clause, the term “EFT” refers to the funds transfer and may also include the information transfer.

(b) Mandatory submission of Contractor’s EFT information. (1) The Contractor is required, as a condition to any payment under this contract, to provide the Government with the information required to make payment by EFT as described in paragraph (d) of this clause, unless the payment office determines that submission of the information is not required. However, until January 1, 1999, in the event the Contractor certifies in writing to the payment office that the Contractor does not have an account with a financial institution or an authorized payment agent, payment shall be made by other than EFT. For any payments not made after January 1, 1999, the Contractor shall provide EFT information as described in paragraph (d) of this clause.

(2) If the Contractor provides EFT information applicable to multiple contracts, the Contractor shall specifically state the applicability of this EFT information in terms acceptable to the payment office.

(c) Contractor’s EFT information. Prior to submission of the first request for payment (whether for invoice or contract financing payment) under this contract, the Contractor shall provide the information required to make contract payment by EFT, as described in paragraph (d) of this clause, directly to the Government payment office named in this contract. If more than one payment office is named for the contract, the Contractor shall provide a separate notice to each office. In the event that the EFT information changes, the Contractor shall be responsible for providing the changed information to the designated payment office(s).

Required EFT Information. The Contractor may make payment by EFT through either an Automated Clearing House (ACH) subject to the banking laws of the United States or the Federal Reserve Wire Transfer System at the Government’s option. The Contractor shall provide the following information for both methods in a form acceptable to the designated payment office. The Contractor may supply this data for this or multiple contracts (see paragraph (b) of this clause).

(1) The contract number to which this notice applies.

(2) The Contractor’s name and remittance address, as stated in the contract, and account number at the Contractor’s financial agent.

(3) The signature (manual or electronic, as appropriate), title, and telephone number of
the Contractor official authorized to provide this information.

(4) For ACH payments only:
   (i) Name, address, and 9-digit Routing Transit Number of the Contractor's financial agent.
   (ii) Contractor's account number and the type of account (checking, saving, or lockbox).

(5) For Federal Reserve Wire Transfer System payments only:
   (i) Name, address, telegraphic abbreviation, and the 9-digit Routing Transit Number for the Contractor's financial agent.
   (ii) If the Contractor's financial agent is not directly on-line to the Federal Reserve Wire Transfer System and, therefore, not the receiver of the wire transfer payment, the Contractor shall also provide the name, address, and 9-digit Routing Transit Number of the correspondent financial institution receiving the wire transfer payment.

(e) Suspension of payment. (1) Notwithstanding the provisions of any other clause of the Government is not required to make any payment under this contract until after receipt, by the designated payment office, of the correct EFT payment information from the Contractor or a certificate submitted in accordance with paragraph (b) of this clause. Until receipt of the correct EFT information, any invoice or contract financing request shall be deemed not to be a valid invoice or contract financing request as defined in the Prompt Payment clause of this contract.

(2) If the EFT information changes after submission of correct EFT information, the Government shall begin using the changed EFT information no later than the 30th day after its receipt to the extent payment is made by EFT. However, the Contractor may request that no further payments be made until the changed EFT information is implemented by the payment office. If such suspension would result in a late payment under the Prompt Payment clause of this contract, the Contractor's request for suspension shall extend the due date for payment by the number of days of the suspension.

(f) Contractor EFT arrangements. The Contractor shall designate a single financial agent capable of receiving and processing the electronic funds transfer using the EFT methods described in paragraph (d) of this clause. The Contractor shall pay all fees and charges for receipt and processing of transfers.

(g) Liability for uncompleted or erroneous transfers. (1) If an uncompleted or erroneous transfer occurs because the Government failed to use the Contractor-provided EFT information in the correct manner, the Government remains responsible for (i) making a correct payment, (ii) paying any prompt payment penalty due, and (iii) recovering any erroneously directed funds.

(2) If an uncompleted or erroneous transfer occurs because the Contractor-provided EFT information was incorrect at the time of Government release of the EFT payment transaction instruction to the Federal Reserve System, and—
   (i) if the funds are no longer under the control of the payment office, the Government is deemed to have made payment and the Contractor is responsible for recovery of any erroneously directed funds; or
   (ii) if the funds remain under the control of the payment office, the Government retains the right to either make payment by mail or suspend the payment in accordance with paragraph (e) of this clause.

(h) EFT and prompt payment. (1) A payment shall be deemed to have been made in a timely manner in accordance with the Prompt Payment clause of this contract, if, in the EFT payment transaction instruction given to the Federal Reserve System, the date specified for settlement of the payment is on or before the prompt payment due date, provided the specified payment date is a valid date under the rules of the Federal Reserve System.

(2) When payment cannot be made by EFT because of incorrect EFT information provided by the Contractor, no interest penalty is due after the date of the uncompleted or erroneous payment transaction, provided that notice of the defective EFT information is issued to the Contractor within 7 days after the Government is notified of the defective EFT information.

(i) EFT and assignment of claims. If the Contractor assigns the proceeds of this contract as provided for in the Assignment of Claims clause of this contract, the assignee shall provide the assignee EFT information required by paragraph (d) of this clause. In all respects, the requirements of this clause shall apply to the assignee as if it were the Contractor. EFT information which shows the ultimate recipient of the transfer to be other than the Contractor, in the absence of a proper assignment of claims acceptable to the Government, is incorrect EFT information within the meaning of paragraph (e) of this clause.

(j) Payment office discretion. If the Contractor does not wish to receive payment by EFT methods for one or more payments, the Contractor may submit a request to the designated payment office to refrain from requiring EFT information or using the EFT payment method. The decision to grant the request is solely that of the Government.

(k) Change of EFT information by financial agent. The Contractor agrees that the Contractor's financial agent may notify the Government of a change to the routing transit number, Contractor account number, or account type. The Government shall use the changed data in accordance with paragraph (e)(2) of this clause. The Contractor agrees that the information provided by the agent is deemed to be correct information as if it were provided by the Contractor. The Contractor agrees that the agent's notice of changed EFT data is deemed to be a request by the Contractor in accordance with paragraph (e)(2) that no further payments be made until the changed EFT information is implemented by the payment office.

(End of clause)

52.232–34 Optional Information for Electronic Funds Transfer Payment.

As prescribed in 32.1103 (b) and (c), insert the following clause:

OPTIONAL INFORMATION FOR ELECTRONIC FUNDS TRANSFER PAYMENT (AUG 1996)

(a) Method of payment. (1) Except as provided in paragraph (a)(2) of this clause, after the Contractor provides the information described in paragraph (d) of this clause, in accordance with paragraph (b) of this clause, Payments by the Government under this contract, including invoice and contract financing payments, may be made by check or electronic funds transfer (EFT) at the option of the Government. If payment is made by EFT, the Government may, at its option, also forward the associated payment information by electronic transfer. As used in this clause, the term “EFT” refers to the funds transfer and may also include the information transfer.

(2) Notwithstanding the provision of this clause making the furnishing of EFT information optional, the Contractor shall furnish the EFT information described in paragraph (d) for any payment to be made after January 1, 1999.

(b) Contractor consent. (1) If the Contractor is willing to be paid by EFT, the Contractor shall provide the EFT information described in paragraph (d) of this clause. The Contractor agrees that, after providing EFT information in accordance with this clause, the Contractor cannot withdraw the Government's right to make payment by EFT for this contract.

(2) If the Contractor provides EFT information applicable to multiple contracts, the Contractor shall specifically state the applicability of this EFT information in terms accepted to the payment office.

(c) Contractor's EFT information. Prior to submission of the first request for payment (whether for invoice or contract financing payment) under this contract, for which the Contractor desires EFT payment, the Contractor shall provide the information required to make contract payment by EFT, as described in paragraph (d) of this clause, directly to the Government payment office named in this contract. If more than one payment office is named for the contract, the Contractor shall provide a separate notice to each office. In the event that the EFT information changes, the Contractor shall be responsible for providing the changed information to the designated payment office(s).

(d) Required EFT information. The Government may make payment by EFT through any Automated Clearing House (ACH) subject to the domestic banking laws of the United States or the Federal Reserve Wire Transfer System at the Government's option. The Contractor shall provide the following information for both methods in a form acceptable to the designated payment office. The Contractor may supply this data for this or multiple contracts (see paragraph (b) of this clause).

(1) The contract number to which this notice applies.

(2) The Contractor's name and remittance address, as stated in the contract, and account number at the Contractor's financial agent.

(3) The signature (manual or electronic, as appropriate), title, and telephone number of
the Contractor official authorized to provide this information.

(4) For ACH payment only:

(i) Name, address, and 9-digit Routing Transit Number of the Contractor’s financial agent.

(ii) Contractor’s account number and the type of account (checking, saving, or lockbox).

(5) For Federal Reserve Wire Transfer System payments only:

(i) Name, address, telegraphic abbreviation, and the 9-digit Routing Transit Number for the Contractor’s financial agent.

(ii) If the Contractor’s financial agent is not directly on-line to the Federal Reserve Wire Transfer System and, therefore, not the receiver of the wire transfer payment, the Contractor shall also provide the name, address, and 9-digit Routing Transit Number of the correspondent financial institution receiving the wire transfer payment.

(e) Suspension of payment. (1) Notwithstanding the provisions of any other clause of this contract, if, after receipt of the Contractor’s EFT information in accordance with paragraph (b) of this clause, the EFT information is found to be incorrect, or, for payment after January 1, 1999, if EFT information has not been furnished, then within the designated payment office of the correct EFT information from the Contractor, (i) the Government is not required to make any further payment under this contract; and (ii) any invoice or contract financing request shall be deemed not to be a valid invoice or contract financing request as defined in the Prompt Payment clause of this contract.

(2) If the EFT information changes after submission of correct EFT information, the Government shall begin using the changed EFT information no later than the 30th day after its receipt to the extent payment is made by EFT. However, the Contractor may request that no further payments be made until the changed EFT information is implemented by the payment office. If such suspension would result in a late payment under the Prompt Payment clause of this contract, the Contractor’s request for suspension shall extend the due date for payment by the number of days of the suspension.

(f) Contractor EFT arrangements. The Contractor shall designate a single financial agent capable of receiving and processing the electronic funds transfer using the EFT methods described in paragraph (d) of this clause. The Contractor shall pay all fees and charges for receipt and processing of transfers.

(g) Liability for uncompleted or erroneous transfers. (1) If an uncompleted or erroneous transfer occurs because the Government failed to use the Contractor-provided EFT information in the correct manner, the Government remains responsible for (i) making a correct payment, (ii) paying any prompt payment penalty due, and (iii) recovering any erroneously directed funds.

(2) If an uncompleted or erroneous transfer occurs because Contractor-provided EFT information was incorrect at the time of Government release of the EFT payment transaction instruction to the Federal Reserve System, and—

(i) If the funds are no longer under the control of the payment office, the Government is deemed to have made payment and the Contractor is responsible for recovery of any erroneously directed funds; or

(ii) If the funds remain under the control of the payment office, the Government retains the right to either make payment by mail or suspend the payment in accordance with paragraph (e) of this clause.

(h) EFT and prompt payment. (1) A payment shall be deemed to have been made in a timely manner in accordance with the Prompt Payment clause of this contract if, in the EFT payment transaction instruction given to the Federal Reserve System, the date specified for settlement of the payment is on or before the prompt payment due date, provided the specified payment date is a valid date under the rules of the Federal Reserve System.

(2) When payment cannot be made by EFT because of incorrect EFT information provided by the Contractor, no interest penalty is due after the date of the completed or erroneous payment transaction, provided that notice of the defective EFT information is issued to the Contractor within 7 days after the Government is notified of the defective EFT information.

(i) EFT and assignment of claims. If the Contractor assigns the proceeds of this contract as provided for in the Assignment of Claims clause of this contract, the assignee shall provide the assignee EFT information required by paragraph (d) of this clause. In all respects, the requirements of this clause shall apply to the assignee as if it were the Contractor. EFT information which shows the ultimate recipient of the transfer to be other than the Contractor, in the absence of a proper assignment of claims acceptable to the Government, is incorrect EFT information within the meaning of paragraph (e) of this clause.

(j) Payment office discretion. If, after submitting the EFT information, the Contractor does not wish to receive payment by EFT methods for one or more payments, the Contractor may submit a request to the designated payment office to refrain from using the EFT payment method. The decision to grant the request is solely that of the Government.

(k) Change of EFT information by financial agent. The Contractor agrees that the Contractor’s financial agent may notify the Government of a change to the routing transit number, Contractor account number, or account type. The Government shall use the changed data in accordance with paragraph (e)(2) of this clause. The Contractor agrees that the information provided by the agent is deemed to be correct information as if it were provided by the Contractor. The Contractor agrees that the agent’s notice of changed EFT data is deemed to be a request by the Contractor in accordance with paragraph (e)(2) that no further payments be made until the changed EFT information is implemented by the payment office.

(End of clause)

Federal Acquisition Circular (FAC) 90-42 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-42 is effective August 29, 1996.

DATED: August 21, 1996.

Eleanor R. Spector,
Director, Defense Procurement.

DATED: August 22, 1996.

Ida M. Ustad,
Deputy Associate Administrator, Office of Acquisition Policy.

DATED: August 21, 1996.

Tom Luedtke,
Deputy Associate Administrator for Procurement, NASA.

[FR Doc. 96-22034 Filed 8-28-96; 8:45 am]
Payment by Electronic Funds Transfer (FAC 90-42, FAR Case 91-118)

This interim rule amends the FAR to add a new Subpart 32.11, Electronic Funds Transfer, which provides policy and procedures for Government payment by electronic funds transfer. The rule replaces the contract clause at 52.232-28, Electronic Funds Transfer Payment Methods, with two new clauses at 52.232-33, Mandatory Information for Electronic Funds Transfer Payment, and 52.232-34, Optional Information for Electronic Funds Transfer Payment. The rule also makes related amendments to Parts 12 and 13 and the clause at 52.212-4, Contract Terms and Conditions—Commercial Items. The rule facilitates implementation of Section 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). Section 31001(x)(1) amends 31 U.S.C. 3332 to mandate payment by electronic funds transfer in certain situations.

Dated: August 23, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.
Environmental Protection Agency

40 CFR Part 745
Lead; Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities; Final Rule
ENVI RONMENTAL PROTECTION
AGENCY

40 CFR Part 745
[OPPTS–62128B; FRL–5389–9]
RIN 2070–AC64

Lead; Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a Federal regulation under section 402 of the Toxic Substance Control Act (TSCA) to ensure that individuals conducting lead-based paint activities in target housing and child-occupied facilities are properly trained and certified, that training programs providing instruction in such activities are accredited and that these activities are conducted according to reliable, effective and safe work practice standards. The Agency is also finalizing a Federal regulation under section 404 of TSCA that will allow States and Indian Tribes to seek authorization to administer and enforce the regulations developed under section 402. The goal of this regulation is to ensure the availability of a trained and qualified workforce to identify and address lead-based paint hazards, and to protect the general public from exposure to lead hazards.

DATES: This document is effective August 29, 1996. Specific applicability dates related to this final rule are as follows:

States and Indian Tribes seeking EPA authorization to administer and enforce their own lead-based paint activities programs may apply to the Agency starting October 28, 1996. Following EPA authorization, the requirements of the State or Tribal program will become effective as specified in such program.

For States and Indian Tribes that do not apply to EPA for and receive authorization, EPA will administrate and enforce the regulations for lead-based paint activities contained in subpart L. The requirements of Subpart L will begin to apply in non-authorized States and Indian Country no later than August 31, 1998, as specified below.

In States and Indian Country where EPA will administrate and enforce subpart L, training programs that seek to provide lead-based paint activities training courses or refresher courses pursuant to § 745.225 may first apply to EPA for accreditation on or after August 31, 1998. Such training programs cannot provide, offer, or claim to provide training or refresher training for lead-based paint activities as defined in this subpart, without acquiring accreditation from EPA pursuant to § 745.225 on or after March 1, 1999.

In EPA-administered States and Indian Country, no individual or firm can perform, offer, or claim to perform lead-based paint activities as defined in this subpart, without certification from EPA to conduct such activities pursuant to § 745.226 on or after August 30, 1999. Such individuals or firms may first apply to EPA for certification pursuant to section 745.226 after March 1, 1999. In EPA-administered States and Indian Country, after August 30, 1999 all lead-based paint activities, as defined in this subpart, must be performed pursuant to the work practice standards contained in § 745.227.

ADDRESSES: Copies of this rule, the public comments received on this rule, EPA’s response to those comments and other relevant documents that support the rule are available for public inspection at EPA’s headquarters office on weekdays, except legal holidays, between the hours of noon and 4 p.m. at the following location: Environmental Protection Agency, TSCA Public Docket Office (7407), 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Legal Authority
III. Relationship of Sections 402 and 404 to TSCA
IV. Scope and Applicability
V. Requirements for Certification
VI. Certification
VII. Framework for Work Practice Standards
VIII. Response to Comments on Work Practice Standards
IX. State Programs
X. Regulatory Assessment Requirements
XI. State Programs
XII. Rulemaking Record
XIII. References

I. Introduction

The training, certification and accreditation requirements and work practice standards contained in this rule are being promulgated pursuant to section 402 of TSCA, 15 U.S.C. 2682, as amended on October 28, 1992. The Model State Program and regulations on the authorization of State and Tribal lead programs are being promulgated pursuant to section 404 of TSCA, 15 U.S.C. 2684.

B. Summary

Today’s final rule is intended to ensure that individuals conducting lead-based paint inspections, risk assessments and abatements in target housing and child-occupied facilities are properly trained and certified, and that training programs providing instruction in such activities are accredited. Target housing is defined as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities, or any 0-bedroom dwelling. A child-occupied facility is defined as a building or portion of a building, constructed prior to 1978, visited by the same child, 6 years of age or under, on at least 2 different days within any week,
provided that each days visit lasts at least 3 hours, the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours.

Child-occupied facilities may include, but are not limited to, daycare centers, preschools and kindergarten classrooms.

In addition, the regulations contain a Model State Program (MSP), which States and Indian Tribes are encouraged to refer to and use as guidance to develop their own Federally authorized lead-based paint activities programs. The MSP identifies five key elements—training, accreditation, certification, work practice standards and enforcement—which EPA believes are needed to promote and develop a qualified and trained workforce able to conduct lead-based paint activities safely, effectively and reliably. The regulations also contain procedures for States and Indian Tribes to follow when applying to EPA for authorization to administer and enforce a State or Tribal lead-based paint activities programs. The MSP will allow States and Indian tribes to manage and administer these training, accreditation and certification programs at the State or Tribal level. The Agency believes that programs such as this, which require among other things the certification of individuals, are best administered at the State or Tribal level allowing for individual State or Tribal-specific flexibility.

The purpose of these training, accreditation, and certification requirements and work practice standards in today's final rule is to ensure that lead-based paint abatement professionals, including workers, supervisors, inspectors, risk assessors, and project designers, are well-trained in conducting lead-based paint activities in target housing and child occupied facilities. The rule will also ensure, through the certification of professionals, that inspections for the identification of lead-based paint, risk assessments for the evaluation of lead-based paint hazards, and abatements for the permanent elimination of lead-based paint hazards are conducted safely, effectively and reliably. In addition, training providers will be accredited to ensure that high quality training for these professionals is available. The Agency believes this certification and accreditation program will allow homeowners and others to hire a well-qualified work force that is adequately trained in the proper procedures for conducting lead-based paint activities.

The work practice standards in today's final rule are not intended to regulate activities that involve or disturb lead-based paint, but only those that are described as an inspection, risk assessment or abatement by an individual who offers these services. This rule would not regulate a renovation contractor that incidentally disturbs lead-based paint or an individual who samples paint on a kitchen cabinet to determine if the paint contains lead. Today's final rule would cover a contractor who offers to abate a home of lead-based paint hazards, or an inspector who offers to conduct a lead-based paint inspection in a residential dwelling.

Regulated Entities. Potentially regulated entities are those training providers that would be accredited and those professionals who would be trained and certified to conduct lead-based paint abatements.

<table>
<thead>
<tr>
<th>Category</th>
<th>Examples of Regulated Entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lead abatement professionals</td>
<td>Workers, supervisors, inspectors, risk assessors and project designers engaged in lead-based paint activities</td>
</tr>
<tr>
<td>Training providers</td>
<td>Firms providing training services in lead-based paint activities</td>
</tr>
</tbody>
</table>

This table is not intended to be exhaustive, but rather provides a guide of the entities that are likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you or your business is regulated by this action, you should examine the provisions in part 745 of the regulatory text. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

C. Background

On October 28, 1992, the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X) became law. As a result, the Toxic Substances Control Act (TSCA) was amended to include a new title, Title IV, 15 U.S.C. 2681–2692. TSCA Title IV directs EPA to promulgate several regulations, including the lead-based paint activities training, certification, and accreditation requirements, work practice standards and the MSP included in today's final rule.

The requirements in today's final rule were first proposed on September 2, 1994 (59 FR 45872) (FRL±4633±9). Several changes have been made to the proposed rule because of comments received by the Agency. Nonetheless, the primary objective of the proposed rule and today's final rule remains the same and is consistent with the goals stated in Title X and the mandates prescribed in TSCA Title IV.

The primary objective of today's final rule is to address the nation's need for a qualified and properly trained workforce to assist in the prevention, detection and elimination of hazards associated with lead-based paint. By promoting the establishment of this workforce through today's final rule, the Agency will help to ensure that individuals and firms conducting lead-based paint activities in target housing and child occupied facilities will do so in a way that safeguards the environment and protects the health of building occupants, especially children aged 6 years and younger.

In addition to today's final rule under sections 402 and 404 of TSCA, EPA is developing other rules as mandated by other sections of TSCA Title IV. The relationship of today's final rule to these other rules is discussed in more detail in Unit IV of this preamble.

II. Consultation with Stakeholders

Following the September 2, 1994 publication of the lead-based paint activities proposal, the Agency met at different times with representatives from various State environmental and public health agencies. At least three meetings were held with State and Tribal representatives under the auspices of the Forum on State and Tribal Toxics Action or FOSTTA. FOSTTA is an organization that serves as a forum for State and Tribal officials to jointly participate in addressing national toxics issues, including lead, and to improve communication and coordination among the States, Indian Tribes and EPA. Under FOSTTA, a lead project has been established to work with the States and Tribes on lead-related issues. Between 10 and 12 States participate on the lead project with EPA.

In addition to FOSTTA, the Agency met on December 5 and 6, 1994, with 93 representatives from 49 State health and environmental agencies and 12 representatives from 10 Indian Tribes. Minutes from the FOSTTA meetings, and the December 1994 meeting are in the docket for today's final rule (Ref. 1).
the Agency also held meetings with the States and Indian Tribes to discuss their current and future roles as co-regulators in the area of lead-based paint activities. These meetings, in combination with the written comments submitted by the States, helped shape today's final rule.

III. Response to Comments on the Scope of the Rule

The comment period for the proposed rule extended from September 2, 1994 to December 15, 1994. The Agency received a total of 323 comments and has reviewed them all. These comments, along with a detailed summary (Ref. 2) and the Response to Public Comment Document (Ref. 3), a written response to the issues raised by commenters, can be found in the public docket for today's final rule.

Based on the public comments, the Agency has made several changes to the proposed rule. Two of these changes affect the scope of the final rule by modifying the definitions of the buildings and structures covered. Additionally, the Agency has amended the definition of abatement. These changes, and others, are summarized below. For a more detailed discussion of issues raised by commenters and changes made to the final rule, readers should refer to the Response to Public Comment Document.

A. Building Types

One principal change in the final rule is the Agency's decision to delay promulgation of training and certification requirements and work practice standards for individuals and firms conducting lead-based paint activities in public buildings (except child-occupied facilities), commercial buildings, superstructures and bridges. This decision was primarily based on the need to clarify the "deleading" definition contained in the September 2, 1994 proposal, and the Agency's desire to avoid conflict and overlap with the training requirements contained in the Occupational Safety and Health Administration's (OSHA) interim final lead standard (29 CFR 1926.62).

Under the September 2, 1994 proposal, individuals and firms conducting deleading activities in public and commercial buildings, superstructures and bridges would have been subject to EPA's training and certification requirements and work practice standards and, possibly, the OSHA training requirements contained in OSHA's interim final lead standard. Under the proposed rule, EPA's intention was to include OSHA's training requirements in EPA's training and certification program. However, commenters noted uncertainty as to whether EPA's proposed definition of "deleading" would have included precisely the same activities which would trigger the training requirements under OSHA's interim final lead standard.

Consequently, commenters believed that EPA's training and certification program would have imposed OSHA training when, in fact, OSHA may not require it. Other commenters also believed that OSHA's training requirements were adequate and that EPA's training and certification program was unnecessary for individuals and firms conducting "deleading" activities in public and commercial buildings, superstructures and bridges.

In its review of the comments received on the deleading definition, the Agency has determined that the definition of the term needs to be clarified. At this time, the Agency is continuing to review the public comments it received on its proposed definition, and is examining available data for the purposes of developing options to establish training and certification requirements and work practice standards for individuals and firms that conduct deleading activities in public and commercial buildings, superstructures and bridges. The Agency is also considering options that will eliminate the potential for overlap between any training requirements EPA may propose in the future and OSHA training requirements for such individuals and firms.

Another related change involves the Agency's decision to include requirements for lead-based paint activities conducted in public buildings (except child-occupied facilities) in the future action covering commercial buildings, superstructures and bridges. Accordingly, today's final rule does not cover public buildings constructed prior to 1978 (except child-occupied facilities).

The Agency is taking this action in response to numerous comments that urged the Agency to focus its efforts on lead-based paint activities conducted in housing and other facilities frequented by children. In the September 2, 1994 proposed rule, individuals and firms conducting lead-based paint activities in public buildings would have been required to adhere to the same regulations as in target housing, regardless of whether children frequented the buildings. In the September 2, 1994 proposal, the Agency specifically requested comment on whether all public buildings should be subject to the same regulations and grouped together in this way with target housing.

A significant majority of comments expressed concern that application of these requirements to all public buildings, as defined in the September 2, 1994 proposal, would have resulted in the expenditure of substantial resources without a comparable reduction in lead-based paint exposures among children aged 6 years and under. Under the September 2, 1994 proposal, the Agency broadly defined public buildings as "any building constructed prior to 1978, except target housing, which is generally open to the public or occupied or visited by children, including but not limited to stores, museums, airport terminals, convention centers, office buildings, restaurants, hospitals, and government buildings, as well as facilities such as schools and day-care centers."

In response to those comments that the Agency focus its requirements on individuals and firms conducting lead-based paint activities in buildings frequented by children, today's final rule establishes a sub-category of public buildings named "child-occupied facilities."

Today's final rule defines a child-occupied facility as "a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least 2 different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day-care centers, preschools and kindergarten classrooms."

Under today's final rule, individuals, firms and training providers that either offer training in the performance of lead-based paint activities in child-occupied facilities, or that perform or offer to perform such activities in child-occupied facilities are subject to the same requirements as individuals, firms and training providers involved in target housing.

The Agency's decision to define and establish child-occupied facilities as a sub-category of public buildings with requirements equivalent to those for target housing is based on one of the key objectives of today's final rule, which is to prevent and reduce lead exposures among young children.

The Agency believes that children face potentially equivalent (if not greater) risks from lead-based paint hazards in schools and day-care centers as they do at home. Indeed, some
children spend more time in particular classroom or day-care room in a given day or week than they might spend in a single room in their homes. If that classroom contained a lead-based paint hazard, the children in it could be at risk.

The Agency believes section 402(b) provides it with the flexibility necessary to regulate lead-based paint activities in child-occupied facilities in the same manner it regulates those activities in target housing. Although section 402(b)(2) uses terms such as "identification" and "dealing" instead of "inspection," "risk assessment," and "abatement," EPA believes that, given the similarity of the population to be protected and the nature of the risk they face, the section 402(b)(2) terms can be understood to include the same types of lead-based paint activities as specified in section 402(b)(1). "Identification" of lead-based paint under section 402(b)(2) is analogous to "inspection" under section 402(b)(1). "Dealing" under section 402(b)(2) is a form of "abatement" under section 402(b)(1). While there is no direct analog in 402(b)(2) to "risk assessment," EPA believes such activity is fairly (and necessarily, from a logical perspective) included within the phrase "activities conducted by a person who conducts or plans to conduct an elimination of lead-based paint or lead-based paint hazards." (See definitions of "dealing" in section 402(b)(2)).

Commenters also supported the Agency's decision to focus on those buildings or portions of buildings where children spend a significant amount of time, or that children regularly or frequently use, rather than all public buildings. Commenters cited preschools and kindergarten classrooms as examples of the types of buildings that needed to be included, like target housing, in the regulatory program contained in today's final rule. By citing such facilities as examples, commenters appeared to indicate that the Agency should focus on facilities that a 6-year old child might visit, rather than facilities that children may visit intermittently or infrequently, such as museums, hospitals, grocery stores or airports.

In selecting the 3-hour, 2-day a week time requirement for its definition of a child-occupied facility, the Agency considered national survey data compiled by the U.S. Department of Education (Ref. 4) and the U.S. Bureau of the Census (Ref. 5). Data from the Department of Education and the Bureau of the Census indicate that children attending preschool between age 3 and age 6 or under will meet for a minimum of 3 hours a day, 2 days a week.

Based on this data, the Agency chose to define "child-occupied" facilities as facilities where a child would spend a minimum of at least 3 hours a day, 2 days a week. Relying on the available data, the Agency believes its definition will cover the vast majority of preschools, kindergartens and day-care centers. Moreover, the decision to exclude child-occupied facilities constructed after 1978 is consistent with the statutory definition of both target housing and public buildings, which exclude both housing and public buildings constructed after 1978.

The Agency also sought to include only facilities where there is regular or recurring visitation, over time, by a child, by including a combined annual visitation minimum of 60 hours. The rationale for this choice was that a likely minimum recurring visitation schedule for a child would be a 10-week day-care session, 2 days per week, 3 hours per day that would total 60 hours.

Today's final rule requires that individuals and firms conducting lead-based paint activities in child-occupied facilities meet the same training and certification requirements as individuals and firms working in target housing. The Agency designed the training and certification requirements for individuals and firms working in target housing primarily to ensure that abatement professionals are instructed on how to conduct lead-based paint activities to identify, reduce or eliminate lead-based paint hazards that may present risks to children. Consequently, the Agency believes these requirements are also appropriate for individuals working in child-occupied facilities.

Commenters did not support the development of a set of work practice standards for child-occupied facilities that would differ from the work practice standards in target housing. Nor does the Agency have any reason to conclude that a different set of work practice standards should be developed for child-occupied facilities. Consequently, the work practice standards for child-occupied facilities do not differ from those work practice standards established by this final rule for target housing.

The proposed rule specifically exempted from regulation individuals who perform lead-based paint activities within residences which they own, unless the residence is occupied by a person or persons other than the owner or the owner's immediate family while the activities are being conducted. The majority of public commenters supported this exemption and it will remain in the final rule. However, some commenters expressed concern that homeowners should not perform abatements in their own home where there is a child with an elevated blood lead level. The Agency agrees with this comment and has changed the final rule accordingly.

B. Definition of Lead-Based Paint Abatement in Target Housing and Child-Occupied Facilities

The Agency received roughly 60 comments on its proposed definition of lead-based paint abatement. In developing the proposed rule, the Agency relied on the definition of abatement contained in section 401 of TSCA. Section 401(1) of TSCA defines abatement as:

...any set of measures designed to permanently eliminate lead-based paint hazards in accordance with standards established by the Administrator under this title. Such term includes:

(A) the removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and

(B) all preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures.

In its September 2, 1994 proposal, the Agency defined "abatement" as follows:

Abatement means any set of measures designed to permanently eliminate lead-based paint hazards in accordance with standards established by the Administrator under Title IV of TSCA. Such term includes:

(1) the removal of lead-based paint and lead-contaminated dust, the permanent containment or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and

(2) all preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures.

Abatement shall be presumed in the following circumstances:

(A) projects for which there is a written contract stating that an individual or firm will be conducting activities in or to a dwelling unit that will permanently eliminate lead-based paint hazards;

(B) projects involving the permanent elimination of lead-based paint or lead contaminated soil and conducted by firms or individuals certified in accordance with this § 745.226 or this regulation; or

(C) projects involving the permanent elimination of lead-based paint or lead contaminated soil and conducted by firms or individuals who, through their company name, promotional literature, or otherwise advertise or hold themselves out to be lead abatement professionals.

(3) Abatement does not include renovation and remodeling, or landscaping activities.
whose primary intent is not to permanently eliminate lead-based paint hazards, but is instead to repair, restore or remodel a given structure or dwelling, even though these activities may incidently result in a reduction in lead-based paint hazards.

In response to the proposal, commenters expressed concern that the phrase “...any set of measures, ...” implied that the Agency assumed that abatement will always occur throughout an entire residential dwelling, rather than to some subset of components. The Agency agrees with the commenters and has clarified its belief that abatements may be performed on components of buildings, as well as the whole building, by adding the following phrase: “any set of measures designed to permanently eliminate lead-based paint” to its definition of abatement in today’s final rule.

In the proposed rule, by way of clarification, the Agency provided three circumstances (see (2)(A)(B) and (C) above) in which abatement shall be presumed. Commenters noted that, as proposed, these illustrative circumstances may have resulted in the imposition of today’s requirements upon individuals and firms conducting renovation and remodeling or other similar nonabatement activities.

For example, a renovation and remodeling contractor may also be certified as an abatement supervisor or worker, and may choose to advertise his/her lead-based paint abatement services as one specialty his/her business can provide. This should not mean that all renovation or remodeling projects this contractor works on should be considered abatement for the purposes of this rule. In response to these comments, § 745.223(3)(ii) and (3)(iii) of the abatement definition in today’s final rule identifies activities that are not considered abatements. These include renovation and remodeling activities covered by § 745.223(4) of the abatement definition which are not specifically designed to permanently eliminate lead-based paint hazards, but instead, are designed to repair or remodel a residential dwelling, and interim control activities.

Another issue raised by commenters was that the Agency’s abatement definition focused on the intent of the building owner and the individual or firm conducting an abatement. The commenters suggested that the Agency’s intent-based approach creates a loophole for building owners and contractors who will escape regulation by calling abatement something else, such as renovation and remodeling. A third concern was that the definition required abatement activities to result in the permanent elimination of a lead-based paint hazard, as opposed to a temporary reduction of a hazard.

Although these comments are not without merit, EPA has decided to maintain its proposed abatement definition, with some minor adjustments. EPA believes that the clear intent of Congress was to focus the scope of this initial regulation on abatement activities, and to define abatements as those projects where there is a conscious effort on the part of the building owner and contractor (“measures designed to’) to permanently eliminate lead-based paint hazards.

In writing its definition of abatement, Congress did not say any set of measures “which permanently eliminate” lead-based paint hazards. Nor did it say any set of measures “which have the effect of permanently eliminating” lead-based paint hazards. Instead, Congress defined abatements as any set of measures “designed to permanently eliminate” lead-based paint hazards. Webster’s defines the term “design” as “to intend for a definite purpose.” By including the phrase “designed to” in its definition of abatement, EPA believes that Congress was specifically directing EPA to regulate as abatements only those activities which are undertaken with the definite purpose or intent of permanently eliminating lead-based paint hazards.

The reason for this focus can be found in the legislative history that accompanies Title X. Prior to the passage of Title X, and even today, abatements were being conducted to reduce or eliminate lead exposure to children when in fact they were, because of improper training or technique, increasing exposures. This situation, in part, prompted Congress to direct the Agency to develop today’s final rule regulating abatement activities.

Other commenters suggested that the Agency’s definition of abatement should specifically include renovation and remodeling, interim controls, operations and maintenance, and any other activity that may disturb lead-based paint and create a potential hazard.

The definition of abatement in section 401(1) of TSCA includes a list of specific activities (e.g., removal of lead-based paint, replacement of lead-painted surfaces or fixtures) which are included within the definition’s scope. This list is cited by some commenters as indicating that abatement should include activities, such as renovation, that are not necessarily intended to eliminate lead-based paint hazards.

However, in providing this list, Congress did not intend that it be read or applied in isolation from the preceding intent-based definitional language. The list provided in section 401(1)(A) and (B) merely identifies some of the “measures” that may be taken by a contractor to “permanently eliminate lead-based paint hazards.” EPA believes that, for any of the measures specified in section 401(1)(A) and (B) to be considered abatement, they must also be conducted with the intent or “definite purpose” of permanently eliminating lead-based paint hazards.

Clearly, Congress recognized that these other activities, such as renovation or remodeling, may disturb lead-based paint and may result in lead-based paint hazards. In response to this concern, Congress directed the Agency, under section 402(c), to conduct a study to determine the extent to which renovation and remodeling activities may create lead-based paint hazards. Based on the results of this study, section 402(c)(3) of TSCA directs EPA to revise today’s regulations to address the lead-based paint hazards associated with renovation and remodeling. Thus, rather than requiring regulations now for all non-abatement activities, section 402 of TSCA directs EPA to defer such regulation pending further study to determine which, if any, renovation and remodeling-type activities create a lead-based paint hazard.

IV. Relationship of Sections 402 and 404 to Section 403 of TSCA

Under section 403 of TSCA, EPA is developing a rule that will identify conditions of lead-based paint, and lead levels and conditions in residential dust and soil that would result in a hazard to building occupants, especially children age 6 and under. In combination with the work practice standards contained in § 745.227 of today’s final rule, the Agency expects that the levels and conditions identified in its proposed TSCA section 403 rule will provide clear direction on how to identify, prioritize and respond to hazards from lead in and around target housing.

Promulgation of the TSCA section 403 rule, however, has been delayed until the Agency completes various information gathering and assessment activities. On January 3, 1996, the United States District Court for the Northern District of New York issued a decree, consented to by EPA and the Atlantic States Legal Foundation (ASLF), that required EPA to propose the TSCA section 403 rule by November 30, 1996 and to issue a final rule by September 30, 1997 (Ref. 8).
In the interim, the Agency has published guidance to assist the public in identifying lead-based paint hazards, sources of lead exposure, and the need for control actions in environments where children may be present.

EPA originally issued this guidance in a July 14, 1994 memorandum from Lynn R. Goldman, Assistant Administrator for Prevention, Pesticides and Toxic Substances, to the Agency's Regional Division Directors, entitled “Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead-Contaminated Soil” (the “section 403 Guidance”). Subsequently, copies of the section 403 Guidance have been available from the Agency upon request. To further disseminate the section 403 Guidance, the Agency published the full text of that document in the Federal Register on September 11, 1995 (60 FR 47248) (FRL–4969–6).

In the September 2, 1994 preamble, the Agency provided a lengthy discussion of the relationship between the section 402/404 regulations and the forthcoming section 403 regulation. The Agency explained why it believed it was appropriate to offer the section 402/404 rule for public comment, in the absence of a section 403 regulation (See 59 FR 45875).

In response, the Agency received several public comments. None of the comments stated that the Agency should promulgate a final regulation for lead-based paint activities in target housing without a final section 403 rule. Seven comments were received from parties with an interest in public and commercial buildings, superstructures and bridges, urging the Agency to delay promulgating a TSCA section 402/404 rule covering those types of structures until the section 403 rule has been promulgated. As discussed previously, today’s final rule does not address these building types, and thus these comments are not applicable.

Lastly, one commenter stressed the importance of publishing the TSCA section 403 rule as quickly as possible, but did not suggest that delaying action on the TSCA section 402/404 rule was necessary.

The Agency understands that without a final section 403 rule identifying lead-based paint hazards, full implementation of today’s final rule will be difficult. The Agency has addressed this problem in the ASLF consent decree, by committing to promulgate a final rule under section 403 by September 30, 1997, well before subpart L of this rule will become effective in EPA administered States and Indian Country.

V. Response to Comments on the Accreditation of Training Programs in Target Housing and Child-Occupied Facilities

Section 745.225 includes various requirements and the application procedures that training programs must follow to become accredited by EPA to provide instruction in the lead-based paint activities and work practice standards described in this rule. These procedures and requirements apply to training programs that will offer both basic and refresher training courses.

Training programs may offer courses for one or more of the following five work disciplines: (1) Inspector, (2) risk assessor, (3) supervisor, (4) abatement worker, and (5) project designer. Minimum curricula requirements for each of these courses can be found at § 745.225(d).

The Agency has already developed and released model course curricula materials for the inspector, risk assessor, supervisor, and abatement worker disciplines. The Agency is currently modifying and updating these materials, and developing a new model course for project designers, to reflect the course curricula contained in § 745.225(d). EPA will make these materials available prior to August 31, 1998.

The Agency received a variety of comments on the work disciplines, training courses and accreditation procedures in the proposed rule. Among the key issues raised were: the number of work disciplines; the length of the courses; their traditional classroom approach; the course curricula; the course test and hands-on assessment; instructor qualifications; and the procedures for applying for accreditation.

In response to these comments, the Agency has adjusted the proposed rule in several ways. EPA believes these adjustments will result in a more flexible accreditation system for both training program providers and for individuals seeking training and certification through that system.

A. Framework for Training

Generally, most commenters agreed in principle with the tasks and responsibilities identified by the Agency under its five work disciplines: inspector, risk assessor, supervisor, worker, and project designer. On the other hand, commenters were divided on whether five separate work disciplines and training courses were needed to accomplish the tasks and objectives associated with inspection, risk assessment and abatement. In general, commenters were concerned with the potential for redundancy and overlap among the proposed five training courses.

Although the final rule retains five distinct work disciplines, as originally proposed, the Agency has made several changes to make the courses more modular in their design, eliminate potential redundancies in the course curricula, and reduce course length. Because of these changes, the Agency believes that the market will be better able to manage and more efficiently provide training to individuals responsible for performing lead-based paint inspection, risk assessment and abatement activities.

The Agency has consulted with OSHA to eliminate any redundancies between the course curricula contained in § 745.225(d)(3) and (5) for the abatement supervisor and worker, and the training program OSHA has established under its interim lead standard (29 CFR 1926.62). Based on discussions with OSHA and a review of public comments, the Agency has decided that the best way to eliminate any redundancies or confusion regarding OSHA training versus EPA training is to remove OSHA’s training program elements from the course curricula contained in § 745.225(d)(3) and (5).

As a result, training programs have the option of offering courses in: (1) OSHA training; (2) EPA training; or (3) both OSHA and EPA training. Only those programs that wish to offer EPA training would need to apply for accreditation under this rule.

A key difference between OSHA and EPA training is that OSHA training is primarily designed to reduce the occupational exposure to lead for construction workers. The OSHA standard establishes maximum limits of exposure to lead for all workers covered, including an action level of 30 µg/m³ calculated as an 8-hour time-weighted average (TWA). At or above this action level, workers are subject to OSHA’s training requirements, which primarily involve instruction in respirator use, engineering and work practice controls for the containment of lead, and OSHA’s medical surveillance program.

In contrast, the primary purpose of EPA training for abatement workers, supervisors and project designers is to protect building occupants, particularly children ages 6 years and younger, from potential lead-based paint hazards and exposures both during and after an abatement.

The deletion of OSHA’s training program elements has helped reduce the length of the abatement worker course from a proposed 32-hour course...
(including 10 hours of hands-on instruction) to 16 hours (including 8 hours of hands-on instruction). The Agency has also reduced the emphasis on providing instruction in basic construction techniques and focused instead on the practical application of abatement methods and practices. The Agency believes providing adequate instruction on both construction and abatement techniques, even in a 32-hour course, would have been very difficult, if not impossible.

Furthermore, the final rule has retained 8 of the 10 hours of hands-on instruction, as proposed. Commenters were extremely supportive of the hands-on requirements of the rule, and the Agency believes that hands-on training helps trainees to retain the knowledge they acquire. Incorporating, as it does, 8 hours of hands-on training, the Agency believes that the 16-hour requirement in the final rule will enable workers to conduct safe, reliable and effective abatements.

Another change designed to reduce course length and eliminate overlap in the rule is the decision to establish one 32-hour course requirement that both supervisors and project designers will take, and to establish an additional 8-hour course supplement that project designers are required to take.

Under the proposed rule, supervisors and project designers would have been required to take one 40-hour course, and project designers would have been required to take an additional 16-hour course supplement. Most of the comments on the proposal suggested that the Agency could combine some of the course topics from the two classes.

As in the proposed rule, the Agency's premise for developing one course for both supervisors and project designers is the similarity in the job responsibilities of these two work disciplines. Areas where the supervisor and project designer share similar learning needs are listed in the course curriculum at § 745.225(d)(3). Some of the course topics (e.g., risk assessment/inspection report interpretation) reflect the Agency's decision to insert topics from the proposed project designer course into that of the final joint supervisor/project designer course.

For example, the ability to interpret inspection and risk assessment reports is a skill that both supervisors and project designers must have, since they are both responsible for either the oversight of abatement activities or are responsible for designing abatement plans based on the results of inspections and risk assessments.

The course supplement for project designers is intended to provide specific instruction in designing lead-based paint abatement activities in target housing and child-occupied facilities. Clearly, this 8-hour course cannot train an individual in all aspects of project design. However, the course will compliment the education and skills that project designers must have (e.g., a degree in engineering or 4 years experience in building construction and design) by providing lead-specific design instruction.

The Agency also received several comments regarding the training for inspectors and risk assessors. Many commenters requested clarification about whether an individual must take both the inspector and risk assessor course as a part of the process to become certified as a risk assessor. The simple answer is yes; however, the inspector and risk assessor courses do not necessarily have to be taken back-to-back. Training providers have the option of offering the inspector course separate from the risk assessor course, although the provider may choose to offer the two courses as one unit. More detail regarding the certification process for inspectors and risk assessors is provided in Unit VI. of this preamble.

An additional change to the rule is the allowance for alternative training methods, including supplemental at-home study programs. The Agency specifically requested comment on the use of at-home study materials and other alternative training methods in its September 2, 1994 proposal. Most of the comments received on this issue supported the use of alternative training methods in lieu of classroom instruction, with certain restrictions.

Commenters opposed to the use of alternative training methods generally expressed reservations regarding the quality of such methods and the need for the teacher/student interaction afforded in the classroom.

Based on a review of these comments, the final rule permits the use of alternative training techniques (e.g., video training, computer-based training) as a supplement to the hands-on skills assessment or as a substitute for the lecture portion of the training course requirements outlined in § 745.225(d). The Agency agrees with commenters who note that alternative training programs, such as at-home study, can result in the effective transfer of information, if certain restrictions are implemented to ensure the quality of these programs.

To ensure the quality of such alternative programs, the final rule requires training providers who opt to use alternative techniques to submit all materials as specified under § 745.225(b)(1) as a part of their application for accreditation. These materials include copies of the course agenda, and student and instructor manuals.

The accreditation of alternative training programs will be based on EPA's review of the training materials submitted under § 745.225(b)(1), including the course agenda and manuals. In its review, the Agency will consider on a case-by-case basis the provisions made by a training program to ensure the quality of its course materials. Based on that review, the Agency may accredit programs offering alternative training and instructional methods.

In addition, § 745.225(c)(6) of the final rule also requires all training programs, including those using alternative training methods, to meet the minimum hourly requirements for hands-on activities in their training courses. Under § 745.225(c)(7), all training programs are also required to administer a course test and conduct a hands-on skills assessment or a proficiency test as discussed below.

One specific example of alternative training/testing techniques that the rule mentions is the use of a proficiency test in lieu of a hands-on assessment and course test. A course that offers a proficiency test would consist primarily of an evaluation of the effectiveness and reliability of a student's ability to conduct a particular lead-based paint activity. The proficiency test must also cover all of the topics and skills addressed in a particular course. For instance, a proficiency-based course in inspection could involve a mix of lecture material with students conducting a mock inspection in a residential dwelling with known lead-based paint concentrations. The student would be evaluated on the accuracy of the results of their inspection.

One other issue raised by commenters was the lack of detail on specific activities for the "hands-on" component of a course. The Agency has not however, modified the final rule to specify activities that training programs must use for the hands-on component of their courses. The Agency still believes that qualified training programs should be able, without additional regulation, to develop specific hands-on activities based on their knowledge of lead-based paint activities and the industry.

Furthermore, the Agency notes that, as the technologies for conducting lead-based paint activities develop, the focus of the elements of hands-on training will change. The course topics required to have a hands-on component are
B. Training Program Accreditation Requirements

1. General comments. The Agency received a significant number of comments on the qualifications proposed for instructors. Additionally, commenters requested clarification on whether the Agency requires training providers to offer courses for individuals who do not speak English, or who have low reading comprehension. Other commenters asked the Agency to clarify or change specific aspects of the proposed accreditation process.

For example, several commenters requested clarification on the number of instructors that a training program must employ to become accredited. Some commenters thought that under the September 2, 1994 proposal, a training program would be required to employ a minimum of three individuals to obtain accreditation: a training manager, a principal instructor and a work practice instructor. Other commenters interpreted the proposed rule to mean that at a minimum only one individual—the training manager—was required to staff a training program.

On this same topic, some commenters criticized the proposal for setting up an "exclusive" training system. They believed that the proposed experience, education and other qualifications for the training manager, and principal and work practice instructors were excessive. These commenters stated that the proposed qualifications were unnecessary, and that they would prevent competent and talented instructors from offering training in lead-based paint activities. Under the final rule, one person may be employed as both the training manager and the principal instructor, if the individual possesses the qualifications listed at § 745.225(c)(1) and (2).

Furthermore, the Agency observes that the final rule no longer includes work experience or educational prerequisites for work practice instructors, but instead allows training programs to employ guest work practice instructors, who may provide either lecture or hands-on instruction in a course.

Some commenters urged the Agency to stipulate specific qualifications for guest instructors, or to limit the amount of time a guest instructor may be employed by a training program. The final rule does not, however, set such limits. The Agency believes that it would be too difficult to regulate the qualifications of the many kinds of inter-disciplinary guest instructors that a training program might want to employ, given that their backgrounds and credentials will vary significantly. For example, physicians, certified abatement supervisors, lawyers, housing officials and other professionals could possibly be employed as guest instructors. Given the diversity in education, training and experience among these professionals, the Agency does not believe that establishing specific qualifications is either possible or useful and the final rule leaves that determination to the training manager.

In terms of setting a limit on the amount of time that a guest instructor may be used, the Agency has placed the responsibility for ensuring the quality of a training course on the training manager. The Agency believes that the decision for determining how much time a guest instructor should be used is a decision best made by the training manager, in consultation with the principal instructor.

Additionally, the Agency notes that the training manager ultimately is responsible for ensuring the quality of instruction, and that it is in the best interest of a training manager to account for the capabilities and experience of the principal instructors.

Lastly, the Agency notes that today's final rule does not require training providers to offer courses for individuals who do not speak English or who have a low reading comprehension. The Agency believes that training providers should be given the flexibility to offer special courses for such individuals, depending on demand. However, the Agency does recommend that training providers make special provisions to accommodate the needs of individuals who cannot speak English, or who have a low reading comprehension.

2. Prerequisites—training manager. In addition to these changes, today's final rule more clearly describes the prerequisites for the training manager.

For example, under the proposed rule the qualifications required for a training manager were flexible and intended to accommodate a broad range of work experience and educational backgrounds. Specifically, the proposal would have required that training managers, at a minimum, possess either some training or education in teaching adults. In addition, the proposal would have required that training managers possess experience or education in one of three additional areas, specifically: (1) A bachelor's or graduate degree in building construction, engineering, industrial hygiene, safety, or public health; or (2) 4 years of experience managing an occupational health and safety program, or (3) an additional 2 years of experience teaching adults.

The final rule has been revised, however, to require training managers to meet any one of the four prerequisites now listed at § 745.225(c)(1). As discussed later in this section of the preamble, the prerequisites contained in the final rule are different from those proposed and include the addition of a fourth alternative prerequisite under § 745.225(c)(1)(i). Additionally, the final rule no longer contains the requirement that all training managers possess either training or education in teaching adults. The Agency's decision to eliminate the training or educational requirement in adult education was based on its review of several comments. These comments suggested that, although training or experience in adult education may be valuable, it should not be required of all training managers, given that the primary function of the training manager is to administer and manage a training program—not necessarily to instruct adults. The Agency agrees with these comments, but notes that the final rule maintains the 2 years of experience in adult education as one of the four prerequisites that can now be used to qualify an individual as a training manager.

The decision to retain the 2 years of experience in adult education as one of the four available prerequisites for qualifying training managers is based on several factors. The most important factor is the Agency's desire to accommodate the broad range of work experience and educational backgrounds that training managers and instructors may bring to their work. This approach, which most commenters widely supported, has been retained and further extended under § 745.225(c)(1) of the final rule.

For instance, in addition to recognizing bachelor or graduate level degrees in building construction, engineering, industrial hygiene, safety, or public health, the final rule also would permit individuals who possess a degree in business administration or education to assume the responsibilities of a training program manager. Although these experiences may differ from one another, the Agency believes that an individual can effectively utilize them to ensure the development of a quality training program. Furthermore, the Agency's role in the accreditation process also will contribute to the development of quality lead-based paint activities training programs.
3. Prerequisites—principal instructors. The final rule also provides a great deal of flexibility in recognizing the work experience and educational backgrounds of principal instructors. For example, instead of specifically listing the type of training, experience or education in teaching adults that a principal instructor must possess—as had been proposed—the final rule now requires only that a principal instructor possess demonstrated experience in teaching adults. This change is based on numerous comments that object to the specificity in the proposed rule, particularly the requirement that principal instructors do one of the following: (1) Complete a 40-hour train-the-trainer course, or (2) obtain a degree in adult education, or (3) possess at least 2 years of experience in teaching workers/adults.

Most of the comments on this requirement stated that a 40-hour train-the-trainer course was too long and/or that the educational degree or 2-year work experience requirement was excessive. Other commenters requested clarification on what constituted 2 years of work experience, and noted that a 40-hour train-the-trainer course was not available for the purposes of qualifying principal instructors.

Based on its review of this proposed requirement and in response to these comments, the Agency revised the final rule to require that principal instructors possess demonstrated experience, education or training in teaching workers/adults, as well as a minimum of 16 hours in lead-specific training.

Commenters on the proposal also stated that requiring principal instructors to have 2 years experience in the construction industry would limit the number of qualified instructors. In response, the Agency now requires that principal instructors possess demonstrated experience, education or training in lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health or industrial hygiene.

Although the term “demonstrated” is very broad, the Agency believes that the final rule should accommodate the wide range of experiences that principal instructors may have acquired in teaching adults. This requirement will allow an instructor to demonstrate, through a variety of materials—official academic transcripts, resumes, letters of reference, certificates from training courses—that they possess the skills or experience necessary to provide effective instruction. This approach is preferable to requiring training providers to develop an exhaustive list of work experiences or academic degrees, that will invariably omit an unthought-of, but relevant, job title.

C. Accreditation Application Process

The Agency received a variety of comments on the process of applying for accreditation. Some commenters indicated that the Agency should have required more documentation as a part of the application process, while other commenters felt that fewer documents and less information were needed to complete an application package.

The information and materials to be submitted by training programs as a part of the application process are specified at § 745.225(b)(1) in today's final rule. With some minor exceptions, as described below, EPA has retained most of the information and documentation requested from the proposed rule.

For example, the Agency will no longer require that training programs submit examples of course completion certificates, since it is unlikely that receipt of such copies will help prevent fraud or misrepresentation of such certificates.

As a matter of clarification, a few commenters thought that the proposed rule would have required that training programs submit to EPA the documentation listed at § 745.225(c)(4), as proof of the qualifications of its instructors. Under the final rule, the Agency has now clarified that it does not require these documents as part of the application process for accreditation. Rather, they are to be retained at the training site and must be made available to the Agency in the event of an inspection, audit or an enforcement action.

Comment also were received asking the Agency to specify the facilities and type of equipment needed to deliver quality training, and clarification on whether training programs should submit separate descriptions of facilities and equipment when conducting off-site training.

In its review of these requests, the Agency believes that some commenters felt EPA should assist the training community in establishing a floor for the type of equipment investments that a training facility should make. The Agency disagrees that it should play a direct role as a part of the regulatory process in these matters. The Agency also believes it is not necessary to specify the facilities, type of equipment and other related details that training programs should employ as a part of their routine operations.

Rather, the Agency believes that training providers should review the course curriculum requirements contained in § 745.225(d) of the final rule, and, if possible, obtain copies of or information on the model course curricula developed by the Agency. This type of information should assist in determining the type of equipment and other materials that will be needed to provide instruction in lead-based paint activities.

Other commenters asked the Agency to specify the content of a course test blueprint and the activities that should be included as a part of the hands-on assessment. The test blueprint should outline the training objectives of the course. Presumably, these objectives will be the basis for developing course test questions, and providers should indicate that. The Agency does not believe it needs further clarification, for qualified training providers, what activities constitute hands-on training. Training providers should be able to develop suitable hands-on exercises to meet the accreditation requirements given the direction provided in the rule.

Several comments were received on the Agency's requirement that, in order to provide refresher training courses in one or more disciplines, a training program must either simultaneously apply for accreditation to teach the corresponding full length course(s) or already be accredited to teach the corresponding course. Among the comments received on this requirement, a small majority favored it.

Despite this support, the Agency has eliminated this requirement for several reasons. One is that the Agency recognizes that under the grandfathering provisions contained in § 745.226(d) there is likely to be a high level of demand for refresher training, once § 745.225 becomes effective. Therefore, the Agency believes that maximizing the opportunities for providers to offer refresher training courses will be necessary to assist the training community in meeting the demand for these courses. Under § 745.225(e), training programs will be required to link the instruction and testing provided in a refresher training course with the course topics contained in § 745.225(d), as appropriate. This will help ensure consistency between EPA's full-length and refresher training curricula.

Furthermore, the policy of permitting training programs to offer refresher-only training—without a precondition of offering full-length courses—is consistent with other Agency directives and policies issued under the Asbestos Hazard Emergency Response Act of 1986.
D. Re-accreditation of Training Programs and Quality of Instruction

Section 745.225(f) contains requirements to ensure the continued availability of quality training by requiring training providers to apply for re-accreditation every 4 years. The reaccreditation process is very similar to the initial application process.

Commenters were generally supportive of the requirements for re-accrediting training providers, although a few commenters suggested that training providers should be re-accredited more frequently than every 3 years. They reasoned that re-accreditation is necessary more than once every 3 years because of rapid technological changes in the lead-based paint activities field and the need to ensure that training courses provide instruction in the most current technology.

The Agency disagrees with this comment. Under the accreditation program established by today’s final rule, EPA will maintain a list of accredited training programs. When a technological advance or other significant information develops that EPA believes would benefit the lead-based paint activities training community, EPA will provide this information to the accredited training providers. The Agency believes that keeping training providers informed of recent advances in technology allows training providers to be re-accredited every 4 years.

Some commenters expressed concern that the rule would not ensure that a training program would continue to offer the same quality of instruction in the years after initial accreditation. Further, these commenters were concerned that the proposed re-accreditation requirements did not fully address this issue. In response, the Agency has changed the final rule to require that training providers include a description of changes to training facilities or equipment since their last application was approved. This description should only include changes that would adversely affect the ability of students to learn. An example of such a change would be the loss of facilities to be used for hands-on instruction.

In order to further improve the quality of instruction, the Agency is exploring the possibility of providing pass/fail data from the third-party certification exam to training providers for their students. This information can be used by the provider to adjust their curriculum or instruction over time to maintain an acceptable (as determined by the provider) pass rate.

VI. Response to Comments on the Training and Certification of Individuals

Today’s final rule recognizes five work disciplines: inspector, risk assessor, supervisor, abatement worker, and project designer. Training requirements and certification procedures for individuals working within these disciplines are established under § 745.226 of this rule. These include specific training, education and/or experience requirements and, for the inspector, risk assessor and supervisor disciplines, passage of a certification examination.

In response to comments, the Agency has simplified the titles for some of the work disciplines: the “inspector” is now called the “inspector”; the “inspector/risk assessor” is simply the “risk assessor”; and the “project designer/planner” is now the “project designer.”

Under today’s final rule, certified individuals may only perform lead-based paint activities in the following work disciplines:

- Certified inspectors may perform inspection and abatement clearance activities as described in § 745.227(b) and (e)(8) and (e)(9);
- Certified risk assessors may perform inspection, abatement clearance, lead-hazard screen or risk assessment activities, as described in § 745.227(b), (c), (d), and (e)(8) and (e)(9); and
- Certified supervisors, abatement workers and project designers may perform abatement activities as described in § 745.227(e).

The final rule also does not limit or define the circumstances under which a project designer must be used. In the proposal, the Agency would have required the use of a project designer on all abatement projects of 10 residential dwellings or more. The Agency is concerned that such a requirement would be too inflexible and would not account for the varying complexity of abatement projects. The Agency did not find compelling support among commenters for this provision, and it has been eliminated. The Agency will provide training and certification for individuals who seek to offer abatement project design services, but it is the building owner who must decide if a project designer is needed on a particular project.

Another change to the final rule is the extension of the recertification interval from 3 years proposed to 5 years, for individuals who have passed a proficiency test as part of their training. (See the discussion of proficiency training in Unit V. of this preamble). The rationale for this change is that such an individual will have demonstrated a high level of proficiency in the field in which they are certified, and thus it is presumed that they would require less frequent re-training.

Comments on the training and certification requirements for individuals working in the lead-based paint activities field focused on two key areas: the applicability of specific education and experience prerequisites as a part of the certification process; and the use of an examination in the certification process.

A. Training, Education and/or Experience Requirements

In general, commenters agreed with the proposed rule’s five designated work disciplines and the lead-based paint activities associated with each, with some minor exceptions. A key issue raised by commenters, however, was the Agency’s establishment of specific education and/or experience requirements.

Although the Agency neither proposed nor requested comment specifically on the possibility of exempting any industry or group of professionals from either part or all of its proposed training and certification requirements, several requests were received for such exemptions. Commenters submitted requests for some type of exemption for the following professions, among others: certified industrial hygienists, professional engineers, licensed architects, toxicologists, code enforcement officials, safety professionals, nurses, social workers and environmental professionals, and “experienced” State and local health officials.

Among the comments in support of exemptions, proposals ranged from blanket exemptions to, more commonly, various forms of partial exemptions. At least one commenter provided an alternative training course deemed more suitable to its members than the course proposed by EPA. This commenter also requested that the Agency recognize various levels of competency among the members of its organization, and suggested a tiered approach for exempting individuals from particular training requirements to address those levels of competency.

Although most of the commenters were seeking an exemption from the training and certification requirements for the risk assessor discipline, other similar requests were sought for the
supervisor, project designer and inspector disciplines.

Commenters representing various trade organizations based their reasons for seeking a training exemption on the level of education and/or experience their professional members already possess. In some instances, commenters also referenced an existing certification process that their members must undergo and implied that this certification process equaled or exceeded the certification process proposed by the Agency for lead-based paint professionals.

In general, the Agency agrees that the basic work experience and/or educational requirements of many nationally recognized certification programs either meet or exceed the experience and/or educational prerequisites contained in today’s final rule under § 745.226(b) and (c). Several of these certification programs are covered by § 745.226(b)(1)(iii)(B)(3) of the rule, including programs sponsored by the American Board of Industrial Hygiene, the National Society of Professional Engineers and the Board of Certified Safety Professionals. Additionally, members of other organizations who possess the minimum work experience and/or educational requirements contained in § 745.226(b) or (c) also may qualify to become certified under today’s final rule.

However, the Agency disagrees that work experience and/or educational prerequisites alone ought to be sufficient for the purposes of certifying individuals to conduct lead-based paint activities. Further, the Agency does not believe that the certification programs identified by commenters adequately address and specifically provide training in the identification, evaluation and abatement of lead-based paint and its associated hazards. Notably, none of the commenters provided the Agency with evidence of a currently available training course and/or module that expressly addresses lead-based paint activities as part of their professional certification process. Furthermore, commenters did not present evidence that their certification programs included hands-on instruction in the conduct of lead-based paint activities, which is a critical element of the training courses in today’s final rule.

Therefore, although the certification requirements contained in § 745.226(b) and (c) recognize a broad range of work experiences and educational backgrounds as the first step in qualifying as an inspector, risk assessor, supervisor, project designer or abatement worker, the final rule does not provide for any training exemptions. A primary reason is that the lead-based paint activities field is a new field, and that a majority of the individuals entering it—despite their expertise in similar fields—may not possess either direct experience, or an education that has focused on the identification and elimination of lead-based paint hazards. Consequently, the Agency believes that, in most cases, individuals entering the lead-based paint activities field will need specialized training. The Agency is willing to work with professional organizations and other groups that want to develop training courses for their members that meet EPA’s accreditation requirements.

However, the Agency is aware that there are individuals and groups who have been working in the lead-based paint activities field prior to the promulgation of today’s final rule. These individuals need to reference § 745.226(d) of the final rule which contains the Agency’s criteria for recognizing the work experience, education and training on-the-job training that individuals may have received prior to the effective date of § 745.225.

If an individual determines that he or she meets the requirements contained in § 745.226(d), the individual may apply for certification under the reduced set of requirements and within the limitations contained in that section. Under these requirements, qualified individuals are required to successfully complete a refresher training course specific to the certification they are seeking, and if required under § 745.226(b), to pass a certification examination.

In addition to the broad issue of exemptions, comments also received on various educational and experience requirements specific to the inspector, risk assessor and supervisor disciplines. Under the proposed rule, the Agency had opted not to impose educational requirements for either the abatement worker or project designer. This was due primarily to language in Title X, section 1004(3)(B)’s definition of “certified contractor” as it pertains to these two disciplines.

However, based on overwhelming support from commenters, today’s final rule adds educational and experience requirements for the project designers, though not for workers. These requirements are contained in § 745.226(c)(1)(ii)(B), and include either: (1) A bachelor’s degree in engineering, architecture, or a related profession and 1 year of experience related to building construction and design or a related field; or (2) 4 years of experience in building construction and design or a related field.

The basis for this requirement is EPA’s belief, as reflected by a majority of commenters, that a project designer should have significant work experience, or a professional degree and some experience, in building design, or a related field, such as architecture or civil engineering.

Although the support was not nearly as broad or consistent, commenters also asked for modifications to the education and experience requirements for the inspector and risk assessor disciplines. Specifically, some commenters suggested that the Agency require that an inspector possess at least a high school diploma or equivalent to obtain certification. The Agency declined to include this requirement as a part of the certification process for inspectors, in part, based on its desire to provide individuals with an entry level position into the lead-based paint activities field. In response to comments that a high school degree or equivalent is needed to ensure a minimum level of competency among inspectors, the Agency believes that its training requirements and the certification examination will ensure an acceptable level of competency.

In the case of education and/or experience requirements for risk assessors, the proposed rule has been modified at § 745.226(b)(1)(iii)(B) to clarify the various mixes of education and experience that are acceptable for certification as a risk assessor. As discussed in the proposed rule, the educational and experience requirements for risk assessors are extremely important, given the pivotal role of a risk assessor in evaluating and presenting options to reduce lead-based paint hazards. The certified risk assessor must be qualified to make a competent, and rational assessment of the location and severity of any lead-based paint hazards. Based on that role, the Agency has developed work experience and/or educational prerequisites, which in combination with the training contained in § 745.225(d)(1) and (2) and the work practice standards contained in § 745.227(b), (c), (d) and (e), will enable the risk assessor to identify risks associated with lead-based paint hazards and to develop options to eliminate those hazards.

These credentials are very similar to those contained in the proposed rule with the exception that certified industrial hygienists, professional engineers, registered architects and other professionals listed under § 745.226(b)(1)(iii)(B)(3) are not required to possess 1 year of experience before becoming trained as risk assessors. The
decision to eliminate the 1 year of experience was based on the Agency’s review of comments and the fact that many professional certification programs already incorporate various work experience prerequisites, which in some cases are comparable to the prerequisites listed in the proposed rule. For example, to register as a professional engineer, an individual is required to possess a 4-year degree, and 4 years of progressive experience in engineering projects. The program for certified safety professionals also includes a 4-year degree and the 4-year work experience requirement.

Furthermore, the Agency notes that the academic training of these professionals also may cover subjects relating to building design, construction, environmental remediation and other areas relevant to lead-based activities. The Agency also notes that it does not necessarily view the alternative work experience and/or educational prerequisites listed under § 745.226(b)(1)(iii)(A) for risk assessors; § 745.226(b)(1)(iii)(C) for supervisors; and § 745.226(c)(1)(ii)(B) for project designers as necessarily equivalent. Rather, as was the case in establishing experience and/or educational prerequisites for training program managers and principal instructors, the Agency’s intention is to recognize a broad range of relevant qualifications that individuals entering the lead-based paint activities field are likely to possess.

For example, the experience and education of a certified industrial hygienist who has worked in the chemical industry may be very different from that of a professional engineer who has worked in building construction. However, the Agency believes that both these individuals can be trained as risk assessors.

B. Passage of the Certification Examination

In addition to training requirements and educational and experience requirements, individuals seeking to become certified as inspectors, risk assessors and supervisors are required to pass a certification examination, in addition to a course examination. The purpose of the certification examination is twofold.

One reason for the examination is to ensure that each individual certified under today’s regulations will possess a minimum, acceptable level of knowledge and understanding of the tasks and responsibilities associated with the relevant work discipline. Other major functions of the certification examination are to provide a universal tool to measure an individual’s knowledge, and to encourage States or Tribes to enter reciprocal certification arrangements with other States or Tribes.

Comments on the utility of a certification examination were generally supportive. Commenters understood the function of the examination and agreed to it in principle. Nonetheless, commenters, particularly State commenters, stressed that EPA incorporates security and quality control measures to ensure the integrity of the examination. Additionally, States indicated that they did not necessarily want to adopt EPA’s certification examination, but might want to develop their own examination or use the EPA examination and add a State specific component.

In response, outside the regulatory framework of this rule, the Agency has been working closely with the States to develop a certification examination. In general, the goal of the certification examination process is to give each State the flexibility it desires to fashion its certification program, while at the same time ensure a consistent national level of competence in the lead-based paint activities workforce. As currently designed, the exam will include provisions to maintain the security of the item bank of questions.

VII. Framework for Work Practice Standards for Conducting Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities

A. Introduction

Section 745.227 establishes standards for conducting three lead-based paint activities: inspection, risk assessment and abatement. In addition, § 745.227 provides requirements for conducting three related tasks that may be performed as either single tasks or as a part of an inspection, risk assessment or abatement. These three tasks are: a lead hazard screen, laboratory analysis, and composite dust sampling. Section 745.227 also establishes certain recordkeeping requirements. This section of the rule also establishes the dates by which compliance with these standards and procedures is required.

The standards and procedures for conducting the lead-based paint activities contained in § 745.227 are being issued under authority of TSCA section 402(a), which directs EPA to issue such standards, taking into account reliability, effectiveness and safety.

B. Scope and Applicability

Under today’s final rule, the standards for lead-based paint activities contained in § 745.227 apply only in target housing and child-occupied facilities. Standards for lead-based paint activities conducted in steel structures and public and commercial buildings, which had been proposed on September 2, 1994, will be addressed after further Agency review. A discussion of the Agency’s decision to address steel structures and public and commercial buildings outside this rulemaking is presented in Unit II.A. of this preamble.

Another important feature of the standards contained in § 745.227 is that they do not mandate circumstances under which any particular lead-based paint activity must be performed. Instead the decision to, for example conduct an inspection, is left to the building owner.

Additionally, the Agency is preparing a rule under TSCA section 403 that will identify conditions of lead-based paint and lead levels and conditions in residential soil and dust that would result in a hazard to building occupants. Although the TSCA section 403 rule has not yet been proposed, Agency guidance on this subject was issued July 14, 1994, and is discussed in detail in Unit IV of this preamble. The section 403 Guidance also includes recommendations on actions that can be taken in response to conditions of lead-based paint and lead levels and conditions in residential soil and dust.

Until the final section 403 rule is promulgated, the Agency recommends that individuals and firms refer to the section 403 Guidance for assistance in identifying the presence of a lead-based paint hazard and deciding whether to conduct lead-based paint activities.

The primary purpose of the standards in today’s final rule is to provide certified individuals and firms with a set of minimum requirements to be followed when conducting inspection, risk assessment and abatement activities. These requirements are primarily procedural in nature: for inspection, risk assessment and abatement activities, the standards specify the steps that EPA believes must be taken to conduct those activities safely, effectively and reliably. For abatement activities, the standards also place restrictions on certain techniques used to eliminate lead-based paint.

C. Use of Guidance and Recordkeeping Requirements

Today’s final rule does not prescribe detailed work practices that should be followed for each unique situation in
which lead-based paint activities may be conducted. For that level of detail, individuals should consult Federal and State guidance that provides specific instructions on how to conduct inspection, risk assessment and abatement activities. These guidance documents include: the U.S. Department of Housing and Urban Development’s Guidelines for the Control of Lead-Based Paint Hazards in Housing (HUD Guidelines) (Ref. 6), the section 403 Guidance, EPA’s Residential Sampling for Lead: Protocols for Dust and Soil Sampling (Ref. 7), and any additional guidance issued by States or Indian Tribes that have been authorized by EPA under § 745.324 of this rule. While not regulatory requirements, these documents are recommended by the Agency because they provide reliable and effective information on this subject. Additionally, training courses that have been accredited by EPA or an EPA-authorized State or Tribe will provide detailed instruction on inspection, risk assessment and abatement standards and methodologies.

To complement the existing guidance documents, the Agency is currently preparing a technical guidance document as a companion to this rule. The Agency will distribute this guidance document to accredited training providers, the lead-based paint activities contracting community, and State and local governments, prior to the date that compliance with § 745.225 of this rule is required. In its decision to recommend guidance as an adjunct to the requirements at § 745.227, the Agency carefully considered several factors, including enforcement issues and comments received from the public on this approach.

With regard to enforcement, many of the work practice standards contained in § 745.227 of today’s final rule, such as sampling methodologies and visual inspection techniques, refer to guidance. As a result, the Agency recognizes that there are questions about the extent to which it will be able to take an enforcement action against individuals who choose not to use the various guidance recommended by EPA. Nonetheless, the Agency has many reasons for deciding to reference and develop guidance as a supplement to this rule, rather than to promulgate rigid work practice standards.

The September 2, 1994 proposal specifically requested comments on the use of guidance as a supplement to the rule’s regulatory requirements. In general, the majority of commenters support the use of guidance as a supplement to the regulatory requirements contained in § 745.227. In some cases, commenters directly expressed their support, whereas in other cases, commenters expressed neither support nor opposition. Overall, the Agency believes that commenters accepted its proposed approach of referring to guidance.

The Agency believes there are several reasons to recommend guidance rather than to establish detailed national work practice standards for lead-based paint activities. Based on that information and input, the standards proposed in September included strict reporting requirements and documentation of the quality control measures and methodologies employed when conducting inspection, risk assessment and abatement activities. These reporting and documentation requirements remain a critical component of the standards established by today’s final rule. In combination with the rule’s basic work practice standards, training, certification and accreditation requirements, the reporting/documentation activities will help to ensure the effectiveness of the standards and facilitate the use of guidance.

A second reason for relying on non-regulatory guidance instead of rule-based standards is the number of differences that can be found in the structure, design and occupant use patterns of the residential dwellings and child-occupied facilities covered by this rule. For example, under the standards for conducting a risk assessment at § 745.227(d)(4), a risk assessor is required to collect dust samples in rooms where children aged 6 years and under are most likely to come into contact with dust. The rule does not prescribe precisely which rooms or how many samples to collect, because the risk assessor needs to consider site-specific variables to determine which rooms should be sampled and the number of samples that should be taken from each room. These variables include: the size and number of rooms in the building; interior design elements in a building and differences in design that are used by a child; the location of windows and doors; the condition of door frames, window troughs and stools; and occupant use patterns.

As a specific example, in a small residential dwelling, a child may not have a separate playroom, but may play in selected areas of one room or more, such as a corner in a living room or dining room, or may have a bedroom that doubles as a playroom. On the other hand, in a large residential dwelling, a child may have a separate playroom and bedroom, and certain areas in a living room or family room for play activity. Furthermore, a child’s pattern of use in a residential dwelling can vary considerably, and that pattern may only be possible to determine through an interview with a guardian.

Based on these and other variables that may be encountered when conducting a risk assessment, inspection or abatement, the Agency believes that to try to anticipate and attempt to list all circumstances that may be encountered would make the regulation overly prescriptive and rigid. However, by establishing minimum requirements and basic procedures for conducting inspection, risk assessment and abatement activities, the Agency is setting a safe, reliable and effective baseline of steps for certified individuals and firms to follow to make sound decisions based on site-specific conditions.

A third reason for the Agency’s decision to avoid being overly prescriptive is the state of technology within the lead-based paint activities field. Although there has been progress in the development of new technologies to support specific lead-based paint identification techniques and abatement methods, the Agency recognizes that the field is advancing and that the technologies and methods that will help define it are still evolving.

Consequently, the standards contained in today’s final rule do not specify that certain technologies or methods be utilized for sampling and analysis. Additionally, the rule does not prescribe any specific methods or technologies for conducting an abatement, although it does restrict certain work practices known to pose risks to building occupants, workers and the environment.

As had been proposed, today’s final rule relies on the use of documented methodologies that incorporate adequate quality control measures. These methodologies and measures are available in existing Federal and State guidance documents, and will be taught at accredited training programs. Although not overly detailed or prescriptive, EPA believes that the work practice standards contained in today’s
the reports that they prepare pursuant to § 745.227(h).

B. Inspection

The objective of an inspection is to determine, and then report on, the existence of lead-based paint through a surface-by-surface investigation of a residential dwelling or child-occupied facility. As such, an inspection involves identifying the presence of lead in paint. An inspection does not include taking dust or soil samples. An inspection must be conducted by either a certified inspector or a certified risk assessor, and must include the provision of a report explaining the results of the investigation.

The inspection standards contained in §745.227(b) reflect the Agency’s decision not to provide detailed regulatory requirements on how to perform specific lead-based paint identification tasks, such as taking a paint chip sample or using an X-ray fluorescence (XRF) device. In the final rule, the Agency also has removed specific requirements to use the HUD Guidelines when collecting paint chip samples or when using an XRF device to test for the presence of lead-based paint.

Instead, the Agency requires that a lead-based paint inspection be conducted using documented methodologies and adequate quality control measures. These documented methodologies are defined as methods or protocols used to sample for the presence of lead in paint, dust, and soil. Documented methodologies that are appropriate for the purposes of this section may be found in: (1) the HUD Guidelines; the EPA Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead-Contaminated Soil (60 FR 47248); the EPA’s Residential Sampling for Lead: Protocols for Dust and Soil Sampling and other EPA sampling guidance; and (2) Regulations, guidance, methods or protocols issued by States and Indian Tribes that have been authorized under §745.324. Additionally these methodologies will be included in EPA’s technical guidance on lead-based paint activities.

Although commenters generally supported this approach, at least three responses suggested that the Agency provide detailed regulations for lead-based paint testing. However, one of these commenters indicated that guidance may be an acceptable approach for establishing testing protocols. These commenters were concerned about the enforcement issues associated with the rule’s dependence on documented methodologies, which to date have only been issued by HUD, EPA and various State agencies, primarily as guidance.

However, other commenters did not object to the Agency’s use of documented methodologies, provided that records are kept as part of the inspection, and that such methodologies are acknowledged as documented methodologies by EPA through future guidance or regulations. As discussed, the Agency is currently preparing a technical guidance document for conducting lead-based paint activities. Additionally, it is possible that the Agency may amend the regulation with more detailed standards in the future, if there is a need to do so.

One reason commenters suggested that the Agency not require certain inspection techniques is that such requirements often have the effect of discouraging the development of emerging or new technologies. For example, the Agency currently does not recommend that chemical test kits be used for lead-based paint activities, as they are repeatedly used for lead-based paint testing (Ref. 8). However, EPA recognizes that at some point in the future, test kit technology is likely to be improved so that the kits can provide reliable test results. At that time, the Agency will be able to recommend chemical test kits for testing the presence of lead in paint.

Two other key issues raised by commenters were: (1) Potential limitations of the proposed procedures for conducting an inspection, assuming that an inspection involves the investigation for lead-based paint throughout an entire residential dwelling or child-occupied facility, rather than a “partial inspection” of just one or more rooms in a residential dwelling or child-occupied facility; and (2) the standard contained in §745.227(b)(2), which requires the testing of all components of a residential dwelling or child-occupied facility with a “distinct painting history,” yet allows inspectors not to test those components determined by the inspector or risk assessor as having been replaced after 1978.

1. Partial inspections. The Agency recognizes that there may be a demand for lead-based paint identification services that do not involve a surface-by-surface investigation for the presence of lead-based paint throughout an entire residential dwelling or child-occupied facility. For example, a homeowner may only be interested in determining if lead is present in the paint in a child’s bedroom, not necessarily the entire residential dwelling. In this instance, it is unlikely that the homeowner will want to pay for an inspection, as defined under today’s regulations.
Although not required, the Agency recommends that a certified inspector or risk assessor be used in cases, such as these, where an individual or firm believes it is only necessary to conduct a “partial inspection” of a property.

More specifically, in response to commenters on this issue, the Agency believes that the definition of an inspection, which under § 745.227(b) requires that testing for lead-based paint take place throughout an entire residential dwelling or child-occupied facility, is appropriate for several reasons.

One reason is that the statutory definition of an inspection in section 401(7) of TSCA calls for a “surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation.” As discussed in the September 2, 1994 proposal, the Agency believes that an inspection is intended to provide a comprehensive inventory of all lead-based paint in a residential dwelling or child-occupied facility. As such, the Agency acknowledges, that the value of a lead-based paint inspection may appeal only to those individuals interested in getting a complete report on painted components in a residential dwelling or child-occupied facility. Although it is difficult to predict, the Agency believes that such a report may be of value to property owners or managers of large multi-family dwellings and child-occupied facilities and home buyers.

Furthermore, the Agency notes that its inspection requirements are consistent with general trends in the housing market, particularly in federally-owned housing or housing receiving federal assistance. That is, inspections are being conducted to ensure that building owners are informed of the presence of lead-based paint throughout a residential dwelling or child-occupied facility.

The Agency's reason for adding this requirement only for “whole house” inspections is to help ensure that the information needed to determine whether lead-based paint is present in a residential dwelling or child-occupied facility is accurately presented. Again, the Agency recognizes that an inspection, as defined under today's final rule, may not provide a value to all persons. Nonetheless, the Agency believes that by requiring that an inspection be conducted throughout a residential dwelling or child-occupied facility it will ensure that a person contracting for the inspection will obtain accurate and reliable information regarding the presence of lead-based paint throughout a residential dwelling and child-occupied facility.

2. Distinct painting history. On the issue of inspecting and sampling all components sharing a distinct painting history, except those components replaced after 1978, there are several points that commenters raised. First, some commenters suggested that the proposed requirement to take one sample per component in every room and one sample per exterior component with a distinct painting history was burdensome in that it required taking an excessive number of samples. The assumption of these commenters was that an inspection requires that each and every painted component throughout a residential dwelling had to be individually tested. The Agency would like to clarify that an inspection does not necessarily require that a large number of paint samples be taken.

To clarify this point, the Agency directs commenters to carefully review the definitions of “component” and “distinct painting history” as contained in § 745.223 of today's final rule. According to these definitions, in a room with four walls painted at the same time with the same paint, only one paint sample would need to be taken to characterize the lead content of the paint on the walls. This is because, although each wall can be considered a separate “component,” the walls share the same distinct painting history. On the other hand, if there were window frames in the room that had been painted with a different paint than the walls (for example, a semi-gloss instead of a flat), two samples would need to be taken, one from the walls and one from the windows. As this example demonstrates, the Agency does not believe that an inspection will involve excessive sampling.

In contrast, other commenters disagreed with these requirements for an inspection, suggesting that they would result in insufficient numbers of samples. Based on the definition of “distinct painting history,” these commenters interpreted the proposal to mean that if all rooms in a residential dwelling had been painted previously with the same paint and in the same color (for example, a white latex paint), it would be possible for an inspector to take only one paint sample from the home.

In response, the Agency notes that in this case it would be clear to an inspector that trim, doors, and windows are usually painted with a different paint type. Determining the distinct painting history of components involves not just an examination of the visible top coat, but the unique layers of paint beneath the surface. A visible examination of these paint layers is easily accomplished by making a discrete incision into the painted surface.

C. Risk Assessment Activities

TSCA section 401(16) provides that the objective of a risk assessment is to determine, and then report, the existence, nature, severity, and location of lead-based paint hazards in residential dwellings based on an on-site investigation. The definition also identifies specific activities that will be employed when conducting a risk assessment, including:

1. The gathering of information regarding the age and history of the housing and occupancy by children aged 6 years and under, (2) visual inspection, (3) limited wipe sampling or other environmental sampling techniques, (4) other activity as may be appropriate, and (5) the provision of a report explaining the results of the investigation. This definition of risk assessment serves as the basis for the standards and procedures associated with a risk assessment contained in § 745.227(d).

The risk assessment procedures in today's final rule, as in the proposal, require the risk assessor to make a recommendation of lead hazard control strategies address all lead-based paint hazards identified as a result of the risk assessment. This activity was not enumerated in the statutory definition, but was added pursuant to TSCA section 401(16), which stated that a risk assessment may include "other activities" as may be appropriate.

The Agency's reason for adding this requirement was to ensure that the individual or firm hiring or contracting for the services of a risk assessor was provided with some reliable guidance on how to respond to the results of a risk assessment.

1. Lead hazard screen. Pursuant to TSCA section 401(16), a risk assessment may include "other activities" as may be appropriate. Based on this language, today's final rule also includes the "lead hazard screen" as a risk assessment activity. The requirements for the screen are contained in § 745.227(c). The reason for including a lead hazard screen in the proposal and today's final rule is to, where appropriate, avoid the costs of conducting a comprehensive risk assessment, particularly in well-maintained housing and child-occupied facilities constructed after 1960, or in housing and child-occupied facilities considered unlikely to have significant lead paint hazards.

The Agency received two comments on the addition of a lead hazard screen
as a risk assessment activity: one commenter noted that the Agency needed to list more explicitly standards for conducting a lead hazard screen. The commenters also agreed that the lead hazard screen should focus on determining the absence of a lead-based paint hazard, rather than the presence of such a hazard and the risks it may pose to building occupants. In response, today's final rule includes specific procedures and standards for conducting a lead hazard screen in § 745.227(c). Furthermore, because the lead hazard screen employs highly sensitive evaluation criteria and limited sampling, the Agency believes that these standards will provide the risk assessor with a basis for determining the absence of lead-based paint hazards.

If any one of the dust samples collected during a lead hazard screen contains a lead level greater than one-half of the applicable clearance level for the tested component, or if any sampled paint is found to be lead-based paint, that is but not a requirement, that the residential dwelling should undergo a full risk assessment. As discussed subsequently in this preamble, clearance levels for specific components can be found in the HUD Guidelines and in EPA's section 403 Guidance, as well as in several State guidance documents.

Clearance levels are used as the basis for determining whether a lead-based paint abatement has been successfully completed and that a residential dwelling or child-occupied facility may be re-occupied (if building occupants were relocated during an abatement). Currently, under the section 403 Guidance, clearance levels for dust also serve as the levels for determining the presence of lead-contaminated dust, which may pose a lead-based paint hazard. A standard for the lead hazard screen of one-half of the applicable clearance levels is extremely stringent. As such, the Agency believes that a dust sample containing less than that level is a reliable indicator that there are no lead-based paint hazards. The work practice standards and evaluation criteria for a lead hazard screen contained in § 745.227(c) are modeled after the HUD Guidelines recommendations for conducting a lead hazard screen.

As discussed previously in the preamble, the Agency recommends that the lead hazard screen be used primarily in well-maintained homes constructed after 1960. According to HUD, it is estimated that approximately 37 million private homes and 428,000 public housing units, or roughly 90 percent of the nation's housing stock built prior to 1960, contain lead-based paint. Generally, if maintenance has been deferred on these homes, there is a high probability for the presence of some deteriorated lead-based paint and/or lead-contaminated dust.

Consequently, the value and any cost savings that may be achieved by conducting a lead hazard screen in poorly maintained, pre-1960 homes, rather than a full risk assessment, may not be realized. For instance, in a pre-1960 home with several components that have deteriorated paint, in practice, just as many deteriorated paint surfaces will be tested for a lead hazard screen as for a risk assessment. However, when conducting the lead hazard screen, a risk assessor is not required to attempt to determine whether those surfaces pose a lead-based paint hazard.

In fact, homeowners and building owners may decide that a lead hazard screen would merely add time and cost to the evaluation process in properties that would more likely benefit from a risk assessment, and the proposed benefits include a comprehensive report, not only on the existence of lead-based paint hazards, but also on the nature, severity, and location of those hazards. Furthermore, the risk assessment also would provide options on how to reduce or eliminate the lead-based paint hazards.

Other standards and activities required as a part of the lead hazard screen in § 745.227(c) include: (1) The collection of background information regarding the physical characteristics of the residential dwelling or child-occupied facility and occupant use patterns that may cause lead-based paint exposure to one or more children age 6 years and under, (2) a visual inspection, (3) the sampling of components with deteriorated paint with a distinct painting history in poor condition, (4) the collection of a minimum of two composite dust samples (one for floors and one for windows), and (5) the preparation of a report on the results of the screen. Specifically, § 745.227(c) requires that in a residential dwelling two composite samples be taken—one from the floors and one from the windows in rooms where one or more children, age 6 and under, are most likely to come into contact with dust. Additionally, in multi-family dwellings and child-occupied facilities, composite dust samples are to be taken from any common areas where one or more children age 6 years and under are likely to come into contact with dust.

2. Risk assessment. In addition to the requirements of a lead hazard screen, the standards contained in § 745.227(d)(3) also involve the collection and review of background information regarding the physical characteristics of a building, and the occupant use patterns that may pose a lead-based paint hazard to children aged 6 years and under. More than two dust samples and soil samples also may be required under § 745.227(d)(4), (5), (6) and (7), respectively. Lastly, the risk assessment report must include options for reducing and/or eliminating lead-based paint hazards.

The requirements contained in § 745.227(d) of today's final rule differ from those proposed in September 1994 in that they reflect the Agency's decision to reduce the detail and specificity of the rule. However, based on the documentation and recordkeeping requirements for a risk assessment, and the rule's training, certification, and accreditation requirements, the Agency believes that the standards contained in today's final rule will promote reliable, safe and effective risk assessments. For example, the proposed rule specified several items of information to be collected as background information during a risk assessment, including the age of the building and any additions being evaluated, copies of any previous inspection reports, and a schematic site plan of the building. In its review of the comments on the proposed rule, the Agency noted that many of these requirements would be met during the preparation of a risk assessment report. For instance, among the items to be presented in a risk assessment report, as contained in § 745.227(d)(10) are the date of construction of the building, data collected as a result of any previous inspection or other analyses available to the risk assessor, and the specific locations of any identified lead-based paint hazards or potential hazards.

In eliminating specific instructions regarding the background information to be collected, the Agency believes that the standards for conducting a risk assessment have been simplified without diminishing the reliability, safety, and effectiveness of those standards. This is because today's final rule has eliminated the duplicative reporting requirements included in the September 2, 1994 proposal by requiring that the information only be contained in the risk assessment report.

In addition to these changes, the Agency has slightly modified § 745.227(d)(10)(xviii), which requires a risk assessor to provide options for eliminating and/or reducing lead-based paint hazards in the risk assessment report. Under the rule, the risk assessor would have been required to provide not only options, but to
recommend one option over another and to include a rationale or justification for his or her selected option. The final rule no longer requires the risk assessor to recommend one option over another, provided the recommended options are all presented in the risk assessment report.

These changes were largely based on comments urging the Agency to allow the individual or firm contracting for the risk assessment to select from the options presented in the report. Although the Agency does not necessarily believe that the proposed requirements would have forced a building owner to select the option recommended by a risk assessor, the Agency is willing to provide building owners with more flexibility in reviewing risk assessment reports and selecting among remediation options.

In response to comments on the latitude a risk assessor is given in determining dust sampling locations and the extent of paint deterioration, the Agency discussed in Unit VI.A. of this preamble, that because the risk assessor will be a trained specialist equipped with the requisite professional judgment needed to evaluate lead-based paint hazards, added specificity is unnecessary in the rule. The Agency also stresses that due to major differences in the structure, design and condition, and occupant use patterns of various buildings, it is best not to identify specific room locations, e.g., kitchen, playroom, bedroom, for the purposes of sampling dust. Instead, the regulations in § 745.227(d)(4), (d)(5), and (d)(6) require that dust samples be collected in rooms and areas where young children are most likely to come into contact with dust.

Similarly, the final rule clarifies that only deteriorated paint with a distinct paint history found to be in poor condition shall be sampled for the presence of lead. “Paint in poor condition” is defined in today’s final rule as more than 10 square feet of deteriorated paint on exterior components with large surface areas; or more than 2 square feet of deteriorated paint on interior components with large surface areas (e.g., walls, ceilings, floors, doors); or interior or exterior components with small surface areas (window sills, baseboards, soffits, trim) on which more than 10 percent of the total surface area of the component is deteriorated. This determination is to be made by the risk assessor based on a documented methodology such as the HUD Guidelines.

As discussed in Unit VII.C. of this preamble, such locations include the playrooms and bedrooms of children, kitchens, and living rooms, as well as common areas associated with a residential dwelling or child-occupied facility.

The Agency also reiterates that detailed instruction on where and how to sample dust is included in the HUD Guidelines, existing EPA guidance and various State regulations and guidance documents, and that these instructions will be taught in accredited training programs and included in future Agency guidance.

Lastly, the Agency has clarified the standards for collecting soil samples contained in § 745.227(d)(7) such that samples need only to be taken from exterior play areas and dripline/ foundation areas where bare soil is present. This requirement is in keeping with the statutory definition of lead-contaminated soil, which basically is the same definition used in today’s final rule. As defined in § 745.223, lead-contaminated soil means bare soil on residential real property and on the property of a child-occupied facility that contains lead at or in excess of levels determined to be hazardous as identified by the EPA Administrator pursuant to TSCA section 403. Guidance on how to collect bare soil samples is provided in EPA’s Residential Sampling for Lead: Protocols for Dust and Soil Sampling document and the HUD Guidelines.

D. Composite Sampling

Under today’s final rule, composite dust and soil sampling is expressly permitted for the purposes of conducting a lead hazard screen, risk assessment, or clearance following an abatement.

This change from the September 2, 1994 proposal is based on comments the Agency received in support of composite sampling for dust and soil, as well as limited evidence supporting the use of composite dust and soil sampling to determine the presence of lead in dust and soil. The Agency also believes that composite sampling is useful because it provides a means for “averaging” the potential for exposure to lead-based paint hazards in a residential dwelling or child-occupied facility. Furthermore, the Agency is permitting use of the technique due to laboratory cost savings generated by sampling analysis.

However, it is important that the individual who is receiving the results of a composite sample understand their limitations and can correctly interpret the results of a composite sample. A brief discussion on this subject can be found in this section, and a thorough discussion of this issue is contained in the HUD guidelines, and will be presented in the risk assessor and supervisor course.

Specific instruction on the taking of composite dust and soil samples is provided in the HUD Guidelines. The technique essentially involves combining several subsamples of the same type of components into one sample for analysis. A composite dust sample is different from a single-surface sample because it combines at least two dust samples from more than one sampling area into one sample.

Pursuant to § 745.227(g) of today’s final rule, composite dust samples must consist of at least two subsamples. At this time the Agency recommends that a composite sample consist of no more than four subsamples, unless the laboratory contracted to analyze the composite sample agrees to accept a sample consisting of more than four subsamples. This recommendation is based on current limitations in the laboratory analysis of composite samples consisting of more than four subsamples (i.e., using available technology, composite samples that combine more than four subsamples are difficult to properly analyze). However, because some EPA-recognized laboratories are acquiring the ability to analyze composite samples consisting of more than four subsamples, the final rule does not explicitly restrict a composite sample from containing more than four subsamples.

Pursuant to § 745.227(g) of today’s final rule, composite dust samples shall not consist of subsamples from more than one type of component. For example, subsamples from four uncarpeted floors from four rooms may be combined into one composite sample. However, in these same four rooms, the rule prohibits two subsamples from windows in two of the rooms from being composited with two subsamples from floors in the other two rooms.

This restriction is due to the varying levels of lead that may be present on different components, and the potential hazard that a component may present. For example, dust samples from floors generally tend to indicate a lower level of contamination, while the frequency of contamination is generally higher in windows. Consequently, the interpretation of the results from a composite sample consisting of subsamples from different components would not adequately characterize the location of the hazard.

One of the primary benefits derived from composite sampling is lower sampling costs due to fewer laboratory analyses. Lead levels generally vary
significantly from one component to
another, and a single surface sample
from one component alone (i.e. from
one area of a floor in a room to another
of the same floor) may not represent
the potential for exposure. Composite
sampling provides a means to determine
potential exposures to lead-based paint
hazards by obtaining a wide cross-
section of possible exposure pathways.

However, composite sampling may
yield laboratory results that are not as
informative as single-surface sampling.
For example, dust samples from the
floors of three rooms might be
composed where only one of the floors
contains lead-contaminated dust higher
than the clearance level contained in the
section 403 Guidance for uncarpeted
floors of 100 µg/ft². This might cause
the composited sample to fail clearance.
On the other hand, if three single-
surface floor dust samples were taken
for clearance testing, the laboratory
analyses would have precisely indicated
which one of the three rooms exceeded
the clearance level, and the inspector or
risk assessor would know exactly which
rooms needed to be recleaned and
retested.

Because of these limitations, it is
imperative that a risk assessor,
inspector, or supervisor understands
and correctly interprets composite
samples.

E. Abatement

As discussed in Unit III.B of this
preamble, the issue that received the
most comment associated with
abatement was the proposed definition
of abatement. The Agency’s response to
those comments is discussed in that
unit of the preamble.

In addition to these comments, other
comments on a number of the work
practice standards, procedures and
restrictions proposed for various
abatement activities were received.
These comments principally addressed
the following issues: (1) “Prohibited” or
restricted abatement work practices; (2)
capsulation; (3) the development of a
pre-abatement plan; (4) clearance
requirements following both interior
and exterior abatements; (5) soil
abatement; and (6) management of waste
from lead abatement activities.

The Agency’s response to these
comments and changes that have been
made to the corresponding standards for
abatement are discussed below.

1. “Prohibited practices.” In the
preamble of the proposed rule, the
Agency indicated that it was
considering banning certain abatement
work practices and/or sub-products of
these practices that were considered
due to the potential risk of lead contamination
posed to workers and/or the
environment. The practices singled out
by the Agency included:

i. Open-flame burning of painted
surfaces.

ii. Dry scraping or sanding of painted
surfaces.

iii. The use of heat guns on painted
surfaces for abatement without proper
protection.

Additionally, the Agency specifically
requested comments and/or data related to
exposure to lead-contaminated dust and
fumes from these and other
abatement work practices.

In response, an overwhelming
majority of comments on this issue urged
the Agency to expressly ban the
use of open-flame burning or torching on
painted surfaces in target housing
and child-occupied facilities, and to
specifically restrict—not necessarily to
ban—the other practices listed above, to
reduce the risks they pose. Furthermore,
commenters also requested that the
Agency set restrictions on the use of
machine sanding or grinding, abrasive
blasting or sandblasting, and
hydroblasting and high-pressure
washing techniques in target housing
and child-occupied facilities.

Commenters also provided a number of
references to studies to document their
recommendations to the Agency.

The restrictions proposed by
commenters generally were consistent
with the HUD Guidelines, and have
been the subject of several studies
which support the restrictions in today’s
final rule. A review of these studies has
been prepared by EPA titled A Review
of Studies Addressing Lead Abatement
Effectiveness (Ref. 9).

An important point related to
restricting the abatement practices
contained in § 745.227(e)(6) is that the
public comments supporting such
restrictions were expressly directed at
target housing and other buildings, such
as child-occupied facilities, where
young children routinely and frequently
spend time. In response, the Agency
stresses that the restrictions on
abatement practices contained in
today’s rule apply only to target
housing and child-occupied facilities.

In contrast, other commenters were
opposed to prohibiting or restricting
similar “dealing” activities, in public
and commercial buildings,
superstructures and bridges.

In public and commercial buildings,
superstructures and bridges, most
commenters were generally satisfied
with existing OSHA regulations for the
purposes of protecting the health and
safety of workers. Concerns were,
however, raised regarding the lack of cost-
effective work practice alternatives to
open-flame burning, machine sanding or
grinding, and abrasive blasting for
removing lead-based paint from public
and commercial buildings,
superstructures and bridges. In response
to these comments, the Agency will
further review options for addressing
lead-based paint activities conducted in
public and commercial buildings,
and superstructures and bridges.

On the other hand, commenters who
favored restricting certain work
practices in target housing and
child-occupied facilities indicated that
although OSHA regulations may protect
workers, they are not designed to
protect building occupants, especially
children aged 6 years and under, from
lead-based paint hazards that may be
generated during an abatement. As
discussed previously, these commenters
also indicated that by restricting certain
work practices, rather than banning
them altogether, lead-contaminated dust
and fumes could be effectively
controlled. Furthermore, these
commenters suggested that in some
instances safer work practice
alternatives are available.

Based on these comments and a
review of studies referenced above,
today’s final rule in § 745.227(e)(6)
imposes certain restrictions on selected
work practices when conducted during
an abatement in target housing and
child-occupied facilities. Today’s final
rule also bans the use of open flame
burning and torching when conducting
abatements in target housing and
child-occupied facilities.

These restrictions include the
operation of a heat gun at a temperature
above 1100 degrees Fahrenheit, due to
the release of lead dust and fumes and
the potential hazards posed to building
occupants, particularly children aged 6
years and under. This restriction is
supported by two studies that found
significant problems with lead-based
paint when volatilized by heat guns and
propane torches operating above this
temperature. These problems included
large increases in the blood lead levels
of children in homes where heat guns
and torches were used at temperatures
in excess of 1100 degrees Fahrenheit
during abatement (Refs. 11 and 12).

The rule also restricts the use of
machine sanding or grinding, abrasive
blasting and sandblasting as abatement
work practices, unless they are
conducted using a High-Efficiency
Particulate Air (HEPA) exhaust control
which removes particles of 0.3 microns
or larger from air at 99.97 percent or
greater efficiency. Although studies
indicate that the effectiveness of HEPA
attachments has been demonstrated in
containing dust releases in the past,
commenters indicate that recent
technology has improved performance. Consequently, if HEPA attachments meet or exceed the performance standard above, the Agency believes they can serve as a tool for ensuring that abatement activities involving the use of machine sanding or grinding, abrasive blasting and sandblasting are conducted safely, reliably and effectively.

Dry scraping and sanding are permitted under today's final rule only around electrical outlets, or when treating defective paint spots totaling no more than 2 square feet in any one interior room, or totaling no more than 20 square feet on exterior surfaces. These restrictions are based on high levels of dust generated by dry scraping and sanding, and the availability of techniques, such as wet spraying or the use of a heat gun below 1100 degrees Fahrenheit, to control dust generation. Additionally the restrictions placed on dry scraping provide allowances for convenience and safety when abating relatively small defective paint spots and areas around electrical outlets.

In regard to the establishment of restrictions for hydroblasting and high-pressure washing, the Agency does not have enough data to demonstrate that these practices may pose a lead-based paint hazard in target housing or child-occupied facilities. Nor is there sufficient data to support specific restrictions on how to effectively control or limit these practices to reduce any hazards they might pose. Consequently, the rule does not establish restrictions for hydroblasting and high-pressure washing. The Agency recommends that controls be used to contain any debris or wastewater that may be generated when hydroblasting and high-pressure washing are employed as abatement techniques.

2. Encapsulation. As discussed in the September 2, 1994 proposed rule, the definition of abatement includes the phrase "permanent containment or encapsulation." This phrase is part of the statutory definition of abatement under Title IV section 401, and it has been retained as part of the abatement definition in § 745.223 of today's final rule.

In the preamble of the proposed rule, however, the Agency also pointed out that all encapsulant will degrade over time, so therefore, no encapsulant is truly permanent. Consequently, the Agency requested comment on whether to include a periodic monitoring requirement when an encapsulant is used to abate lead-based paint. The majority of commenters generally supported the periodic monitoring requirement, but were divided as to whether EPA should regulate such a requirement given that encapsulation technologies are still evolving. Although some commenters encouraged the Agency to include specific monitoring requirements (e.g., once every 6 months, 1 year, 3 years, etc.), others suggested that the Agency develop standards for encapsulant products and/or require that manufacturers provide guarantees regarding the durability and longevity of an encapsulant product. Other commenters requested that the Agency specify who is responsible for monitoring an encapsulant—either the building owner or a third party.

In response to these and other related issues raised by commenters, today's final rule does not specify a particular monitoring requirement, nor does it establish any other specific standards for the use of encapsulants. This decision is based primarily on the development of existing encapsulant technologies and ongoing voluntary efforts within the encapsulant industry to develop performance-based standards for future use.

The American Society of Testing and Materials (ASTM) standards, E 1795 ("Standard Specification for Non-Reinforced Liquid Coating Encapsulation Products for Lead Paint in Buildings"), E 1797 ("Standard Specification for Reinforced Liquid Coating Encapsulation Products for Lead Paint in Buildings"), and E 1796 ("Standard Guide for Selection and Use of Liquid Coating Encapsulation Products for Lead Paint in Buildings") were approved in March 1996. The three standards were developed by a voluntary consensus-building process that included representatives from EPA, other Federal agencies, and a wide range of interests across the lead abatement industry. The standards cover what is considered by ASTM to be the minimum set of material performance requirements for these products, as well as guidance on how to select, apply, evaluate, and maintain the products under normal use conditions. The standards acknowledge that users (e.g., risk assessors, abatement supervisors) should evaluate their individual situation to assess whether additional requirements are needed to adequately protect the surface.

EPA endorses these standards and recommends their use, but has chosen not to require them as part of the work practice standards in this rule. EPA is confident that most States and local jurisdictions will evaluate these standards for their appropriateness for the conditions under which they will be expected to use them. Additional performance requirements as needed. The standards will also be discussed in training course materials for risk assessors and abatement workers and supervisors.

3. Pre-abatement plan. In the proposed rule, the standards for conducting an abatement would have required the development of a "pre-abatement plan" for all abatement projects. Under the proposed rule the pre-abatement plan would have included the following: (1) Information regarding measures taken to protect workers; (2) measures taken to comply with existing Federal, State and local environmental regulations; and (3) an occupant protection plan. In its review of the comments on the pre-abatement plan, and of the occupant protection plan itself, the Agency has decided that the primary purpose of the occupant protection plan is to help ensure that building occupants are protected from potential lead-based paint exposures during an abatement.

This determination is based on comments that suggested the Agency minimize any overlap with existing Federal regulations. For example, if an abatement project resulted in the generation of a hazardous waste, commenters noted that the contractor and/or building owner may already be subject to certain reporting requirements under the Resource Conservation and Recovery Act (RCRA). These commenters argued that it would be duplicative and burdensome to resubmit its RCRA reports to EPA under a TSCA law. A similar rationale applies to the proposed provision of information regarding measures taken to protect workers. This proposed requirement would be duplicative of OSHA provisions to protect workers.

The Agency agrees with commenters on this point, and has removed parts 1 and 2 of the pre-abatement plan from today's rulemaking. Consequently, the only remaining part of the pre-abatement plan is the "occupant protection plan," which in today's final rule replaces the proposed pre-abatement plan.

4. Clearance procedures. Comments received on the clearance procedures contained in the proposed rule indicated a need to clarify the dust sampling requirements associated with clearance. Commenters were confused regarding the number of dust samples that needed to be collected and the locations within a residential dwelling or child-occupied facility that needed to be sampled as a part of the clearance procedures contained in the September 2, 1994 proposal.

Several commenters also suggested that the proposed rule required too many samples, which they believed
would add to the costs of an abatement without necessarily providing better information regarding the efficacy of an abatement. They urged the Agency to reduce the number of samples to be taken for the purposes of clearance following an abatement; some commenters suggested that composite sampling be employed to reduce the required number of clearance samples. And virtually all commenters agreed that the proposed 24-hour waiting period was too long to wait to conduct clearance sampling following an abatement.

In response to these comments, the clearance procedures contained in today's final rule have been presented more clearly and concisely. For example, commenters indicated that in the proposed rule it was not clear whether additional dust clearance samples were required following an abatement project that used containment, as opposed to an abatement that did not use containment. In today's final rule, § 745.227(e)(8)(v)(A) clearly indicates the number of dust samples that are to be taken following an abatement that employs containment. These Include one sample from the floor, and one from the window (if available) in the rooms within the containment area. Additionally, the rule requires that one sample will be taken from the floor outside the containment area.

On the other hand, § 745.227(e)(8)(v)(B) clarifies that, if containment was not employed as a part of the abatement, two dust samples will be taken from rooms in the residential dwelling or child-occupied facility where the abatement was conducted. The final rule also limits the number of rooms that are required to be sampled as part of clearance to four. Clearance inspectors are free to sample more than four rooms, but today's rule establishes a minimum of four rooms that must be sampled. The rooms shall be selected according to documented methodologies. The current HUD guidelines, on such documented methodology, recommend that the rooms be selected based on where most of the dust-generating work was done.

The rationale for this change is that given similar abatement techniques, and more importantly, similar post-abatement cleanup, if the four selected rooms pass clearance, then the other rooms will also likely pass.

Based on comments, the final rule, under § 745.227(e)(8)(iii), now requires a minimum 1-hour waiting period following completion of post-abatement clean-up activities prior to the collection of dust samples for the purposes of clearance. The 1-hour waiting period is consistent with the HUD Guidelines and other State regulations and guidance on the appropriate amount of time needed prior to conducting clearance following an abatement. Supporting rationale in the HUD Guidelines have shown that 1-hour is sufficient time for airborne lead particles to fall on to horizontal surfaces and be collected (Ref. 12).

In regard to a reduction in the number of samples that will be taken as a part of clearance following an abatement, the final rule permits the use of composite sampling. Composite sampling should assist in reducing the number of samples that need to be taken as a part of clearance. As discussed in this Unit of the preamble in paragraph D, the Agency believes that composite sampling can be a reliable, safe and effective alternative to single surface sampling.

Sampling requirements also have been reduced when clearance is conducted following an exterior abatement. Again, several comments were received on clearance requirements following an exterior abatement suggesting that the proposed rule required too many samples. For example, the proposed rule would have required soil samples to be taken prior to an exterior abatement project, so that any lead levels found in the pre-abatement samples could be compared with post-abatement soil samples to determine if there was any contamination resulting from the exterior abatement. The Agency agrees with commenters on this point, and has removed the requirement to take pre-abatement soil samples and the requirement to take soil samples following an exterior abatement. Rather, the final rule requires a visual inspection to determine the presence of any paint chips along the dripline or next to the foundation below any exterior surface abated. If paint chips are present, they must be removed and properly disposed. The Agency is allowing the individual or firm conducting the exterior abatement to determine the need to conduct any soil sampling based on liability concerns the individual or firm may have based on potential claims that the actions of the abatement workers/supervisors caused soil contamination.

In general, the Agency believes that today's final rule more clearly articulates the number of samples that must be taken as a part of clearance testing following an exterior abatement. Through composite sampling, the rule also permits a reduction in the number of analyses to be done. In addition, § 745.227(f) of today's final rule requires that all samples must be sent to EPA-recognized laboratories, which will help ensure the reliability of sampling results.

Notably, under § 745.223 the final rule provides a definition for clearance levels and includes references to the section 403 Guidance, the HUD Guidelines and other guidance for specific numeric values. As discussed in the September 2, 1994 proposed rule, it is possible that numeric values for clearance will be a part of the final section 403 rulemaking, depending on the comments received on this matter under the section 403 proposal. Until numeric values are established for clearance through the regulatory process, certified individuals and firms, training providers and other persons should reference the guidance documents listed in the definition of clearance levels (contained in § 745.223) for numeric limits for clearance.

5. Soil abatement. Commenters requested clarification on various procedures proposed for soil abatement. Included among the items raised by commenters were clarifications as to whether the proposed soil abatement procedures applied only to target housing and child-occupied facilities, or to public and commercial buildings, superstructures and bridges, as well; requests that the Agency stipulate a lead level in soil to be used to determine when soil abatement must occur; and clarification as to whether both bare and coated soil should be abated.

In response, it should be clear under today's final rule that the procedures put forward for soil abatement under § 745.227(e)(7) apply only to target housing and child-occupied facilities. Regulations for the management of lead-contaminated soil at industrial sites currently are provided under RCRA and Superfund.

On the need for a specific lead level to determine when soil abatement is needed, the Agency refers commenters to its section 403 Guidance document. In the section 403 Guidance, Agency recommendations are provided for response activities to lead-contaminated soil based on a range of lead levels. These response actions also take into account whether the contaminated area under consideration is used by children.

For example, in the section 403 Guidance, interim control activities are recommended as a means to reduce possible lead exposures if lead levels in bare soil range between 400 and 5,000 parts per million and the area of concern is expected to be used by children. Such areas could include
residential backyards, and day-care and school yards. Appropriate interim control activities could include planting ground cover or shrubbery to reduce exposure to bare soil, moving play equipment away from contaminated bare soil, or restricting access through posting, fencing or other actions.

As discussed in the section 403 Guidance, however, the decision on whether interim controls or an abatement action is appropriate depends on several variables. For example, the Agency has concluded that at this time, there is insufficient information to determine the amount or type of soil that would protect human health from the risk of exposure to lead-contaminated soil. However, the Agency believes that some depth of soil of a given type may provide adequate protection. The Agency is seeking information on this subject and will address this in the section 403 regulation as part of the discussion on lead-contaminated soil.

6. Management of waste from lead abatement activity. Lead-based paint abatement generates different types of solid waste, including paint chips, architectural components, and contaminated clothing, which may be subject to hazardous waste treatment, storage, and disposal regulations under RCRA Subtitle C (40 CFR part 261). RCRA establishes a comprehensive Federal program for the management of solid and hazardous wastes.

The training requirements in today’s final rule for workers, supervisors and project planners include training in the proper management of wastes generated during abatement activity. These requirements are consistent with RCRA during the conduct of such activities.

Management of architectural component debris was a particular concern of some commenters on the proposed rule. Comments indicated that RCRA Subtitle C waste sampling and testing requirements are impractical for debris, and that the costs associated with managing debris as hazardous waste are impeding progress in reducing lead-based paint hazards. The Agency wishes to minimize potential regulatory impediments to conducting and financing lead-based paint abatements. Thus, EPA intends to issue a separate rulemaking specifically addressing the disposal of architectural debris waste from lead-based paint abatements. Until the Agency promulgates such a rule, the requirements of RCRA continue to apply to lead abatement waste.

One important RCRA issue is the identification of the party deemed the generator of a waste, particularly in the context of contractual relationships such as those for lead-based paint activities. RCRA defines a generator in 40 CFR 260.10 as “any person, by site, whose act or process produces hazardous waste identified or listed in [40 CFR part 261] or whose act first causes a hazardous waste to become subject to regulation.” In the proposal (59 FR 45890), EPA stated that contractors for lead-based paint activities (as opposed to building owners) are the generators of abatement waste and therefore the parties responsible for RCRA compliance. EPA received a number of comments requesting a clarification and reconsideration of this issue.

EPA wishes to clarify that the property owner and the abatement contractor are co-generators of waste from lead-based paint activities, as both parties contribute to its generation. Under co-generator status, one party might manage the disposal of the waste (for example, the building owner might request that a contractor handle this task), but both parties remain legally responsible for proper disposal of the waste and for RCRA compliance. The Agency discussed co-generator status in more detail in an FR notice issued on October 30, 1980 (45 FR 72026).

IX. State Programs
A. Introduction

This unit contains two parts: (1) A discussion of procedures for States and eligible Indian Tribes, including eligible Alaskan Native Villages, to obtain authorization from EPA to administer and enforce (a) a lead-based paint activities program and/or (b) a pre-renovation notification program; and (2) a description of a model program that will serve as a blueprint for these State and Tribal programs.

Section 404(a) of TSCA provides that any State that seeks to administer and enforce the standards, regulations, or other requirements established under sections 402 (lead-based paint activities) or 406 (pre-renovation notification) may submit an application to the Administrator for approval of such a program. As discussed, today’s final rule contains the regulations established pursuant to section 402(a). The Agency has not, at this time, promulgated final regulations under section 406. States may begin to apply for program authorization of a pre-renovation program or the final section 406 regulation is promulgated.

Section 404(b) states that the Administrator may approve such an application only after finding that the State Program is at least as protective of human health and the environment as the Federal program established under the mandates of TSCA section 402 or 406 and that it provides adequate enforcement. The procedures for submitting an application are found in § 745.324 of this regulation and are discussed in more detail below. The Agency is developing an Application Guidance Document that it will distribute, to give additional guidance on how to develop and submit an application for program authorization.

Section 404(c) directs the Agency to promulgate a model State program, which any State that seeks approval to
administer and enforce may adopt. In response to this mandate, the Agency has promulgated, at §§ 745.325, 745.326, and 745.327 minimum requirements and enforcement provisions that a State or Tribal program must have to receive authorization from the Agency to administer a lead-based paint activities program (§ 745.325) and/or a pre-renovation notification program (§ 745.326). These requirements are discussed in more detail in Unit IX.E. of this preamble.

No political subdivisions (e.g., cities, towns, counties, etc.) other than States, as defined by TSCA section 3, and Indian Tribes (see discussion in Unit IX.F. of this preamble), are eligible for authorization under this program.

B. Submission of an Application

Before developing an application for authorization, a State or Indian Tribe must publicly distribute a notice of intent to seek such authorization and provide an opportunity for a public hearing. The State or Indian Tribe is free to conduct this hearing and provide an opportunity for comment in any manner it chooses. Upon completion of the final application that reflects this public participation, the State or Indian Tribe shall submit the application to the appropriate EPA Regional Office.

As described at § 745.324(a), an application for program authorization must include the following elements: a transmittal letter from the Governor or Tribal Chairperson (or equivalent official); a summary of the State or Tribal program; a description and analysis of the program; an Attorney General's or Tribal equivalent's statement attesting to the adequacy of the State's or Indian Tribe's program authority; and copies of all applicable State or Tribal statutes, regulations, standards and other materials that provide the State or Indian Tribe with the authority to administer and enforce a lead-based paint program.

1. Program description. A program application must contain information, specified in § 745.324(b), that describes the program. The program description is the portion of the application that the State or Indian Tribe will use to characterize the elements of their program. The Agency will use this information to make an approval or disapproval decision on a State or Indian Tribe's application. The program description contains five distinct sections. In the first (§ 745.324(b)(1)), the State or Indian Tribe must list the name of the State or Tribal agency that will administer and enforce the program, and if there will be more than one agency administering or enforcing the program, describe the relationship between or among these agencies.

Second, the State or Indian Tribe must, in the application, demonstrate that the program meets the requirements of § 745.325 or 745.326 or both. These elements represent the minimum authorities that a State or Tribal program must have to be considered for program authorization. These elements are discussed in more detail in Unit IX.E.1 and IX.E.2 of this preamble.

Third, the application must provide an analysis of the entire State or Tribal program that describes any dissimilarity from the Federal program in subpart L "Requirements for Lead-Based Paint Activities," or regulations developed pursuant to TSCA section 406. The analysis should address each element of a State or Tribal program: for a lead-based paint activities training and certification program, those elements found at § 745.325(a) (i.e., accreditation of training programs, certification of individuals, and work practice standards for the conduct of lead-based paint activities); and for a pre-renovation notification program, those elements found at § 745.326(a) (i.e., distribution of lead hazard information and a lead hazard information pamphlet).

The analysis must then explain why, considering these differences, the State or Tribal program is at least as protective as the respective Federal program. The Agency is inclined to give deference to a State or Indian Tribes determination that its program is sufficiently protective and appropriate for their State or Indian Tribe. The Agency will use this analysis, along with its own comparison, to evaluate the protectionsiveness of the State or Tribal program. This issue is discussed in more detail in Unit IX.E. of this preamble.

Fourth, the State's or Indian Tribe's application must demonstrate that the program meets the requirements of § 745.327. These elements represent the program elements that a program must have to be considered for authorization. This section of the application is discussed in more detail in Unit IX.E.3 of this preamble.

In addition to the above, the program description for an Indian Tribe must also include a map, legal description, or other information that will identify the geographical extent of the territory over which the Indian Tribe exercises its jurisdiction. The Indian Tribe shall also include a demonstration that it is: (1) Recognized by the Secretary of the Interior as exercising substantial governmental duties and powers; (2) has adequate civil regulatory jurisdiction over the subject matter and entities regulated; and (4) is reasonably expected to be capable of administering the Federal program for which it is seeking authorization.

If the Administrator has previously determined that an Indian Tribe has met these prerequisites for another EPA program authorization, then the Indian Tribe need provide only that additional information unique to its lead-based paint program. The rationale for requiring the Tribe to provide this information is discussed in detail in Unit IX.F. of this preamble.

2. Attorney General's statement. The State or Indian Tribe must provide an assurance that the State or Indian Tribe has the legal authority necessary to administer and enforce the program. The State or Tribal Attorney General (or equivalent Tribal official) must sign this statement. (See discussion in Unit IX.F. of this preamble for specific Tribal program requirements).

3. Public availability of application. Section 404(b) of TSCA requires the Agency to publish in the Federal Register, notice announcing the receipt of a State's or Tribe's application, a summary of the State or Tribal program, the location of copies of the application available for public review, and the dates and times that the application will be available for public review.

Individuals may at the same time submit a request to the Agency for a public hearing on the State or Tribal application. It should be noted that this opportunity for public hearing is separate and distinct from the public comment, discussed in part B. of this unit of the preamble, that the State or Indian Tribe must seek before preparing an application for program approval (§ 745.324(a)(2)).

C. State Certification

Pursuant to section 404(a), at the time of submitting an application for program authorization, a State may also certify to the Administrator that the State program meets the requirements of TSCA section 404(b)(1) and 404(b)(2).

If this certification is contained in a State application, the program is deemed authorized, until the Administrator disapproves the program's application or withdraws the program's authorization. This certification must be contained in a letter from the Governor of the State or the Attorney General, to the Administrator, and must reference the program analysis.
contained in the program description portion of the application as the basis for concluding that the State program is at least as protective as the Federal program and provides for adequate enforcement.

This provision is not available to Indian Tribes because Indian Tribes must first demonstrate to the Agency that they meet the criteria at § 745.324(b)(4) for Treatment as a State ("TAS"). Although Indian Tribes may be able to demonstrate that they have been approved for "Treatment as a State" for any other environmental program (satisfying two of the four TAS criteria), the Agency must make a separate determination that an Indian Tribe has adequate jurisdictional authority and administrative and programmatic capability regarding its lead program before it can determine that the Tribe should be treated as a State. These criteria are discussed in greater detail in Unit IX.F. of this preamble.

As stated at § 745.324(d)(3), if the application does not contain such certification, the State's program will be considered authorized only after the Administrator approves the State application.

EPA encourages both States and Indian Tribes to submit their authorization applications as soon as possible after October 28, 1996. Because the Agency anticipates needing the full 180 days to properly review and act on an application, States and Indian Tribes are strongly encouraged to submit a completed application before March 2, 1998.

D. EPA Approval

Within 180 days following receipt of a complete State or Tribal application, the Administrator will approve or disapprove the application. The Administrator will approve a program only if, after notice and opportunity for public hearing, the Administrator finds that:

(1) The program is at least as protective of human health and the environment as the Federal program contained in subpart L or in regulations developed pursuant to TSCA section 406; and

(2) The program provides adequate enforcement of the appropriate State or Tribal regulations.

The Agency will notify the State or Indian Tribe in writing of the Administrator's decision. As described in § 745.324(c), upon authorization of a State or Tribal program, it will be unlawful under TSCA section 15 and section 409, for any person to violate, fail or refuse to comply with any requirements of such a program.

The Agency believes that section 404 and the decision criteria above give it reasonably broad latitude in approving or disapproving State and Tribal programs. EPA interprets the section 404(b) standard "... at least as protective as ..." to mean that a program need not be identical to, or administered in a manner identical to, the Federal program for that program to be authorized. Indeed, the Agency expects to receive applications for State and Tribal programs that will differ in some respects from the Federal program established in this rulemaking. This is unavoidable (and even desirable) given the differences that undoubtedly exist between lead-based paint problems and approaches to dealing with them at the State and Tribal level. The Agency will make every attempt to accommodate these differences while following the statutory requirement of ensuring that every State or Tribal program is at least as protective as the Federal program.

I. Establishment of the Federal program. If a State or Indian Tribe does not have a program authorized under this rule and in effect by the August 31, 1998, the Administrator will, by such date, establish the Federal program under subpart L, or regulations developed pursuant to TSCA section 406, as appropriate in that State or Indian Country.

2. Withdrawal of authorization. As required by section 404(c) of TSCA, if a State or Indian Tribe is not administering and enforcing its authorized program according to the standards, regulations, and other requirements of TSCA Title IV, including section 404(b)(1) and (b)(2), the Agency will so notify the State or Indian Tribe. If corrective action is not completed within a reasonable time, not to exceed 180 days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to TSCA Title IV in that State or Tribal land. Procedures for withdrawal of authorization can be found in § 745.324(i).

E. Model State Program—Guidance to States and Indian Tribes; EPA Approval Criteria

TSCA section 404(d) directs the Agency to promulgate a MSP that may be adopted by any State or Indian Tribe that seeks to administer and enforce a lead-based paint activities program. As interpreted by EPA, this model is intended to serve two purposes. First, the model is intended to provide States and Tribes guidance as to the contents of a program that they could develop to receive program authorization from EPA. Second, the model is also intended to provide overall guidance to States that have not, until this point, developed legislation or regulations for a training and certification or a pre-renovation notification program.

In the proposed rule, the Agency offered the entire Federal program as a model. The Agency stated that, because section 404(a) requires that an authorized State or Tribal program be at least as protective as the Federal program, a State or Tribal program seeking authorization should resemble, in significant respects, the Federal program. Therefore, the entire Federal program for lead-based paint activities was offered as a model for States and Indian Tribes to use in developing their own programs.

Many commenters, however, stated that the proposal did not articulate in sufficient detail the specific elements a program must have to be authorized by EPA. Some commenters also believed that, as written, the model implied that a State or Tribal program must be identical to the Federal program. The Agency did not intend to give this impression, and in developing a separate model program has attempted to clarify what is expected of a State or Tribal program applying for authorization.

Other commenters stated that the Agency should develop a model program that would dictate all requirements that must be in a State or Tribal program. These commenters expressed the belief that, because the Agency is required to evaluate the protectiveness of a State or Tribal program compared to the Federal program, the Agency should specify all elements of a State or Tribal program or require that a State or Tribe adopt the entire Federal program. Commenters believed this approach would alleviate any uncertainty regarding the interpretation of the statutory phrase "... at least as protective as ...". The Agency has rejected this approach because it would not allow the flexibility that EPA believes is necessary for the effective administration of this program at the State or Tribal level.

In response to comments the Agency has modified the final rule in two significant ways. First, the Agency has developed a set of minimum programmatic elements (§§ 745.325 and 745.326 and discussed in sections 1 and 2 of this Unit of the Preamble) that a State or Tribal program must have to receive authorization from the Agency. This section will provide specific direction to commenters who requested specific direction from the Agency on the
elements that must be contained in a State or Tribal program seeking authorization. The requirements at §§ 745.325 and 745.326 represent the elements EPA believes a State or Tribal program must have to successfully administer a lead-based paint training and certification or a pre-renovation notification program. These elements are discussed in more detail later in this Unit of the preamble.

Second, as required by Title X, a State or Tribal program must also be found, by the Agency, to be at least as protective as the Federal program. In today's final rule State or Indian Tribe is required to develop and submit an analysis of their entire program that describes the program in comparison to the Federal program. This analysis should highlight the differences between the two programs and should provide an explanation why the State or Indian Tribe believes that these differences do not make their program any less protective than the Federal program. The analysis can focus on each of the program elements (e.g. procedures for the accreditation of training providers) and explain why the program element, as a whole, is at least as protective (or not) as the equivalent element in the Federal program.

Alternatively, the analysis can focus on the State or Tribal program as a whole, explaining why the entire State or Tribal program is at least as protective as the Federal program. This approach allows a State or Tribe to design a program that may fall short of the Federal program in one element, but would exceed it for another element.

Either approach allows a State or Indian Tribe to diverge as necessary and appropriate from the specific elements of the Federal program. The critical factor is that, on balance, a State or Tribal program element will be as protective as the corresponding Federal element. For example, a State training program may require fewer initial training hours for a particular discipline than the Federal program, but it would surpass the Federal program in requiring annual refresher training for certification. The State could argue that, on balance, this system is as protective as the Federal program. In this example, the specific State requirements diverge from the Federal program, but the State has concluded that it achieves the same result—properly trained lead-based paint professionals.

In reviewing State or Tribal applications, the Agency will employ this method of analysis as it examines the entire State or Tribal program and compares it with the entire Federal program. The State's or Tribe's own analysis will facilitate EPA review of a State or Tribal program, but more importantly it will allow each State and Indian Tribe to fully describe and explain to EPA their program and the success they believe it will have in meeting the goals of Title X.

Thus, the Agency believes that it can adequately evaluate the protective nature of a State or Tribal program as it compares its program to the Federal program. The remainder of § 745.325 describes requirements that a State or Tribal certification and accreditation program must also contain. Incorporation of these elements into a State or Tribal program will be a significant factor in the Agency's evaluation of the protective nature of a State or Tribal program.

The Agency has included, in the next two sections of this preamble, a discussion of the goals and objectives that the Agency considered when developing its requirements for the Federal program. The Agency believes that each State and Indian Tribe should also consider these goals and objectives as it develops or refines its own program in response to this regulation. While not regulatory requirements, they should provide States and Indian Tribes an insight into the factors that the Agency will consider when it evaluates their programs.

A. Accreditation of training programs. Pursuant to § 745.325(b), the State or Tribal program must contain either regulations or procedures for the accreditation of training programs, or procedures or regulations, for the acceptance of training offered by an accredited training provider in a State or Tribe authorized by EPA.

If the State or Tribe chooses to develop an accreditation program, the regulations or procedures must contain the following: (1) Training curriculum requirements, (2) training hour requirements, (3) hands-on training requirements, (4) trainee competency and proficiency requirements, and (5) requirements for training program quality control. The State or Tribal regulations must also establish procedures for the re-accreditation of training programs, and procedures for the oversight and control of training program activities.

A State or Tribal program for training program accreditation should achieve the following three objectives: (1) Establish common elements in which certified contractors must be trained, (2) provide training that enhances the knowledge and expertise of contractors, and (3) allow the State or Indian Tribe to suspend, revoke or modify the accreditation of training providers who offer substandard training or who violate the requirements of the State or Tribal accreditation program.
The Agency will address the need for work practice standards for the remaining lead-based paint activities, e.g., deleading, identification of lead-based paint and demolition in public buildings, commercial buildings, bridges and superstructures.

All of the work practice standards or regulations that a State or Indian Tribe develops for the conduct of lead-based paint activities must require that these activities, if conducted, be conducted by certified individuals. The work practice standards or regulations that a State or Indian Tribe adopts for the conduct of inspections must ensure that an inspection accurately identifies and reports the presence or absence of lead-based paint within the interior or on the exterior of a residential dwelling. A State's or Indian Tribe's work practice standards or regulations for the conduct of risk assessments must ensure that a risk assessment accurately identifies and reports on the existence, nature, severity and location of lead-based paint hazards, as defined by the State or Indian Tribe. A State's or Indian Tribe's work practice standards or regulations for the conduct of abatement must ensure that abatements are conducted in a way that permanently eliminates lead-based paint hazards, and does not increase the hazards of lead-based paint to building occupants. The State or Tribal work practice standards or regulations must also include requirements for post-abatement clearance sampling.

Additionally, the State or Indian Tribe must adopt or develop a lead-in-dust post-abatement clearance standard.

As described at § 745.325(a)(6), a State or Indian Tribe must develop the appropriate infrastructure to administer and enforce such a program successfully. A State or Indian Tribe must establish a State or Tribal agency or agencies (or designate an existing agency or agencies) to implement, administer, and enforce the program. Given the scope of the program, it is likely that more than one State or Tribal agency will be involved in the implementation and enforcement of this program. States and Indian Tribes are required to identify one agency or organization within a State or Indian Tribe (the primary agency) that will serve to coordinate the activities of these agencies. States and Indian Tribes are also encouraged to, whenever possible, utilize existing certification and accreditation programs and procedures.

Section 745.326(c) describes the requirements for distribution of the lead hazard information pamphlet. Section 406(b) describes the requirements for distribution of the lead hazard information pamphlet for compliance with the above program. The Federal regulations will be promulgated as final at 40 CFR part 745.

Section 745.326 requires that a State or Indian Tribe seeking authorization must, at a minimum, promulgate regulations that will achieve the objectives of the statutory mandate. The State or Tribal program must contain regulations or procedures that require the following: (1) Procedures and requirements for distribution of a lead hazard information pamphlet before the renovations (for compensation in target housing) commence; (2) an approved lead hazard information pamphlet meeting the requirements of TSCA section 406 as approved by EPA; and (3) provisions for the adequate enforcement of compliance with the above program.

Section 745.326(b) describes the requirements for distribution of the lead hazard information pamphlet. States and Indian Tribes must have procedures and elements that specify minimum requirements for the distribution of lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation activity. These Federal regulations will be promulgated as final at 40 CFR part 745.

Section 745.326 requires that a State or Indian Tribe seeking authorization must, at a minimum, promulgate regulations that will achieve the objectives of the statutory mandate. The State or Tribal program must contain regulations or procedures that require the following: (1) Procedures and requirements for distribution of a lead hazard information pamphlet before the renovations (for compensation in target housing) commence; (2) an approved lead hazard information pamphlet meeting the requirements of TSCA section 406 as approved by EPA; and (3) provisions for the adequate enforcement of compliance with the above program.

The Agency has established minimum requirements for the distribution of lead hazard information pamphlet. The Agency has promulgated specific program elements that specify minimum procedures and elements that a State or Tribal program must contain to receive authorization from the Agency to administer and enforce this program. Section 406(a) directs the Agency to develop and publish a lead hazard information pamphlet. Section 406(b) directs the Agency to develop a regulation to ensure that individuals engaged in performing renovation activities for compensation in target housing provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation activity. These Federal regulations will be promulgated as final at 40 CFR part 745.

Section 745.326 requires that a State or Indian Tribe seeking authorization must, at a minimum, promulgate regulations that will achieve the objectives of the statutory mandate. The State or Tribal program must contain regulations or procedures that require the following: (1) Procedures and requirements for distribution of a lead hazard information pamphlet before the renovations (for compensation in target housing) commence; (2) an approved lead hazard information pamphlet meeting the requirements of TSCA section 406 as approved by EPA; and (3) provisions for the adequate enforcement of compliance with the above program.

Section 745.326(b) describes the requirements for distribution of the lead hazard information pamphlet. States and Indian Tribes must have procedures and elements that specify minimum requirements for the distribution of lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation activity. These Federal regulations will be promulgated as final at 40 CFR part 745.
In addition to the content requirements laid out in section 406(a), EPA believes that some additional discussion of Federal priority information may help States who seek to develop alternate pamphlets. In order to educate the public about lead-based paint hazards in the home, the pamphlet should provide citizens with clear and understandable information regarding the health risks associated with exposure to lead hazards, especially the risks to children less than 6 years of age, pregnant women, and women of childbearing age. In light of the exposure prevention goals of the overall Federal lead hazard reduction program, EPA believes that State pamphlets should also include a thorough discussion of measures that can be taken to reduce or avoid exposure to lead hazards from paint, dust, and soil in residential areas.

Since renovations may disturb lead and create hazards, it is essential that renovators and occupants of these homes be encouraged to take special precautions to reduce or avoid exposure during renovations. By providing a reference section including Federal, State, and local sources of assistance, citizens will be able to find certified contractors and information about inspections, risk assessments, interim controls, and abatement procedures available in their areas.

Nevertheless, the Agency recognizes the need for flexibility in the amount of detail to be included in a State's or Indian Tribe's information pamphlet, due to the specific needs of each State or Indian Tribe. In covering all of the elements, States or Indian Tribes may determine the breadth of coverage of each element as they deem necessary. For example, the Agency recognizes that it may be infeasible to list all Federal, State, and local agencies in a reference section. Rather, States and Indian Tribes should focus on providing the main sources of access to that information. In general, more emphasis should be placed on the risks and exposure prevention elements of each State or Indian Tribe. In covering all of the elements, States or Indian Tribes may determine the breadth of coverage of each element as they deem necessary.

3. Program elements—enforcement provisions. As previously discussed, the Agency is required to determine if a State or Tribal program will provide for the enforcement of its regulations. Many commenters expressed concern that the proposed rule did not provide clear guidance as to how the Agency would interpret this phrase. Further, the Agency realizes that it has not provided a benchmark or model for States and Indian Tribes to follow as they develop the compliance and enforcement portions of their lead-based paint programs. As discussed previously, the proposed and final Federal regulations developed pursuant to sections 402(a) and 406 will serve as an example that States and Indian Tribes can use as they develop their own programs. These regulations also help in defining the scope of the terms “...at least as protective as...”

Because there is not a comparable Federal enforcement program to emulate, and in response to the concerns of the commenters seeking more guidance on this issue, the Agency has developed, at § 745.327(b), (c) and (d), requirements that a State or Tribal lead-based paint compliance and enforcement program must meet in order to receive authorization. The Agency believes that a State or Indian Tribe's enforcement program based on these requirements would provide adequate enforcement as that term is used in TSCA section 404(b)(2).

These requirements were developed based on the Agency's experience evaluating and approving other State and Tribal compliance and enforcement programs, as well as the Agency's experience in enforcing its own regulations. Further, the Agency's own compliance and enforcement program for the Federal lead-based paint regulations will contain the elements described at § 745.327.

Section 745.327(b) describes the required standards, regulations and authorities that a State or Tribal program must have. Section 745.327(c) describes specific performance elements that a State or Tribal program must have. Section 745.327(d) describes the required summary of progress and performance that a State or Indian Tribe must agree to submit.

Because these elements are required of a State or Indian Tribe and will require some time to fully implement and develop, the Agency is providing for a phase-in of a State or Tribal lead-based compliance and enforcement program. This phase-in is achieved by allowing States or Indian Tribes to seek either interim or final approval of the enforcement and compliance portion of their lead-based paint program. Either type of approval is sufficient for a State or Tribal program to receive certification under this program. The certification shall include a statement that the elements at § 745.327(b). This certification shall include a statement that the State or Indian Tribe, during the interim approval period, will carry out a lead-based paint compliance and enforcement necessary to ensure that the State or Indian Tribe addresses any significant risks posed by noncompliance with lead-based paint requirements.

The State or Indian Tribe must also present a plan with time frames identified for implementing in the field all of the elements described at § 745.327(c) within 3 years from the date of interim approval. A statement of resources must be included in the State or Tribal plan, which includes the resources the State or Indian Tribe intends to devote to the administration of its lead-based paint compliance and enforcement program.

Finally, the State or Indian Tribe must agree to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at § 745.327(d) and discussed below. This report must be submitted by the primary agency for each State or Indian Tribe that has an authorized program to the Agency by the date of the program authorization. Each authorized program
shall submit the report to the EPA Regional Administrator for the Region in which the State or Indian Tribe is located. The report shall be submitted at least once every 12 months for the first 3 years after program approval. As long as these reports indicate that the authorized program is successful, the reporting interval will automatically be extended to every 2 years. If the subsequent reports demonstrate problems with implementation, EPA will require a return to annual reporting in order to assist the State or Indian Tribe in resolving the problems. These programs will return to biannual reporting after demonstration of successful program implementation.

Final approval of the compliance and enforcement program portion of a State or Tribal lead-based paint program can be granted by EPA either as part of a State’s or Indian Tribe’s initial application (described at § 745.324(a)) or, for States or Indian Tribes which previously received interim approval as discussed above (described at § 745.327(a)(1)), through a separate application.

In order for the compliance and enforcement program to be considered adequate for final approval as a result of the State’s or Indian Tribe’s initial application, the State or Indian Tribe must certify it has the legal authority and ability to immediately implement both the elements at § 745.327(b) and 745.327(c).

The State or Indian Tribe must also submit a statement of resources which identifies the resources the State or Indian Tribe intends to devote to the administration of its lead-based paint compliance and enforcement program. Finally, the State or Indian Tribe must agree to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at § 745.327(d). To the extent not previously submitted through the initial application described at § 745.324(a), States or Indian Tribes must submit copies of all applicable State or Tribal statutes, regulations, standards and other material that provide the State or Indian Tribe with authority to administer and enforce the lead-based paint compliance and enforcement program, and copies of the policies, certifications, plans, reports, and any other documents that demonstrate that the program meets the requirements established at § 745.327.

The remainder of this preamble section describes in more detail the elements at § 745.327(b), (c) and (d). Section 745.327(b) “Adequate Standards, Regulations, and Authority” requires that a State or Tribal program must have the elements discussed below.

1. Lead-based paint activities and requirements. Lead-based paint programs must demonstrate establishment of lead-based paint requirements for those acts described under TSCA sections 402(a) and/or 406 and regulations developed pursuant to those regulations.

2. Authority to enter. Officials must be able to enter, through consent, warrant, or other authority, premises or facilities where violations may occur for purposes of conducting inspections.

3. Flexible remedies. Lead-based paint programs must provide for a diverse and flexible array of enforcement remedies, which must be reflected in an enforcement response policy. The lead-based paint program should be able to select from among the available alternatives, an enforcement remedy that is particularly suited to the gravity of the violation, taking into account potential or actual risk, including:

   (1) Warning letters, or notices of noncompliance, or notices of violation, or the equivalent;

   (2) Administrative or civil actions (e.g., accreditation or certification suspension, revocation or modification, and/or administrative or civil penalty assessment); and

   (3) Authority to apply criminal sanctions or other criminal authority using existing State or Tribal laws, as applicable.

The Agency understands that Indian Tribes may have certain restrictions on their ability to levy criminal sanctions. This limitation will not necessarily have a negative impact on an Indian Tribe’s ability to receive program authorization. The Indian Tribe must, however, explain in its application the nature and extent of any limitation on its ability to levy criminal sanctions.

Federal law bars Indian Tribes from trying criminally or punishing non-Indians in the absence of express authority in a treaty or statute to the contrary. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191(1978). In addition, the Indian Civil Rights Act prohibits any Indian court or Tribunal from imposing for any one offense a criminal penalty greater than $5,000 on Indians within its jurisdiction (25 U.S.C. section 1302(7)). The Agency realizes that requiring Indian Tribes to demonstrate the same criminal authority as States would affectively prohibit any Indian Tribe from obtaining program authorization. The Agency, in part F of this unit of the preamble, provides that Indian Tribes are not required to exercise comprehensive criminal enforcement jurisdiction as a condition for lead-based paint activities program authorization. Under this rule, Indian Tribes are required to provide for the timely and appropriate referral of criminal enforcement matters to the EPA Regional Administrator when Tribal enforcement authority does not exist or is not sufficient (e.g., those concerning non-Indians or violations meriting penalties over $5,000). This section also requires that such procedures be established in a formal Memorandum of Agreement with the Regional Administrator. This approach is the same that the Agency has taken in the context of Tribal programs under the Safe Drinking Water Act and the Clean Water Act.

It should be noted that, as in authorized States, EPA has the authority to take enforcement action if an authorized Indian Tribe did not (or could not) take such action or did not enforce adequately (e.g., did not or could not impose a sufficient penalty). EPA emphasizes that this referral mechanism is available only in those cases where the limitations on Tribal enforcement arise under Federal law. The Memorandum of Agreement will be executed by the Indian Tribe’s counterpart to the State Director (e.g., the Director of Tribal Environmental Office, Program or Agency). The Memorandum of Agreement must include a provision for the timely and appropriate referral to the Regional Administrator for those criminal enforcement matters where that Indian Tribe does not have the authority (e.g., those addressing criminal violations by non-Indian or violations meriting penalties over $5,000). The Agreement will also identify any enforcement agreements that may exist between the Indian Tribe and any State.
Section 745.327(c) “Performance Elements” for a lead-based paint compliance and enforcement program requires that a State or Tribal program include the following elements:

a. Training. Lead-based paint compliance and enforcement programs must, at a minimum, implement a process for training inspection personnel and ensuring that they have well-trained enforcement inspectors. Inspectors must successfully demonstrate knowledge of the requirements of the particular discipline (e.g., abatement supervisor, and/or abatement worker, and/or lead-based paint inspector, and/or risk assessor, and/or project planner) for which they have compliance monitoring or enforcement responsibilities. For example, for State compliance/enforcement inspectors, completion of the applicable accredited training course would successfully demonstrate knowledge of these requirements. Instruction should take the form of both hands-on or on-the-job training and the use of prepared training materials.

b. Compliance assistance. Lead-based paint compliance and enforcement programs must provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with the State or Indian Tribes lead-based paint program(s).

c. Sampling techniques. Lead-based paint compliance and enforcement programs must have in place the technological capability to ensure compliance with the lead-based paint program requirements.

d. Tracking tips and complaints. The lead-based paint compliance and enforcement program must demonstrate the ability to process and react to tips and complaints or other information indicating a violation. EPA expects that the ability to process and react to tips and complaints would, as appropriate, include:

(1) A method for funneling complaints to a central organizational unit for review;
(2) A logging system to record the receipt of the complaint and to track the stages of the follow-up investigation;
(3) A mechanism for referring the complaint to the appropriate investigative personnel;
(4) A system for allowing a determination of the status of the case and ensuring correction of any violations; and
(5) A procedure for notifying citizens of the ultimate disposition of their complaints.

e. Targeting inspections. Lead-based paint compliance and enforcement programs must demonstrate the ability to target inspections to ensure compliance with the lead-based paint program requirements.

f. Follow-up to inspection reports. Lead-based paint compliance and enforcement programs must demonstrate the ability to reasonably, and in a timely manner, process and follow-up on inspection reports and other information generated through enforcement-related activities associated with a lead-based paint program. The State or Indian Tribe must be in a position to ensure correction of violations, and, as appropriate, effectively develop and issue enforcement remedies/responses in follow-up to the identification of violations.

g. Compliance monitoring and enforcement. A lead-based paint compliance and enforcement program must demonstrate that it is in a position to implement a compliance and enforcement program. Such a compliance and enforcement program must ensure correction of violations, and encompass either planned and/or responsive lead hazard reduction inspections and development/issuance of State or Tribal enforcement responses which are appropriate to the violations.

Section 745.327(d) “Summary of Progress and Performance” requires the State or Indian Tribe to submit a report which summarizes the results of implementing the State's or Indian Tribe's lead-based paint compliance and enforcement program, including a summary of the scope of the regulated community within the State or Indian Tribe (which would include the number of individuals and firms certified in lead-based activities and the number of training programs accredited), the inspections conducted, enforcement actions taken, compliance assistance provided, and the level of resources committed by the State or Indian Tribe to these activities and any other lead-based paint administrative and compliance/enforcement activities.

The report should describe any significant changes in the enforcement of the State or Tribal lead hazard reduction program implemented during the last reporting period. The report should also summarize the results of the State’s or Indian Tribe’s implementation activities and what the State or Indian Tribe discovered, in general, with regard to lead-based paint compliance and enforcement in the State or Indian Tribe as a result of these activities during the period reported. The report should also describe how any measures of success were achieved, and directly assess the impact of compliance/enforcement activities on reducing threats to public health.

4. Reciprocity. EPA strongly encourages each State or Indian Tribe to establish reciprocal arrangements with other States and/or Indian Tribes with authorized programs. Such arrangements might address cooperation in certification determinations, the review and accreditation of training programs, candidate testing and examination administration, curriculum development, policy formulation, compliance monitoring, or the exchange of information and data. The benefits to be derived from these arrangements include a potential cost-saving from the reduction of duplicative activity and attainment of a more professional workforce as States and Tribes can refine and improve the effectiveness of their programs based upon the experience and methods of other States and Tribes.

Several elements of the EPA accreditation and certification programs in § 745.225 through 745.226 are intended to facilitate reciprocity. One of the most critical elements is the certification examination. The examination will serve to ensure that each individual certified under this program has a minimum level of knowledge in his or her particular discipline. At the same time, the certification examination development procedures (previously outlined in this preamble), will allow a State or Indian Tribe the flexibility to either adopt a “standardized” examination, or develop its own examination according to “standardized” guidelines. A second element is the inclusion of a refresher training course in the Federal program. Successful completion of a State or Tribal accredited refresher course may serve as an ideal requirement for individuals seeking a reciprocal certification in another State or Tribe.

F. Treatment of Tribes as a State

Today, EPA is also providing Federally recognized Indian Tribes the opportunity to apply for and receive lead-based paint program authorization similar to that available to States. Providing Indian Tribes with this opportunity is consistent with EPA’s Policy for the Administration of Environmental Programs on Indian Reservations. This policy, formally adopted in 1984 and reaffirmed on March 14, 1994 by the Administrator, “. . . views Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and
the health and welfare of the reservation populace.”

A major goal of EPA’s Indian Policy is to eliminate all statutory and regulatory barriers to Tribal administration of Federal environmental programs. Today’s final rule represents another step in the Agency’s continuing commitment toward achieving this goal. However, EPA recognizes, that some eligible Indian Tribes may choose not to apply for program authorization. Despite the choice made, the Agency remains committed to providing technical assistance and training when possible to Tribal entities as they work to resolve their lead-based paint management concerns.

EPA believes that adequate authority exists under TSCA to allow Indian Tribes to seek lead-based paint program authorization. EPA’s interpretation of TSCA is governed by the principles of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Where Congress has not explicitly stated its intent in adopting a statutory provision, the Agency charged with implementing that statute may adopt any interpretation which, in the Agency’s expert judgment, is reasonable in light of the goals and purposes of the statute as a whole. Id. 844. Interpreting TSCA to allow Indian Tribes to apply for program authorization satisfies the Chevron test.

TSCA does not explicitly define a role for Indian Tribes under Sections 402 or 404 and reflects an undeniable intent to extend Tribal authority by denying Indian Tribes the opportunity to apply for program authorization in lieu of the Federal program. With this rule, however, regulated lead-based paint activities in Indian country could be under the jurisdiction of the closest sovereign with program and enforcement authority, the Indian Tribe, rather than the Federal government. Extending the ability to receive program authorization to Indian Tribes is consistent with the general principles of Federal Indian law and the Agency’s Indian Policy, which states that environmental programs (e.g., TSCA Section 402/404) in Indian country will be implemented to the maximum extent possible by Tribal governments. Thus, EPA believes that allowing Indian Tribes to apply for program authorization reflects the sovereign authority of Indian Tribes under Federal law.

In the case of other environmental statutes (e.g., the Clean Water Act), EPA has worked to revise them to define explicitly the role for Indian Tribes under those programs. Yet, EPA has also stepped in on at least two occasions to allow Indian Tribes to seek program approval despite the lack of an explicit Congressional mandate. Most recently, EPA recognized Indian Tribes as the appropriate authority under the Emergency Planning and Community Right-to-Know Act (EPCRA), despite silence on the Tribal role under EPCRA (55 FR 30632; July 26, 1990). EPA reasoned that since EPCRA has no Federal role to back-up State planning activities, it was reasonable to allow the Indian Tribes as the authority under EPCRA to neglect gaps in emergency planning on Indian lands. (54 FR 13000, March 29, 1989).

EPA filled a similar statutory gap much earlier as well, even before development of its formal Indian Policy. In 1974, EPA promulgated regulations which authorized Indian Tribes to redesignate the level of air quality applicable to Indian lands under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act in the same manner that States could redesignate for other lands. See Nance v. EPA (upholding regulations). EPA promulgated this regulation despite the fact that the Clean Air Act at that time made no reference whatsoever to Indian Tribes or their status under the Act. One court already has recognized the reasonableness of EPA’s actions in filling such regulatory gaps on Indian lands. In Nance, the U.S. Court of Appeals for the Ninth Circuit affirmed EPA’s PSD regulations described in the previous paragraph. The Court found that EPA could reasonably interpret the Clean Air Act to allow for Tribal redesignation, rather than allowing the States to exercise that authority or exempting Indian lands from the redesignation process. 745 F.2d 713. The Court noted that EPA’s rule was reasonable in light of the general existence of Tribal sovereignty over activities on Indian Lands, Id. 714.

Today’s final rule is analogous to the rule upheld in Nance. EPA is proposing to fill a gap in jurisdiction on Indian lands. As with the redesignation program, approving Tribal lead-based paint activities programs ensures that the Federal government is not the entity exercising authority that Congress intended to be exercised at a more local level. Furthermore, the case law supporting EPA’s interpretation is even stronger today than at the time of the Nance decision. First, the Supreme Court has reaffirmed EPA’s authority to develop reasonable controlling interpretations of environmental statutes. Chevron, supra. Second, the Supreme Court has emphasized that Indian Tribes have the authority to regulate activities on Indian Lands, including those of non-Indians, where the conduct directly threatens the health and safety of the Indian Tribe or its members. Montana v. United States, 450 U.S. 544, 565 (1981).

In the case of lead-based paint, EPA believes that improperly conducted activities could directly threaten human health (including that of Tribal members) and the environment (including Indian lands). Indian Tribes are likely to be able to assert regulatory authority over activities conducted on Indian lands to protect these interests. Thus, as in Nance, EPA believes that allowing Indian Tribes to apply for program authorization reflects the sovereign authority of Indian Tribes under Federal law.

To have its lead-based paint program authorized by EPA under today’s final rule, an Indian Tribe would have to have adequate authority over the regulated activities. The Jurisdiction of Indian Tribes clearly extends “over both their members and their territory.” United States v. Mazurie, 419 U.S. 544, 557 (1975). However, Indian reservations may include lands owned in fee by nonmembers. “Fee lands” are privately owned by non-members and title to the lands can be transferred without restriction. The extent of Tribal authority to regulate activities by non-Tribal members on fee lands depends on whether those activities threaten or have a direct effect on the political integrity, economic security, or the health or welfare of the Indian Tribe. Montana v. United States, 450 U.S. 544, 565-66 (1981).
The Supreme Court in several post-Montana cases has explored several criteria to assure that the impacts upon Indian Tribes of the activities of non-Indians on fee land, under the Montana test, are more than de minimis. To date, however, the Court has not agreed in a case on point on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an operating rule, a formulation of the Montana standard that will expect a showing that the potential impacts of regulated activities of non-members on the Indian Tribe are serious and substantial. See 56 FR 64876, 64878; December 12, 1991.

EPA will, thus, require that an Indian Tribe seeking lead-based paint program authorization over activities of non-members on fee lands demonstrate jurisdiction, i.e., make a showing that the potential impacts on Indian Tribes from lead-based paint activities of non-members on fee lands are serious and substantial. The choice of an Agency operating rule containing this standard is taken as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of that standard per se. See 56 FR 64878. Whether an Indian Tribe has jurisdiction over activities by non-members on fee lands, will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances and will likely vary from one Tribe to another. The Agency recognizes that the activities regulated under various environmental statutes, including TSCA, generally have the potential for direct impacts on human health and welfare that are serious and substantial. See 56 FR 64878.

The process that the Agency will use for Indian Tribes to demonstrate their authority over non-members on fee lands includes a submission of a statement pursuant to § 745.324(c) explaining the legal basis for the Indian Tribe’s regulatory authority. However, EPA will also rely on its generalized findings regarding the relationship of lead-based paint activities and related hazards to Tribal health and welfare. Thus, the Tribal submission will need to make a showing of facts that there are or may be activities regulated under TSCA Title IV by non-members on fee lands within the territory for which the Indian Tribe is seeking authorization, and that the Indian Tribe or Tribal members could be subject to exposure to lead-based paint hazards from such activities through, e.g., dust, soil, air, and/or direct contact. The Indian Tribe must explicitly assert and demonstrate jurisdiction, i.e., it should make a showing that lead-based paint activities conducted by non-members on fee lands could have direct impacts on the health and welfare of the Indian Tribe and its members that are serious and substantial. Appropriate governmental entities (e.g., an adjacent Indian Tribe or State) will have an opportunity to comment on the Indian Tribe’s jurisdictional assertions during the public comment period prior to EPA’s action on the Indian Tribe’s application. The Agency recognizes that jurisdictional disputes between Indian Tribes and States can be complex and difficult and that it will, in some circumstances, be forced to address such disputes by attempting to work with the parties in a mediative fashion. However, EPA’s ultimate responsibility is protection of human health and the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected agencies work cooperatively for environmental protection.

Under the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Clean Air Act (CAA), Congress has specified certain criteria by which EPA is to determine whether an Indian Tribe may be treated in the same manner as a State. These criteria generally require that the Indian Tribe (1) be recognized by the Secretary of the Interior; (2) have an existing government exercising substantial governmental duties and powers; (3) have adequate civil regulatory jurisdiction over the subject matter and entities to be regulated; and (4) be reasonably expected to be capable of administering the Federal environmental program for which it is seeking approval.

As discussed below, EPA is requiring Indian Tribes seeking program authorization and grants under TSCA section 404 to demonstrate in the Program Description that they meet the four criteria listed above. The process EPA is proposing for Indian Tribes to make this showing, however, generally is not an onerous one. The Agency has simplified its process for determining Tribal eligibility to administer environmental programs under several other environmental statutes. See 59 FR 64339 (December 14, 1994) ("Treatment as a State (TAS) Simplification Rule"). The proposed process for determining eligibility under TSCA, Section 404 programs parallels the simplification rule. Generally, the fact that an Indian Tribe has met the recognition or governmental function requirement under another environmental statute allowing for Tribal assumption of environmental programs (e.g., the Clean Water Act, Safe Drinking Water Act, Clean Air Act) will establish that it meets those particular requirements for purposes of TSCA Section 404 authorization. To facilitate review of Tribal applications, EPA requests that the Indian Tribe demonstrate that it has been approved for "TAS" (under the old "TAS" process) or been deemed eligible to receive authorization (under the simplified process) for any other program.

If an Indian Tribe has not received "TAS" approval or been deemed eligible to receive authorization, the Indian Tribe must demonstrate, pursuant to § 745.324(b)(5)(ii), that it meets the recognition and governmental function criteria described above. A discussion on how to make these showings can be found at 59 FR 64339 (December 14, 1994).

EPA believes, on the other hand, that the Agency must make a separate determination that an Indian Tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each Tribal lead-based paint program. In particular, if the Indian Tribe is asserting jurisdiction over lead-based paint activities conducted by non-members on fee lands, it must explicitly show, in its submission, that the activities of non-members on fee lands regarding lead-based paint could have serious and substantial effects on the health and welfare of the Indian Tribe. Copies of all documents, such as treaties, constitutions, bylaws, charters, executive orders, codes, ordinances, and/or resolutions which support the Indian Tribe’s assertions of jurisdiction must also be included. EPA will review this documentation and any comments given during the public comment period, and then will make a determination whether there has been an adequate demonstration of Tribal jurisdiction over Tribal, and if asserted, non-member activities on fee lands within the boundaries of the reservations.

Finally, capability is a determination that will be made on a case-by-case basis. Ordinarily, the information provided in the application for program approval submitted by an Indian Tribe or State, will be sufficient. Nevertheless, EPA may request, in individual cases, that the Indian Tribe provide a narrative statement or other documents showing that the Indian Tribe is capable of...
administering the program for which it is seeking approval. See 59 FR 64341. Consistent with the simplification rule, no prequalification process will be required for Indian Tribes to obtain program approval for the lead-based paint program. EPA will evaluate whether Indian Tribes have met the four eligibility criteria listed above during the program approval process.

Today’s final rule also authorizes grants to eligible tribes as well as States under TSCA section 404(g). Under the statutory scheme, section 404(g) grants are specifically designed to aid in developing and implementing authorized TSCA lead-based paint activities programs. Given the Agency’s interpretation that TSCA section 404 is properly read to allow EPA to authorize qualifying Tribes to administer a lead-based paint program in lieu of the Federal program, it follows that these Tribes should also be eligible to receive grant funding under TSCA section 404(g) “to develop and carry out authorized programs . . . .” The Agency’s interpretation is consistent with well established statutory construction that ambiguous statutes should be construed in favor of Tribes. See, e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 846 (1982); see also, F. Cohen, Handbook of Federal Indian Law, 224–225 (1982).

X. Regulatory Assessment Requirements

A. Executive Order 12866

Pursuant to Executive Order 12866 (58 FR 51735, October 4, 1993), it has been determined that this is a “significant regulatory action” because this regulation may raise novel legal or policy issues arising out of the initial implementation of the new legal mandates. As such, this action was submitted to the Office of Management and Budget (OMB) for review. Any comments or changes made during that review have been documented in the public record.

In addition, as specified by the Executive Order, the Agency has prepared a regulatory impact analysis (RIA) of the economic impacts associated with this regulation. The complete RIA document, titled TSCA Title IV Sections 402(a) and 404: Target Housing and Child-Occupied Facilities Final Rule Regulatory Impact Analysis, has been included in the public record for this regulation and is available for inspection in the TSCA public docket office. The central issue in the analysis is to identify, quantify and value the private and social benefits and costs of requiring that all lead-based paint abatement activities be performed by certified personnel trained by an accredited program, and that all lead-based paint activities meet certain minimum work practice standards. In attempting to conduct such an analysis, EPA encountered several difficulties related to the availability of data associated with the activity-specific costs and the benefits attributable to having trained and accredited personnel conduct the activities in accordance with specific standards. Using available information, the resulting analysis was issued with the proposed rule and any comments received were considered in the development of the final rule, as well as in the development of the corresponding final RIA. The following is a brief summary of the final RIA:

1. Costs of regulatory action. Cost estimates for performing lead-based paint activities pursuant to today’s final rule are based on the number of inspections, lead hazard screens, risk assessments, and abatement activities and the unit costs associated with performing such activities. The first-year costs are estimated to be $31 million. Since the benefits and costs of this regulation occur at different times during the 50-year analysis period, EPA estimated their present value by discounting them. The selection of a discount rate has a direct bearing on the analysis, because cost and benefit estimates are sensitive to variations in the discount rate. As such, learned opinions vary on which discount rate should be used in certain circumstances. In this analysis, EPA uses a 3% discount rate for the core analysis and a 7% discount rate in the sensitivity analysis. Using a 3% discount rate, the present value of the costs over the 50-year time period total $1114 billion. At a 7% discount rate, total costs fall to $530 million. Total costs of compliance with work practice standards are estimated at $637 million and account for 57% of the discounted costs. The work practice standard costs are the main source of costs, due primarily to the cost of following these standards when conducting risk assessments and abatements in target housing and child-occupied facilities.

Certain assumptions that are a result of data limitations affect the estimates of the incremental costs of the rule. The analysis assumes current practices and training rates make up the baseline to be compared to the changes that will result from the rule provisions. This analysis accounts for the fact that lead-based paint activities are currently occurring, but does not account for the potential increase in such activities over time as a result of EPA regulations implementing other portions of Title X, resulting in greater costs. However, under these circumstances the attendant benefits would also be greater. Also, current training rate estimates assume that on average, lead-based paint activities do not provide full-time employment. If lead-based paint activities do constitute full-time employment, then fewer people will require training.

2. Benefits of regulatory action. The objective of the benefit analysis is to identify the benefits attributable to the regulation, which in this case are the incremental benefits associated with sections 402(a) and 404 of the value of any incremental risk reduction brought about by performing these activities using trained labor that complies with the work practice standards, which are also contained in the rule. These benefits consist of the value to consumers of being able to purchase lead-based paint activities services of more reliable quality. As a result of the reduced uncertainty about the quality of such services, more inspections, lead hazard screens, risk assessments, and abatements will be performed. In addition, the average quality of the services that are performed will rise as the low-quality lead-based paint activities are curtailed or eliminated by the accreditation, training, certification and work-practice standard requirements. The quantification and valuation of these benefits—the ability to purchase a service of more reliable quality and the improvement in quality—would require information about the distribution of quality of lead-based paint activities that building owners may purchase if this rule were promulgated, and in its absence. Due to data limitations, it was not possible to estimate the benefits of the rule. Total benefits of abatement, however, were estimated. The number of quantifiable and monetizable benefit categories in the analysis of abatement benefits is limited because dose-response functions necessary to assess the potential impacts of lead-based paint hazard reductions on human health and the environment are not available, and knowledge of national blood-lead levels pre- and post-implementation of sections 402(a) and 404 is also unavailable.

The second-year total measurable benefits of abatement are estimated at $625 million. Total measurable benefits of abatement, discounted over a 50-year period at 3% percent are estimated at $16.1 billion, and discounted at 7% over the same time period are estimated at $15.5 billion. These benefits accrue from reductions of negative impacts on
children's intelligence, with an estimated present value of total measured benefits of abatement equal to $16.1 billion ($13.1 billion in target housing and $3 billion in child-occupied facilities).

In addition to the measured benefits of abatement in the base analysis, which focuses on protection of children age 6 years or younger, other qualitative benefit categories exist. These categories include:

1. Neonatal mortality;
2. Adult resident health effects such as hypertension, coronary heart disease, and stroke;
3. Infant/child neurological effects;
4. Occupational health effects such as hypertension, coronary heart disease, and stroke; and
5. Environmental risk reductions.

With the exception of (1) and (2), it is not possible to value these benefits due to data limitations. The contributions of these two benefit categories are estimated and included in the sensitivity analysis below. Were the values of these additional benefit categories included in the primary analysis, the measured benefits of the rule could be as much as $54 billion when discounted at 3% over 50 years.


The purpose of this Regulatory Impact Analysis (RIA) was to analyze the benefits, costs, and economic impacts of the final rule implementing sections 402(a)/404. As discussed in the RIA, there are benefits to society associated with the reduction of lead-based paint hazards in general and there are also benefits associated with the establishment of certification programs for ensuring that only trained individuals perform the lead-based paint activities. Although there is insufficient data to allow for a quantification of those benefits, EPA believes that the analysis it conducted with regard to the benefits from reducing lead-based paint hazards indicates that sections 402(a)/404 provide a vehicle that will aid in the realization of those benefits and that the costs of this rule are reasonable in light of the potential magnitude of those benefits, quantified or not.

It is important to point out that while the total costs of the rule are comprehensively quantified, benefits of abatement are only partially quantified. If benefits to adult residents of target housing, lead-based paint abatement workers, individuals who live, work, or travel near abatement activities, and the environment were included, the benefits of the rule would be increased substantially. Estimates for possible benefits to two groups of potential beneficiaries (workers and adult residents of target housing) are provided in the sensitivity analysis discussion below.


Six sets of sensitivity analyses examine the effects on key categories of the benefits of abatements and cost categories. Two sets affected the costs: alternative work practice standard costs (resulting from alternative estimates of likely soil abatement practices) and alternative training costs (resulting from alternative assumptions of likely workload). In addition, varying assumptions of changes in blood-lead levels attributable to the rule provide estimated potential benefits for neonatal mortality, adult residents of abated units and workers. Finally, an alternative discount rate of 7%, which affects both the estimated costs and benefits of the rule, is applied. Use of an alternate discount rate and inclusion of adult resident benefits had the greatest impact on benefits and costs. Simply discounting the stream of costs by 7% increases the present value of the 50-year incremental cost estimate by 52%. Correspondingly, the use of the 7% discount rate decreases the present value of the 50-year benefit stream by 90%. Incorporation of adult resident benefits increases total benefit stream by $17.9 billion per 0.1 µg/dL change in blood lead when discounted at 3% over 50 years, without impacting the costs.

5. Response to comments on the RIA.

The Agency received comments on the RIA from 16 parties. The comments are in five major categories: types of structures covered by the rule, estimation of benefits, estimation of costs, analytic assumptions, and factors left out of the analysis. In several cases, the rule and/or the analysis were revised to respond to these comments. In other cases, the Agency determined that the rule and analysis were appropriate. The comments and responses are summarized here.

Comments on the types of structures covered address the impacts of the rule on public and commercial buildings and steel structures. The Agency plans to develop separate regulations affecting public and commercial buildings and steel structures, and comments will be addressed at that time.

Several commenters stated that EPA had overestimated the benefits of the rule. While it is not possible to isolate the incremental benefits resulting from the rule, estimating the total value of certain categories of benefits due to properly performed abatements provides a useful benchmark against which to evaluate the incremental costs of the rule. This is especially true since poorly performed activities can result in further exposures and thus negative benefits. The RIA benefit estimates rely on IQ-related benefits to children age 6 years and younger; neonatal and adult hypertension benefits which are also assumed to result from the proposed rule are presented in the sensitivity analysis. The benefit estimates include the benefits derived from the reductions in lead-contaminated dust that occur with a lead-based paint abatement.

On the cost side of the analysis, some commenters argued that the costs were overestimated, while others that costs were underestimated. In response to comments that costs were overestimated, the Agency notes that the estimates were conservative. In response to the comments, the costs were underestimated; the Agency notes that the estimated costs are incremental not total. The per unit costs are estimated by comparing current industry practices to those required under the rule, identifying the additional actions the rule would impose, and calculating the costs of these actions. The Agency believes its benefit analysis accounts for the fact that some households will choose to skip the inspection step and start the process with a lead hazard screen or risk assessment. Changes were also made in the regulations governing soil abatements and the analysis of these costs. The Agency has reviewed the analysis and determined that costs are not underestimated.

A few of the comments challenged various analytic assumptions or approaches. Some argued that EPA’s Integrated Exposure Uptake Biokinetic (IEUBK) Model should not be used in estimating the benefits. The Agency believes the use of this model to be appropriate; the Agency currently uses it for risk assessments at sites covered under the Superfund program and the Resource Conservation and Recovery Act. Other comments challenged the discount rate used in the analysis and the handling of productivity growth. The analysis is performed in real, as opposed to nominal, terms and thus it is not necessary to adjust for inflation. The 3% discount rate is consistent with other environmental regulations; the effects of using a higher rate are presented in the sensitivity analysis.

Several comments asserted that the analysis had not accounted for important factors. This is not the case. The final RIA includes the effect of OSHA rules, which was one factor noted by commenters. The impact of the rule on the demand for lead-based paint activities is modeled using data from Massachusetts, where lead-based paint regulations have been in effect for a few years. Attempts to uncover other
In addition, the analysis now uses a single definition of lead-based paint hazards (paint with lead content of 1 mg/cm² and in deteriorated condition or good condition on friction surfaces).

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Agency considered whether today’s regulatory action will have a significant economic impact on a substantial number of small entities. Based on the Agency’s analysis, EPA determined that this action is likely to have a modest adverse economic impact on a substantial number of small entities. EPA conducted a regulatory flexibility analysis for the rule, the results of which are summarized in today’s preamble and discussed in detail in supporting documents in the rulemaking record. In light of that analysis and public comments received, the Agency took numerous steps to minimize any adverse impact associated with the rule, with a particular emphasis on reducing any potential adverse impact on small entities. For example, in the final rule, the Agency reduced the recordkeeping requirements associated with the work practice standards, and reduced the length of the abatement worker course.

Previous sections of the preamble to this final rule include discussions summarizing the need for and objective of this rule, responses to the significant comments received on the proposed rule, and a summary of the analysis of small entity impacts. In addition, a Response to Public Comment Document presents EPA’s detailed response to all the significant comments received on the proposal (including the initial regulatory flexibility analysis prepared for the proposed rule); and a Regulatory Impact Analysis (RIA) includes a complete description of the small entities potentially impacted, the projected requirements that small entities might be subject to, a summary of the changes made to the proposed rule which minimize the burden in the final rule, and an analysis of the projected impacts on small entities. These documents are available in the public docket supporting this rulemaking.

The following is a brief summary of EPA’s analysis of the potential economic impacts on small entities. Basically, section 402(a) does not require or mandate the abatement of lead-based paint, nor require that any particular enterprise participate in the abatement of lead-based paint. However, section 402(a) does require that if an abatement is voluntarily conducted, certain training requirements and work practices must be followed. The costs of required training, certification, and work practice standards may create competitive differences that could result in unfair burdening of small firms. This analysis estimates both the absolute and the relative burden on small and large businesses.

The section 402(a) compliance costs consist of two components that may impact small businesses: (1) Accreditation and training costs for workers and supervisors, as well as certification costs for firms, and (2) incremental costs of work practice standards for abatement procedures. These two components coincide with the two decision points faced by firms interested in performing lead-based paint abatement work (including soil abatement). In order to participate in this industry, a firm must be certified and its employees must be trained and certified. Firms incur these expenses in anticipation of work, based on its assessment of the future demand for such services, its competition, and the price it will be able to charge. If the market demand does not meet these expectations, the firm may not recoup these costs, thus decreasing its profits.

The costs resulting from work practice standards are of a different nature. Firms that perform lead-based paint activities often perform similar work in settings that do not involve lead and are not affected by this rule. Occurring at the second decision point, work practice standards will not have an adverse impact on small businesses as work practice standards are of a different nature. Firms that perform lead-based paint activities are also active in the non-lead-based paint markets. In this voluntary setting, the work practice standards will not have an adverse impact on the profits of businesses, because these firms can focus, instead, on the non-lead-based paint business. Therefore, no estimates of work practice standards burden were made. Likewise, owners of property will incur the work practice standards costs only if they determine that an abatement is to their benefit.

To determine the impact of the training and certification requirements on large and small businesses, the ratios of compliance costs to annual sales were calculated. By using first-year training and certification requirements for large and small businesses, the ratios are calculated. By using first-year training and certification requirements, the largest impacts were estimated (a worst-case scenario). Impacts on firms in subsequent years would be significantly smaller because the demand for training in later years would decrease from the first year “start up” levels. Incremental certification and training costs per establishment were calculated by multiplying the average number of workers per establishment by the per person certification and training costs. Training costs vary by discipline and certification fees of $60 per individual and $350 per firm were estimated. While it is likely that firms will be able to pass some or all of the training and certification costs on to their customers in the form of higher prices, this analysis investigates the worst case in which the firm must absorb all the costs.

Assuming that none of the training and certification costs are shifted forward in the form of higher prices, the ratios of compliance costs to annual sales for small establishments range between 0.6 and 3.2%. For large firms, the ratios tend to be slightly lower, ranging from 0.6 and 1%. In the case of both large and small establishments, the largest cost ratio occurs for Standard Industrial Code 8743, testing laboratories.

As discussed above, firms are likely to pass these costs on to their customers in the form of higher prices because the regulations apply to all firms involved in lead-based paint activities. Therefore, the ratios tend to overestimate the impacts. Since training and licensing costs are a small percent of annual sales, these percentages are only slightly higher for small business than for large ones. The impact of this regulation on small businesses will be small, as is the differential between impacts on large and small businesses.

While this shifting of costs will alleviate the burden on abatement firms, the incremental costs of the regulations may affect building owners. Consistent with the arguments presented above, under this rule abatement is a voluntary action. As such, property owners are unlikely to undertake an abatement unless they are able to pass the cost on to tenants or otherwise recoup the costs in terms of higher property values. Where abatements are mandated under a State law or local ordinance, however, the costs of this rule may have an adverse impact on landlords. While abandonment could possibly be the result, existing information indicates that this is unlikely. Therefore, analyses of potential impacts on property owners or tenants were not performed.

The comparison of impacts on small and large establishments was not performed for two reasons. First, except for the Regional Lead Training Centers...
(RLTCs), most training providers are small, so there would be no differential effect based on size of the firm. In addition, it is likely that training providers will pass the additional costs on to their trainees. This impact is analyzed above under the assumption that firms undertaking lead-based paint activities will bear these costs. Since the changes will be required by Federal regulations, they will apply to all training providers. Second, there will be heightened concern about lead-based paint hazards and thus a greater willingness to pay for trained personnel who will presumably provide higher quality services. In fact, these regulations are likely to create a market for training services and thus may be beneficial to small businesses.

C. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An Information Collection Request (ICR) document has been prepared by EPA (EPA ICR No. 1715.02) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., SW.; Washington, DC 20460; by calling (202) 260-2740; or by e-mail from “farmer.sandy@epa.gov.” The information requirements are not effective until OMB approves them. Under today’s final rule, four entities may be affected by new information collection and reporting requirements. These entities are: (1) States and Indian Tribes; (2) training program providers; (3) individuals engaged in lead-based paint activities; and (4) firms engaged in lead-based paint activities.

Importantly, States and Indian Tribes have the option of choosing to seek authorization to administer lead-based paint activities programs under TSCA section 404; thus the information collection and recordkeeping requirements are voluntary activities for these entities. In those States and Indian Tribes that do not seek program authorization, however, it is assumed that EPA will administer a lead-based paint activities program.

Likewise, individuals and firms that engage in lead-based paint activities, as well as training providers delivering training in such activities also have the option of providing these services. Thus, for those individuals and firms that choose to provide instruction or to contract for the purposes of conducting lead-based paint activities, the information collection and recordkeeping requirements also are voluntary.

Nonetheless, it must be noted that the information collection and recordkeeping requirements contained in the rule become mandatory on the date an entity chooses to administer a program: provide instruction; or contract its services in the lead-based paint activities field. The Agency notes that the rule’s information collection and recordkeeping requirements have been designed so as to assist the Agency in meeting the core objectives of section 402(a) and section 404 of TSCA Title IV. These objectives are to ensure the integrity of an accreditation program for training providers; enable individuals and firms to become certified; and substantiate that programs administered by States and Indian Tribes are as protective as EPA’s federal program. The Agency believes that the information collection and recordkeeping requirements generated by the rule are balanced in that they will permit the Agency to administer the core objectives of TSCA Title IV without imposing an undue burden on those entities that choose to become involved in the lead-based paint activities field. The projected burden for these entities is summarized below.

For the purposes of this discussion, the term “burden” refers to the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions, to learn the information necessary to respond, to gather and maintain data, to analyze information, to verify data accuracy, to process and maintain information, and to disclose and provide information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The average burden per training provider for the first effective year of the rule is estimated to be 28.3 hours with a cost per training provider of $681.40, and lesser burden in subsequent years. The estimated burden for the first effective year of the rule for the total number of training providers is 5,667 hours at a cost of $1,260,279.

The estimated, average burden per individual seeking certification to engage in lead-based paint activities depends on the length of the required training, plus 1 additional hour. For the total of individuals, the first effective year burden is 407,448 hours at a cost of $16,092,230 with lesser burden in subsequent years.

The first effective year burden per State or Indian Tribe depends on whether the entity must put legislation into place before implementing a regulatory program. For States or Indian Tribes that assume legislative and regulatory development the burden is 1,715 hours; for those States or Indian Tribes that need only to acquire program authorization the burden is 138 hours. The total burden for States and Indian Tribes in the first effective year is 48,713 hours at a cost of $959,534, with lesser burden in subsequent years.

For EPA the estimated burden in the first effective year of the rule is 5,940 hours at a cost of $197,285. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the burden estimates and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., SW.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked “Attention: Desk Officer for EPA.” Include the ICR number in any correspondence.

D. Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), EPA has determined that this regulatory action does not contain any “Federal mandates,” as described in the Act, for the States, local, or Tribal governments or the private sector because the rule implements mandates specifically and explicitly set forth by the Congress in TSCA section 402(a) and section 404 without the exercise of any political discretion by EPA.

The first effective year burden estimated that this action does not result in the expenditure of $100 million or more by
any State, local or tribal governments, or by anyone in the private sector. The costs associated with this action are described as required by Executive Order 12866 in section A of this Unit in the preamble.

As specified by Executive Order 12875 (58 FR 58093, October 28, 1993), titled Enhancing the Intergovernmental Partnership, the Agency has sought input from State, local and tribal government representatives throughout the development of this rule. EPA anticipates that these governments will play a critical role in the implementation of a national lead-based paint activities training and certification program. Consequently, the Agency felt that their input and participation were needed to ensure the success of the program.

Specifically, before it began the development of today’s final rule, EPA informally met with a broad range of interested parties, including State, local and tribal governments to solicit information on the subject of lead-based paint activities training, accreditation, certification and standards. Communication and input from the States also was actively sought as the Agency developed a proposed rule, and after the proposed rule was published for public comment on September 2, 1994.

During the public comment period, at least three meetings were held with State representatives under the auspices of the “Forum on State and Tribal Toxics Action” or “FOSTTA.” FOSTTA is an organization that serves as a forum for State and Tribal officials to jointly participate in addressing national toxics issues, including lead. Under FOSTTA, a “lead project” has been formed to work with the States and tribes on lead-related issues. In addition to meetings with FOSTTA representatives, the Agency met on December 5 and 6, 1994, with 93 State representatives from 49 State health and environmental agencies. Twelve representatives from 10 tribes also participated in the December meeting. Furthermore, the Agency received written comments from 83 State and local agencies representing 49 States.

The input received from State, Tribal and local agencies has been very useful in the final development of today’s final rule. The Agency believes that this input has helped produce an efficient rule that will support the development of a workforce qualified to reduce and eliminate lead-based paint hazards. By working with the States, Tribes and local agencies, EPA has initiated preliminary discussions intended to facilitate cooperation and program reciprocity.

E. Executive Order 12898—
Environmental Justice Considerations

Pursuant to Executive Order 12898 (59 FR 7629, February 16, 1994), the Agency has considered environmental justice related issues with regard to the potential impacts of this action on the environmental and health conditions in low-income and minority communities. This examination shows that existing lead-based paint hazards are a risk to all segments of the population living in pre-1978 housing. However, literature indicates that some segments of our society are at relatively greater risk than others.

Although the baseline risks from lead-based paint still disproportionately affect poorer sub-populations, it may be more likely that abatements will take place in residential dwellings occupied by mid- to upper-level income households. Abatements will be voluntary, and wealthier households are more likely to have the financial resources to abate any existing problem in their home, or to avoid lead-based paint hazards by not moving into a residential dwelling with lead-based paint. Even though a national strategy of eliminating lead-based paint hazards targets a problem affecting a greater share of poor households and minorities, the impact of income on the ability to undertake voluntary abatements may result in a more inequitable distribution of the risks in the future.

In response to this situation, several Federal agencies have established grant programs that will provide financial support to reduce the prevalence of lead poisoning among disadvantaged children. The EPA also has several information initiatives designed to educate the public, with a particular emphasis on this socio-economic group, of the dangers of lead.

XI. Submission to Congress and the General Accounting Office

This action is not a “major rule” as defined by 5 U.S.C. 804(2) of the Administrative Procedure Act. Pursuant to 5 U.S.C. 801 (a)(1)(A), EPA submitted this action to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to its publication in today’s Federal Register.

XII. Rulemaking Record

EPA has established a record for this rulemaking (docket control number OPPTS–621288). A public version of the record, without any information claimed as confidential business information, is available in the TSCA Public Docket Office, from 12 noon to 4 p.m., Monday through Friday, except legal holidays. The TSCA Public Docket Office is located at EPA headquarters, in Rm. G102, 401 M St., SW., Washington, DC. 20460.

The rulemaking record contains information considered by EPA in developing this final rule. The record includes: (1) All Federal Register notices, (2) relevant support documents, (3) reports, (4) memoranda and letters, and (5) hearing transcripts responses to comments, and other documents related to this rulemaking.

Unit XIII. of this preamble contains the list of documents which the Agency relied upon while developing today’s regulation and can be found in the docket. Other documents, not listed there, such as those submitted with written comments from interested parties, are contained in the TSCA Docket office as well. A draft of today’s final rule submitted by the Administrator to the OMB for an interagency review process prior to publication of the rule is also contained in the public docket.

XIII. References

(1) Minutes from the December 5 and 6, 1994 National Lead Conference; and minutes from Forum on State and Tribal Toxics Action (FOSTTA) meetings from 1994 and 1995.

(2) Lead; Requirements for Lead-Based Paint Activities; Proposed Rule; Summary of Public Comments; prepared by the Office of Pollution Prevention and Toxics, (January 31, 1995).

(3) Lead; Requirements for Lead-Based Paint Activities; Proposed Rule; Response to Public Comment Document; prepared by the Office of Pollution Prevention and Toxics, (August 1, 1996).


§ 745.220 Scope and applicability.
(a) This subpart contains procedures and requirements for the accreditation of lead-based paint activities training programs, procedures and requirements for the certification of individuals and firms engaged in lead-based paint activities, and work practice standards for performing such activities. This subpart also requires that, except as discussed below, all lead-based paint activities, as defined in this subpart, be performed by certified individuals and firms.
(b) This subpart applies to all individuals and firms who are engaged in lead-based paint activities as defined in § 745.223, except persons who perform these activities within residential dwellings that they own, unless the residential dwelling is occupied by a person or persons other than the owner’s immediate family while these activities are being performed, or a child residing in the building has been identified as having an elevated blood lead level. This subpart applies only in those States or Indian Country that do not have an authorized State or Tribal program pursuant to § 745.324 of subpart Q.
(c) Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any property or facility, or engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural, including the requirements of this subpart regarding lead-based paint, lead-based paint activities, and lead-based paint hazards.
(d) While this subpart establishes specific requirements for performing lead-based paint activities they should be undertaken, nothing in this subpart requires that the owner or occupant undertake any particular lead-based paint activity.

§ 745.223 Definitions.
The definitions in subpart A apply to this subpart. In addition, the following definitions apply.

2. By adding new subparts L and Q

Subpart L—Lead-Based Paint Activities

§ 745.220 Scope and applicability.
(a) This subpart contains procedures and requirements for the accreditation of lead-based paint activities training programs, procedures and requirements for the certification of individuals and firms engaged in lead-based paint activities, and work practice standards for performing such activities. This subpart also requires that, except as discussed below, all lead-based paint activities, as defined in this subpart, be performed by certified individuals and firms.
(b) This subpart applies to all individuals and firms who are engaged in lead-based paint activities as defined in § 745.223, except persons who perform these activities within residential dwellings that they own, unless the residential dwelling is occupied by a person or persons other than the owner’s immediate family while these activities are being performed, or a child residing in the building has been identified as having an elevated blood lead level. This subpart applies only in those States or Indian Country that do not have an authorized State or Tribal program pursuant to § 745.324 of subpart Q.
(c) Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any property or facility, or engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural, including the requirements of this subpart regarding lead-based paint, lead-based paint activities, and lead-based paint hazards.
(d) While this subpart establishes specific requirements for performing lead-based paint activities they should be undertaken, nothing in this subpart requires that the owner or occupant undertake any particular lead-based paint activity.

§ 745.223 Definitions.
The definitions in subpart A apply to this subpart. In addition, the following definitions apply.

Abatement means any measure or set of measures designed to permanently eliminate lead-based paint hazards. Abatement includes, but is not limited to:

1. The removal of lead-based paint and lead-contaminated dust, the permanent enclosure or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and

2. All preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures.

3. Specifically, abatement includes, but is not limited to:

(i) Projects for which there is a written contract or other documentation, which provides that an individual or firm will be conducting activities in or to a residential dwelling or child-occupied facility that:
   (A) Shall result in the permanent elimination of lead-based paint hazards; or
   (B) Are designed to permanently eliminate lead-based paint hazards and are described in paragraphs (1) and (2) of this definition.

(ii) Projects resulting in the permanent elimination of lead-based paint hazards, conducted by firms or individuals certified in accordance with § 745.226, unless such projects are covered by paragraph (4) of this definition;

(iii) Projects resulting in the permanent elimination of lead-based paint hazards, conducted by firms or individuals who, through their company name or promotional literature, represent, advertise, or hold themselves out to be in the business of performing lead-based paint activities as identified and defined by this section, unless such projects are covered by paragraph (4) of this definition;

(iv) Projects resulting in the permanent elimination of lead-based paint hazards, that are conducted in...
response to State or local abatement orders.

(4) A abatement does not include renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint hazards. Furthermore, abatement does not include interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards.

Accredited training program means a training program that has been accredited by EPA pursuant to § 745.225 to provide training for individuals engaged in lead-based paint activities.

Adequate quality control means a plan or design which ensures the authenticity, integrity, and accuracy of samples, including dust, soil, and paint chip or paint film samples. Adequate quality control also includes provisions for representative sampling.

Certified firm means a company, partnership, corporation, sole proprietorship, association, or other business entity that performs lead-based paint activities to which EPA has issued a certificate of approval pursuant to § 745.226(f).

Certified inspector means an individual who has been trained by an accredited training program, as defined by this section, and certified by EPA pursuant to § 745.226 to conduct inspections. A certified inspector also samples for the presence of lead in dust and soil for the purposes of abatement clearance testing.

Certified abatement worker means an individual who has been trained by an accredited training program, as defined by this section, and certified by EPA pursuant to § 745.226 to perform abatements.

Certified project designer means an individual who has been trained by an accredited training program, as defined by this section, and certified by EPA pursuant to § 745.226 to prepare abatement project designs, occupant protection plans, and abatement reports.

Certified risk assessor means an individual who has been trained by an accredited training program, as defined by this section, and certified by EPA pursuant to § 745.226 to conduct risk assessments. A risk assessor also samples for the presence of lead in dust and soil for the purposes of abatement clearance testing.

Certified supervisor means an individual who has been trained by an accredited training program, as defined by this section, and certified by EPA pursuant to § 745.226 to supervise and conduct abatements, and to prepare occupant protection plans and abatement reports.

Child-occupied facility means a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day’s visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day-care centers, preschools and kindergarten classrooms.

Clearance levels are values that indicate the maximum amount of lead permitted in dust on a surface following completion of an abatement activity.

Common area means a portion of a building that is generally accessible to all occupants. Such an area may include, but is not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, garages, and boundary fences.

Component or building component means specific design or structural elements or fixtures of a building, residential dwelling, or child-occupied facility that are distinguished from each other by form, function, and location. These include, but are not limited to, interior components such as: ceilings, crown molding, walls, chair rails, doors, door trim, floors, fireplaces, radiators and other heating units, shelves, shelving, supports, stair treads, stair risers, stair stringers, newel posts, railing caps, balustrades, windows and trim (including sashes, window heads, jambs, sills or stools and treads), built in cabinets, columns, beams, bathroom vanities, counter tops, and air conditioners; and exterior components such as: porch roofing, chimneys, flashing, gutters and downspouts, ceilings, soffits, fascias, rake boards, cornerboards, bulkheads, doors and window trim, fences, floors, joists, lattice work, railings and railing caps, siding, handrails, stair risers and treads, stair stringers, columns, balustrades, window sills or stools and treads, casings, sashes and wells, and air conditioners.

Containment means a process to protect workers and the environment by controlling exposures to the lead-contaminated dust and debris created during an abatement.

Course agenda means an outline of the key topics to be covered during a training course, including the time allotted to teach each topic.

Course test means an evaluation of the overall effectiveness of the training which shall test the trainees’ knowledge and retention of the topics covered during the course.

Course test blue print means written documentation identifying the proportion of course test questions devoted to each major topic in the course curriculum.

Deteriorated paint means paint that is cracking, flaking, chipping, peeling, or otherwise separating from the substrate of a building component.

Discipline means one of the specific types or categories of lead-based paint activities identified in this subpart for which individuals may receive training from accredited programs and become certified by EPA. For example, “abatement worker” is a discipline.

Distinct painting history means the application history, as indicated by its visual appearance or a record of application, over time, of paint or other surface coatings to a component or room.

Documented methodologies are methods or protocols used to sample for the presence of lead in paint, dust, and soil.

Elevated blood lead level (EBL) means an excessive absorption of lead that is a confirmed concentration of lead in whole blood of 20 µg/dl (micrograms of lead per deciliter of whole blood) for a single venous test or of 15–19 µg/dl in two consecutive tests taken 3 to 4 months apart.

Encapsulant means a substance that essentially seals lead-based paint and the environment using a liquid-applied coating (with or without reinforcement materials) or an adhesively bonded covering material.

Encapsulation means the application of an encapsulant.

Enclosure means the use of rigid, durable construction materials that are mechanically fastened to the substrate in order to act as a barrier between lead-based paint and the environment.

Guest instructor means an individual designated by the training program manager or principal instructor to provide instruction specific to the lecture, hands-on activities, or work practice components of a course.

Hands-on skills assessment means an evaluation which tests the trainees’ ability to satisfactorily perform the work practices and procedures identified in § 745.225(d), as well as any other skill taught in the training course.

Hazardous waste means any waste as defined in 40 CFR 261.3.
Inspection means a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation.

Interim certification means the status of an individual who has successfully completed the appropriate training course in a discipline from an accredited training program, as defined by this section, but has not yet received formal certification in that discipline from EPA pursuant to § 745.226. Interim certifications expire 6 months after the completion of the training course, and is equivalent to a certificate for the 6-month period.

Interim controls means a set of measures designed to temporarily reduce human exposure or likely exposure to lead-based paint hazards, including specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident educational programs.

Lead-based paint means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligrams per square centimeter or more than 0.5 percent by weight.

Lead-based paint activities means, in the case of target housing and child-occupied facilities, inspection, risk assessment, and abatement, as defined in this subpart.

Lead-based paint hazard means any condition that causes exposure to lead from lead-contaminated dust, soil, or lead-contaminated paint that is present on accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as identified by the Administrator pursuant to TSCA section 403.

Lead-contaminated dust means dust in residential dwellings, or child-occupied facilities that contains an area of soil or dust concentration of lead at or in excess of levels identified by the Administrator pursuant to TSCA section 403.

Lead-contaminated soil means bare soil on residential real property and on the property of a child-occupied facility that contains lead at or in excess of levels identified by the Administrator pursuant to TSCA section 403.

Lead-hazard screen is a limited risk assessment activity that involves limited paint and dust sampling as described in § 745.227(c).

Living area means any area of a residential dwelling used by one or more children age 6 and under, including, but not limited to, living rooms, kitchen areas, dens, play rooms, and children's bedrooms.

Multi-family dwelling means a structure that contains more than one separate residential dwelling unit, which is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons.

Paint in poor condition means more than 10 square feet of deteriorated paint on exterior components with large surface areas; or more than 2 square feet of deteriorated paint on interior components with large surface areas (e.g., walls, ceilings, floors, doors); or more than 10 percent of the total surface area of the component is deteriorated on interior or exterior components with small surface areas (window sills, baseboards, soffits, trim).

Permanently covered soil means soil which has been separated from human contact by the placement of a barrier consisting of solid, relatively impermeable materials, such as concrete or asphalt. Grass, mulch, and other landscaping materials are not considered permanent covering.

Person means any natural or judicial person including any individual, corporation, partnership, or association; any Indian Tribe, State, or political subdivision thereof; any interstate body; and any department, agency, or instrumentality of the Federal government.

Principal instructor means the individual who has the primary responsibility for organizing and teaching a particular course.

Recognized laboratory means an environmental laboratory recognized by EPA pursuant to TSCA section 405(b), as being capable of performing an analysis for lead compounds in paint, soil, and dust.

Reduction measures means designed to reduce or eliminate human exposure to lead-based paint hazards through methods including interim controls and abatement.

Residential dwelling means (1) a detached single-family dwelling unit (as defined in this section), including detached structures such as porches and stoops; or (2) a single family dwelling unit in a structure that contains more than one separate residential dwelling unit, which is used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons.

Risk assessment means (1) an on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards, and (2) the provision of a report by the individual or the firm conducting the risk assessment, explaining the results of the investigation and options for reducing lead-based paint hazards.

Target housing means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any one or more children age 6 years or under resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling.

Training curriculum means an established set of course topics for instruction in an accredited training program for a particular discipline designed to provide specialized knowledge and skills.

Training hours means at least 50 minutes of actual learning, including, but not limited to, time devoted to lecture, learning activities, small group activities, demonstrations, evaluations, and/or hands-on experience.

Training manager means the individual responsible for administering a training program and monitoring the performance of principal instructors and guest instructors.

Visual inspection for clearance testing means the visual examination of a residential dwelling or a child-occupied facility following an abatement to determine whether or not the abatement has been successfully completed.

Visual inspection for risk assessment means the visual examination of a residential dwelling or a child-occupied facility to determine the existence of deteriorated lead-based paint or other potential sources of lead-based paint hazards.

§ 745.225 Accreditation of training programs: target housing and child-occupied facilities.

(a) Scope. (1) A training program may seek accreditation to offer lead-based paint activities courses in any of the following disciplines: inspector, risk assessor, supervisor, project designer, and abatement worker. A training program may also seek accreditation to offer refresher courses for each of the above listed disciplines.

(2) Training programs may first apply to EPA for accreditation of their lead-based paint activities courses or refresher courses pursuant to this section on or after August 31, 1998.

(3) A training program shall not provide, offer, or claim to provide EPA-accredited lead-based paint activities courses without applying for and receiving accreditation from EPA as required under paragraph (b) of this section on or after March 1, 1999.

(b) Application process. The following are procedures a training program shall follow to receive EPA accreditation.
accreditation to offer lead-based paint activities courses:

(1) A training program seeking accreditation shall submit a written application to EPA containing the following information:

(i) The training program’s name, address, and telephone number.

(ii) A list of courses for which it is applying for accreditation.

(iii) A statement signed by the training program manager certifying that the training program meets the requirements established in paragraph (c) of this section. If a training program uses EPA-recommended model training materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under subpart Q of this part, the training program manager shall include a statement certifying that, as well.

(iv) If a training program does not use EPA-recommended model training materials or training materials approved by an authorized State or Indian Tribe, its application for accreditation shall also include:

(A) A copy of the student and instructor manuals, or other materials to be used for each course.

(B) A copy of the course agenda for each course.

(v) All training programs shall include in their application for accreditation the following:

(A) A description of the facilities and equipment to be used for lecture and hands-on training.

(B) A copy of the course test blueprint for each course.

(C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course.

(D) A copy of the quality control plan as described in paragraph (c)(9) of this section.

(2) If a training program meets the requirements in paragraph (c) of this section, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may also request additional materials retained by the training program under paragraph (i) of this section. If a training program’s application is disapproved, the program may reapply for accreditation at any time.

(3) A training program may apply for accreditation to offer courses or refresher courses in as many disciplines as it chooses. A training program may seek accreditation for additional courses at any time as long as the program can demonstrate that it meets the requirements of this section.

(c) Requirements for the accreditation of training programs. For a training program to obtain accreditation from EPA to offer lead-based paint activities courses, the program shall meet the following requirements:

(1) The training program shall employ a training manager who has:

(i) At least 2 years of experience, education, or training in teaching workers or adults; or

(ii) A bachelor’s or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, business administration or program management or a related field; or

(iii) Two years of experience in managing a training program specializing in environmental hazards; and

(iv) Demonstrated experience, education, or training in the construction industry including: lead or asbestos abatement, painting, carpentry, renovation, remodeling, occupational safety and health, or industrial hygiene.

(2) The training program shall designate a qualified principal instructor for each course who has:

(i) Demonstrated experience, education, or training in teaching workers or adults; and

(ii) Successfully completed at least 16 hours of any EPA-accredited or EPA-authorized State or Tribal-accredited lead-specific training.

(3) The principal instructor shall be responsible for the organization of the course and oversight of the teaching of all course material. The training manager may designate guest instructors as needed to provide instruction specific to the lecture, hands-on activities, or work practice components of a course.

(4) The following documents shall be recognized by EPA as evidence that training managers and principal instructors have the education, work experience, training requirements or demonstrated experience, specifically listed in paragraphs (c)(1) and (c)(2) of this section.

(i) Official academic transcripts or diploma as evidence of meeting the education requirements.

(ii) Resumes, letters of reference, or documentation of work experience, as evidence of meeting the work experience requirements.

(iii) Certificates from train-the-trainer courses and lead-specific training courses, as evidence of meeting the training requirements.

(5) The training program shall ensure the availability of, and provide adequate facilities for, the delivery of the lecture, course test, hands-on training, and assessment activities. This includes providing training equipment that reflects current work practices and maintaining or updating the equipment and facilities as needed.

(6) To become accredited in the following disciplines, the training program shall provide training courses that meet the following training hour requirements:

(i) The inspector course shall last a minimum of 24 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the inspector course are contained in paragraph (d)(1) of this section.

(ii) The risk assessor course shall last a minimum of 16 training hours, with a minimum of 4 hours devoted to hands-on training activities. The minimum curriculum requirements for the risk assessor course are contained in paragraph (d)(2) of this section.

(iii) The supervisor course shall last a minimum of 32 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the supervisor course are contained in paragraph (d)(3) of this section.

(iv) The project designer course shall last a minimum of 8 training hours. The minimum curriculum requirements for the project designer course are contained in paragraph (d)(4) of this section.

(v) The abatement worker course shall last a minimum of 16 training hours, with a minimum of 8 hours devoted to hands-on training activities. The minimum curriculum requirements for the abatement worker course are contained in paragraph (d)(5) of this section.

(7) For each course offered, the training program shall conduct either a course test at the completion of the course, and if applicable, a hands-on
skills assessment, or in the alternative, a proficiency test for that discipline. Each individual must successfully complete the hands-on skills assessment and receive a passing score on the course test to pass any course, or successfully complete a proficiency test.

(i) The training manager is responsible for maintaining the validity and integrity of the hands-on skills assessment or proficiency test to ensure that it accurately evaluates the trainees’ performance of the work practices and procedures associated with the course topics contained in paragraph (d) of this section.

(ii) The training manager is responsible for maintaining the validity and integrity of the course test to ensure that it accurately evaluates the trainees’ knowledge and retention of the course topics.

(iii) The course test shall be developed in accordance with the test blueprint submitted with the training accreditation application.

(b) The training program shall issue unique course completion certificates to each individual who passes the training course. The course completion certificate shall include:

(i) The name, a unique identification number, and address of the individual.

(ii) The name of the particular course that the individual completed.

(iii) Dates of course completion/test passage.

(iv) Expiration date of interim certification, which shall be 6 months from the date of course completion.

(v) The training manager’s name, address, and telephone number of the training program.

(9) The training manager shall develop and implement a quality control plan. The plan shall be used to maintain and improve the quality of the training program over time. This plan shall contain at least the following elements:

(i) Procedures for periodic revision of training materials and the course test to reflect innovations in the field.

(ii) Procedures for the training manager’s annual review of principal instructor competency.

(10) The training program shall offer courses which teach the work practice standards for conducting lead-based paint activities contained in §745.227, and other standards developed by EPA pursuant to Title IV of TSCA. These standards shall be taught in the appropriate courses to provide trainees with the knowledge needed to perform the lead-based paint activities they are responsible for conducting.

(11) The training manager shall be responsible for ensuring that the training program complies at all times with all of the requirements in this section.

(12) The training manager shall allow EPA to audit the training program to verify the contents of the application for accreditation as described in paragraph (b) of this section.

(d) Minimum training curriculum requirements. To become accredited to offer lead-based paint courses instruction in the specific disciplines listed below, training programs must ensure that their courses of study include, at a minimum, the following course topics. Requirements ending in an asterisk (*) indicate areas that require hands-on activities as an integral component of the course.

(1) Inspector. (i) Role and responsibilities of an inspector.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertains to lead-based paint and lead-based paint activities.

(iv) Lead-based paint inspection methods, including selection of rooms and components for sampling or testing.*

(v) Paint, dust, and soil sampling methodologies.*

(vi) Clearance standards and testing, including random sampling.*

(vii) Preparation of the final inspection report.*

(viii) Recordkeeping.

(2) Risk assessor. (i) Role and responsibilities of a risk assessor.

(ii) Collection of background information to perform a risk assessment.

(iii) Sources of environmental lead contamination such as paint, surface dust and soil, water, air, packaging, and food.

(iv) Visual inspection for the purposes of identifying potential sources of lead-based paint hazards.*

(v) Lead hazard screen protocol.

(vi) Sampling for other sources of lead exposure.*

(vii) Interpretation of lead-based paint and other lead sampling results, including all applicable State or Federal guidance or regulations pertaining to lead-based paint hazards.*

(viii) Development of hazard control options, the role of interim controls, and operations and maintenance activities to reduce lead-based paint hazards.

(ix) Preparation of a final risk assessment report.

(3) Supervisor. (i) Role and responsibilities of a supervisor.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State, and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Liability and insurance issues relating to lead-based paint abatement.

(v) Risk assessment and inspection report interpretation.*

(vi) Development and implementation of an occupant protection plan and abatement report.

(vii) Lead-based paint hazard recognition and control.*

(viii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.*

(ix) Interior dust abatement/cleanup or lead-based paint hazard control and reduction methods.*

(x) Soil and exterior dust abatement or lead-based paint hazard control and reduction methods.*

(xi) Clearance standards and testing. (xii) Cleanup and waste disposal.

(xiii) Recordkeeping.

(4) Project designer. (i) Role and responsibilities of a project designer.

(ii) Development and implementation of an occupant protection plan for large-scale abatement projects.

(iii) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices for large-scale abatement projects.

(iv) Interior dust abatement/cleanup or lead hazard control and reduction methods for large-scale abatement projects.

(v) Clearance standards and testing for large-scale abatement projects.

(vi) Integration of lead-based paint abatement methods with modernization and rehabilitation projects for large-scale abatement projects.

(5) Abatement worker. (i) Role and responsibilities of an abatement worker.

(ii) Background information on lead and its adverse health effects.

(iii) Background information on Federal, State and local regulations and guidance that pertain to lead-based paint abatement.

(iv) Lead-based paint hazard recognition and control.*

(v) Lead-based paint abatement and lead-based paint hazard reduction methods, including restricted practices.*

(vi) Interior dust abatement methods/cleanup or lead-based paint hazard reduction.*

(vii) Soil and exterior dust abatement methods or lead-based paint hazard reduction.*

(e) Requirements for the accreditation of refresher training programs. A training program may seek accreditation to offer refresher training courses in any of the following disciplines: inspector, risk assessor, supervisor, project
designer, and abatement worker. To obtain EPA accreditation to offer refresher training, a training program must meet the following minimum requirements:

(1) Each refresher course shall review the curriculum topics of the full-length courses listed under paragraph (d) of this section, as appropriate. In addition, to become accredited to offer refresher training courses, training programs shall ensure that their courses of study include, at a minimum, the following:
   (i) An overview of current safety practices relating to lead-based paint activities in general, as well as specific information pertaining to the appropriate discipline.
   (ii) Current laws and regulations relating to lead-based paint activities in general, as well as specific information pertaining to the appropriate discipline.
   (iii) Current technologies relating to lead-based paint activities in general, as well as specific information pertaining to the appropriate discipline.

(2) Each refresher course, except for the project designer course, shall last a minimum of 8 training hours. The project designer refresher course shall last a minimum of 4 training hours.

(3) For each course offered, the training program shall conduct a hands-on assessment (if applicable), and at the completion of the course, a course test.

(4) A training program may apply for accreditation of a refresher course concurrently with its application for accreditation of the corresponding training course as described in paragraph (b) of this section. If so, EPA shall use the approval procedure described in paragraph (b) of this section. In addition, the minimum requirements contained in paragraphs (c) (except for the requirements in paragraph (c)(6)), and (e)(1), (e)(2) and (e)(3) of this section shall also apply.

(5) A training program seeking accreditation to offer refresher training courses only shall submit a written application to EPA containing the following information:
   (i) The refresher training program's name, address, and telephone number.
   (ii) A list of courses for which it is applying for accreditation.
   (iii) A statement signed by the training program manager certifying that the refresher training program meets the minimum requirements established in paragraph (c) of this section, except for the requirements in paragraph (c)(6) of this section. If a training program uses EPA-developed model training materials, or training materials approved by a State or Indian Tribe that has been authorized by EPA under § 745.324 to develop its refresher training course materials, the training manager shall include a statement certifying that, as well.
   (iv) If the refresher training course materials are not based on EPA-developed model training materials or training materials approved by an authorized State or Indian Tribe, the training program's application for accreditation shall include:
      (A) A copy of the student and instructor manuals to be used for each course.
      (B) A copy of the course agenda for each course.
   (v) All refresher training programs shall include in their application for accreditation the following:
      (A) A description of the facilities and equipment to be used for lecture and hands-on training.
      (B) A copy of the course test blueprint for each course.
      (C) A description of the activities and procedures that will be used for conducting the assessment of hands-on skills for each course (if applicable).
      (D) A copy of the quality control plan as described in paragraph (c)(9) of this section.
   (vi) The requirements in paragraphs (c)(1) through (c)(5), and (c)(7) through (c)(12) of this section apply to refresher training providers.

(i) If a refresher training program meets the requirements listed in this paragraph, then EPA shall approve the application for accreditation no more than 180 days after receiving a complete application from the refresher training program. In the case of approval, a certificate of accreditation shall be sent to the applicant. In the case of disapproval, a letter describing the reasons for disapproval shall be sent to the applicant. Prior to disapproval, EPA may, at its discretion, work with the applicant to address inadequacies in the application for accreditation. EPA may also request additional materials retained by the refresher training program under paragraph (i) of this section. If a refresher training program's application is disapproved, the program may reapply for accreditation at any time.

(j) Re-accreditation of training programs. (1) Unless re-accredited, a training program's accreditation (including refresher training accreditation) shall expire 4 years after the date of issuance. If a training program meets the requirements of this section, the training program shall be re-accredited.

(2) A training program seeking re-accreditation shall submit an application to EPA no later than 180 days before its accreditation expires. If a training program does not submit its application for re-accreditation by that date, EPA cannot guarantee that the program will be re-accredited before the end of the accreditation period.

(3) The training program's application for re-accreditation shall contain:
   (i) The training program's name, address, and telephone number.
   (ii) A list of courses for which it is applying for re-accreditation.
   (iii) A description of any changes to the training facility, equipment or course materials since its last application was approved that adversely affects the students ability to learn.
   (iv) A statement signed by the program manager stating:
      (A) That the training program complies at all times with all requirements in paragraphs (c) and (e) of this section, as applicable; and
      (B) The recordkeeping and reporting requirements of paragraph (i) of this section shall be followed.

(k) Upon request, the training program shall allow EPA to audit the training program to verify the contents of the application for re-accreditation as described in paragraph (f)(3) of this section.

(l) Suspension, revocation, and modification of accredited training programs. (1) EPA may, after notice and an opportunity for hearing, suspend, revoke, or modify training program accreditation (including refresher training accreditation) if a training program, training manager, or other person with supervisory authority over the training program has:
   (i) Misrepresented the contents of a training course to EPA and/or the student population.
   (ii) Failed to submit required information or notifications in a timely manner.
   (iii) Failed to maintain required records.
   (iv) Falsified accreditation records, instructor qualifications, or other accreditation-related information or documentation.
   (v) Failed to comply with the training standards and requirements in this section.
   (vi) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(m) Made false or misleading statements to EPA in its application for accreditation or re-accreditation which EPA relied upon in approving the application or re-accreditation.

(2) In addition to an administrative or judicial finding of violation, execution of a consent agreement in settlement of an enforcement action constitutes, for purposes of this section, evidence of a
failure to comply with relevant statutes or regulations.

(h) Procedures for suspension, revocation or modification of training program accreditation. (1) Prior to taking action to suspend, revoke, or modify the accreditation of a training program, EPA shall notify the affected entity in writing of the following:

(i) The legal and factual basis for the suspension, revocation, or modification.
(ii) The anticipated commencement date and duration of the suspension, revocation, or modification.
(iii) Actions, if any, which the affected entity may take to avoid suspension, revocation, or modification, or to receive accreditation in the future.
(iv) The opportunity and method for requesting a hearing prior to final EPA action to suspend, revoke or modify accreditation.
(v) Any additional information, as appropriate, which EPA may provide.

(2) If a hearing is requested by the accredited training program, EPA shall:

(i) Provide the affected entity an opportunity to offer written statements in response to EPA’s assertions of the legal and factual basis for its proposed action, and any other explanations, comments, and arguments it deems relevant to the proposed action.
(ii) Provide the affected entity such other procedural opportunities as EPA may deem appropriate to ensure a fair and impartial hearing.
(iii) Appoint an official of EPA as Presiding Officer to conduct the hearing. No person shall serve as Presiding Officer if he or she has had any prior connection with the specific matter.

(3) The Presiding Officer appointed pursuant to paragraph (h)(2) of this section shall:

(i) Conduct a fair, orderly, and impartial hearing within 90 days of the request for a hearing.
(ii) Consider all relevant evidence, explanation, comment, and argument submitted.
(iii) Notify the affected entity in writing within 90 days of completion of the hearing of his or her decision and order. Such an order is a final agency action which may be subject to judicial review.

(4) If EPA determines that the public health, interest, or welfare warrants immediate action to suspend the accreditation of any training program prior to the opportunity for a hearing, it shall:

(i) Notify the affected entity of its intent to immediately suspend training program accreditation for the reasons listed in paragraph (g)(1) of this section. If a suspension, revocation, or modification notice has not previously been issued pursuant to paragraph (g)(1) of this section, it shall be issued at the same time the emergency suspension notice is issued.
(ii) Notify the affected entity in writing of the grounds for the immediate suspension and why it is necessary to suspend the entity’s accreditation before an opportunity for a suspension, revocation or modification hearing.
(iii) Notify the affected entity of the anticipated commencement date and duration of the immediate suspension.
(iv) Notify the affected entity of its right to request a hearing on the immediate suspension within 15 days of the suspension taking place and the procedures for the conduct of such a hearing.

(5) Any notice, decision, or order issued by EPA under this section, any transcripts or other verbal record of oral testimony, and any documents filed by an accredited training program in a hearing under this section shall be available to the public, except as otherwise provided by section 14 of TSCA or part 2 of this title.

(6) The public shall be notified of the suspension, revocation, modification or reinstatement of a training program’s accreditation through appropriate mechanisms.

(7) EPA shall maintain a list of parties whose accreditation has been suspended, revoked, modified or reinstated.

(i) Training program recordkeeping requirements. (1) A accredited training programs shall maintain, and make available to EPA, upon request, the following records:

(ii) All documents specified in paragraph (c)(4) of this section that demonstrate the qualifications listed in paragraphs (c)(1) and (c)(2) of this section of the training manager and principal instructors.

(ii) Current curriculum/course materials and documents reflecting any changes made to these materials.
(iii) The course test blueprint.
(iv) Information regarding how the hands-on assessment is conducted including, but not limited to:

(A) Who conducts the assessment.
(B) How the skills are graded.
(C) What facilities are used.
(D) The pass/fail rate.
(v) The quality control plan as described in paragraph (c)(9) of this section.

(vi) Results of the students’ hands-on skills assessments and course tests, and a record of each student’s course completion certificate.

(vii) Any other material not listed above in paragraphs (i)(1)(i) through (i)(1)(vii) of this section that was submitted to EPA as part of the program’s application for accreditation.

(2) The training program shall retain these records at the address specified on the training program accreditation application (or as modified in accordance with paragraph (i)(3) of this section for a minimum of 3 years and 6 months.

(3) The training program shall notify EPA in writing within 30 days of changing the address specified on its training program accreditation application or transferring the records from that address.

§ 745.226 Certification of individuals and firms engaged in lead-based paint activities: target housing and child-occupied facilities.

(a) Certification of individuals. (1) Individuals seeking certification by EPA to engage in lead-based paint activities must either:

(i) Submit to EPA an application demonstrating that they meet the requirements established in paragraphs (b) or (c) of this section for the particular discipline for which certification is sought;

(ii) Submit to EPA an application with a copy of a valid lead-based paint activities certification (or equivalent) from a State or Tribal program that has been authorized by EPA pursuant to subpart Q of this part.

(2) Individuals may first apply to EPA for certification to engage in lead-based paint activities pursuant to this section on or after March 1, 1999.

(3) Following the submission of an application demonstrating that all the requirements of this section have been met, EPA shall certify an applicant as an inspector, risk assessor, supervisor, project designer, or abatement worker, as appropriate.

(4) Upon receiving EPA certification, individuals conducting lead-based paint activities shall comply with the work practice standards for performing the appropriate lead-based paint activities as established in § 745.227.

(5) It shall be a violation of TSCA for an individual to conduct any of the lead-based paint activities described in § 745.227 after August 30, 1999, if that individual has not been certified by EPA pursuant to this section to do so.

(b) Inspector, risk assessor or supervisor. (1) To become certified by EPA as an inspector, risk assessor, or
supervisor, pursuant to paragraph (a)(1)(i) of this section, an individual must:

(i) Successfully complete an accredited course in the appropriate discipline and receive a course completion certificate from an accredited training program.

(ii) Pass the certification exam in the appropriate discipline offered by EPA; and,

(iii) Meet or exceed the following experience and/or education requirements:

(A) Inspectors. (1) No additional experience and/or education requirements.

(2) [Reserved]

(B) Risk assessors. (1) Successful completion of an accredited training course for inspectors; and

(2) Bachelor's degree and 1 year of experience in a related field (e.g., lead, asbestos, environmental remediation work, or construction), or an Associate's degree and 2 years experience in a related field (e.g., lead, asbestos, environmental remediation work, or construction); or

(3) Certification as an industrial hygienist, professional engineer, registered architect and/or certification in a related engineering/health/environmental field (e.g., safety professional, environmental scientist); or

(4) A high school diploma (or equivalent), and at least 3 years of experience in a related field (e.g., lead, asbestos, environmental remediation work, or construction).

(C) Supervisor. (1) One year of experience as a certified lead-based paint abatement worker; or

(2) At least 2 years of experience in a related field (e.g., lead, asbestos, environmental remediation work) or in the building trades.

(2) The following documents shall be recognized by EPA as evidence of meeting the requirements listed in (b)(2)(iii) of this paragraph:

(i) Official academic transcripts or diploma, as evidence of meeting the education requirements.

(ii) Resumes, letters of reference, or documentation of work experience, as evidence of meeting the work experience requirements.

(iii) Course completion certificates from lead-specific or other related training courses, issued by accredited training programs, as evidence of meeting the training requirements.

(3) In order to take the certification examination for a particular discipline an individual must:

(i) Successfully complete an accredited course in the appropriate discipline and receive a course completion certificate from an accredited training program.

(ii) Meet or exceed the education and/or experience requirements in paragraph (b)(1)(iii) of this section.

(4) The course completion certificate shall serve as interim certification for an individual until the next available opportunity to take the certification exam. Such interim certification shall expire 6 months after issuance.

(5) After passing the appropriate certification exam and submitting an application demonstrating that he/she meets the appropriate training, education, and/or experience prerequisites described in paragraph (b)(1) of this section, an individual shall be issued a certificate by EPA. To maintain certification, an individual must be re-certified as described in paragraph (e) of this section.

(6) An individual may take the certification exam no more than three times within 6 months of receiving a course completion certificate.

(7) If an individual does not pass the certification exam and receive a certificate within 6 months of receiving his/her course completion certificate, the individual must retake the appropriate course from an accredited training program before reapplying for certification from EPA.

(c) Abatement worker and project designer. (1) To become certified by EPA as an abatement worker or project designer, pursuant to paragraph (a)(3)(i) of this section, an individual must:

(i) Successfully complete an accredited course in the appropriate discipline and receive a course completion certificate from an accredited training program.

(ii) Meet or exceed the following additional experience and/or education requirements:

(A) Abatement workers. (1) No additional experience and/or education requirements.

(2) [Reserved]

(B) Project designers. (1) Successful completion of an accredited training course for supervisors.

(2) Bachelor's degree in engineering, architecture, or a related profession, and 1 year of experience in building construction and design or a related field; or

(3) Four years of experience in building construction and design or a related field.

(2) The following documents shall be recognized by EPA as evidence of meeting the requirements listed in this paragraph:

(i) Official academic transcripts or diploma, as evidence of meeting the education requirements.

(ii) Resumes, letters of reference, or documentation of work experience, as evidence of meeting the work experience requirements.

(iii) Course completion certificates from lead-specific or other related training courses, issued by accredited training programs, as evidence of meeting the training requirements.

(3) The course completion certificate shall serve as an interim certification until certification from EPA is received, but shall be valid for no more than 6 months from the date of completion.

(4) After successfully completing the appropriate training courses and meeting any other qualifications described in paragraph (c)(1) of this section, an individual shall be issued a certificate from EPA. To maintain certification, an individual must be re-certified as described in paragraph (e) of this section.

(d) Certification based on prior training. (1) Any individual who received training in a lead-based paint activity between October 1, 1990, and March 1, 1999 shall be eligible for certification by EPA under the alternative procedures contained in this paragraph. Individuals who have received lead-based paint activities training at an EPA-authorized State or Tribal accredited training program shall also be eligible for certification by EPA under the following alternative procedures:

(i) Applicants for certification as an inspector, risk assessor, or supervisor shall:

(A) Demonstrate that the applicant has successfully completed training or on-the-job training in the conduct of a lead-based paint activity.

(B) Demonstrate that the applicant meets or exceeds the education and/or experience requirements in paragraph (b)(1)(iii) of this section.

(C) Successfully complete an accredited refresher training course for the appropriate discipline.

(D) Pass a certification exam administered by EPA for the appropriate discipline.

(ii) Applicants for certification as an abatement worker or project designer shall:

(A) Demonstrate that the applicant has successfully completed training or on-the-job training in the conduct of a lead-based paint activity.

(B) Demonstrate that the applicant meets the education and/or experience requirements in paragraphs (c)(1) of this section; and
(C) Successfully complete an accredited refresher training course for the appropriate discipline.

(2) Individuals shall have until August 30, 1999 to apply to EPA for certification under the above procedures. After that date, all individuals wishing to obtain certification must do so through the procedures described in paragraph (a), and paragraph (b) or (c) of this section, according to the discipline for which certification is sought.

(e) Re-certification. (1) To maintain certification in a particular discipline, an individual shall apply to and be re-certified by EPA in that discipline by EPA either:

(i) Every 3 years if the individual completed a training course with a course test and hands-on assessment; or

(ii) every 5 years if the individual completed a training course with a proficiency test.

(2) An individual shall be re-certified if the individual successfully completes the appropriate accredited refresher training course and submits a valid copy of the appropriate refresher course completion certificate.

(f) Certification of firms. (1) All firms which perform or offer to perform any of the lead-based paint activities described in §745.227 after August 30, 1999 shall be certified by EPA.

(2) A firm seeking certification shall submit to EPA a letter attesting that the firm shall only employ appropriately certified employees to conduct lead-based paint activities, and that the firm and its employees shall follow the work practice standards in §745.227 for conducting lead-based paint activities.

(3) From the date of receiving the firm's letter requesting certification, EPA shall have 90 days to approve or disapprove the firm's request for certification. Within that time, EPA shall respond with either a certificate of certification if an individual has:

(i) Obtained training documentation through an accredited training program through misrepresentation of admission requirements.

(ii) Obtained certification through misrepresentation of certification requirements or related documents dealing with education, training, professional registration, or experience.

(iii) Obtained certification without having proof of certification.

(iv) Performed work requiring certification at a job site without having proof of certification.

(v) Permitted the duplication or use of another's individual's certificate by another.

(vi) Performed work for which certification is required, but for which appropriate certification has not been received.

(vii) Failed to comply with the appropriate work practice standards for lead-based paint activities at §745.227.

(viii) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(2) In addition to an administrative or judicial finding of violation, for purposes of this section only, execution of a consent agreement in settlement of an enforcement action constitutes evidence of a failure to comply with relevant statutes or regulations.

(h) Suspension, revocation, and modification of certifications of firms engaged in lead-based paint activities. (1) EPA may, after notice and opportunity for hearing, suspend, revoke, or modify a firm's certification if a firm has:

(i) Failed to comply with the work practice standards for lead-based paint activities at §745.227.

(ii) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(iii) Failed to maintain required records.

(iv) Failed to comply with Federal, State, or local lead-based paint statutes or regulations.

(2) If EPA determines that the public health, interest, or welfare warrants immediate action to suspend the certification of any individual or firm prior to the opportunity for a hearing, it shall:

(i) Notify the affected entity of its intent to immediately suspend, revoke, or modify the certification for the reasons listed in paragraph (h)(1) of this section. If a suspension, revocation, or modification notice has not previously been issued, it shall be issued at the same time the immediate suspension notice is issued.

(ii) Notify the affected entity in writing of the grounds upon which the immediate suspension is based and why it is necessary to suspend the entity's accreditation before an opportunity for a hearing to suspend, revoke, or modify the individual's or firm's certification.

(iii) Notify the affected entity of the commencement date and duration of the immediate suspension.

(iv) Notify the affected entity of its right to request a hearing on the immediate suspension within 15 days of the suspension taking place and the
§ 745.227 Work practice standards for conducting lead-based paint activities: target housing and child-occupied facilities.

(a) Effective date, applicability, and terms. (1) Beginning on March 1, 1999, all lead-based paint activities shall be performed pursuant to the work practice standards contained in this section.

(b) Inspection. (1) An inspection shall be conducted only by a person certified by EPA as an inspector or risk assessor and, if conducted, must be conducted according to the procedures in this paragraph.

(2) When conducting an inspection, the following locations shall be selected according to documented methodologies and tested for the presence of lead-based paint:

(i) In a residential dwelling and child-occupied facility, each component with a distinct painting history and each exterior component with a distinct painting history shall be tested for lead-based paint; except those components that the inspector or risk assessor determines to have been replaced after 1978, or to not contain lead-based paint.

(ii) In a multi-family dwelling or child-occupied facility, each component with a distinct painting history in every common area, except those components that the inspector or risk assessor determines to have been replaced after 1978, or to not contain lead-based paint.

(3) Paint shall be sampled in the following manner: (i) The analysis of paint to determine the presence of lead shall be conducted using documented methodologies which incorporate adequate quality control procedures; and/or

(ii) All collected paint chip samples shall be analyzed according to paragraph (f) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(4) The certified inspector or risk assessor shall prepare an inspection report which shall include the following information:

(i) Date of each inspection.

(ii) Address of building.

(iii) Date of construction.

(iv) Apartment numbers (if applicable).

(v) Name, address, and telephone number of the owner or owners of each residential dwelling or child-occupied facility.

(vi) Name, signature, and certification number of each certified inspector and/or risk assessor conducting testing.

(vii) Name, address, and telephone number of the certified firm employing each inspector and/or risk assessor, if applicable.

(viii) Each testing method and device and/or sampling procedure employed for paint analysis, including quality control data and, if used, the serial number of any x-ray fluorescence (XRF) device.

(ix) Specific locations of each painted component tested for the presence of lead-based paint.

(x) The results of the inspection expressed in terms appropriate to the sampling method used.

(c) Lead hazard screen. (1) A lead hazard screen shall be conducted only by a person certified by EPA as a risk assessor.

(2) If conducted, a lead hazard screen shall be conducted as follows:

(i) Background information regarding the physical characteristics of the residential dwelling or child-occupied facility and occupant use patterns that may cause lead-based paint exposure to one or more children age 6 years and under shall be collected.

(ii) A visual inspection of the residential dwelling or child-occupied facility shall be conducted to:

(A) Determine if any deteriorated paint is present, and

(B) Locate at least two dust sampling locations.

(iii) If deteriorated paint is present, each surface with deteriorated paint, which is determined, using documented methodologies, to be in poor condition and to have a distinct painting history, shall be tested for the presence of lead.

(iv) In residential dwellings, two composite dust samples shall be collected, one from the floors and the other from the windows, in rooms, hallways or stairwells where one or more children, age 6 and under, are most likely to come in contact with dust.

(v) In multi-family dwellings and child-occupied facilities, in addition to the floor and window samples required in paragraph (c)(1)(iii) of this section, the risk assessor shall also collect composite dust samples from common areas where one or more children, age 6 and under, are most likely to come into contact with dust.

(3) Dust samples shall be collected and analyzed in the following manner:

(i) All dust samples shall be taken using documented methodologies that incorporate adequate quality control procedures.

(ii) All collected dust samples shall be analyzed according to paragraph (f) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(4) Paint shall be sampled in the following manner: (i) The analysis of paint to determine the presence of lead shall be conducted using documented methodologies which incorporate adequate quality control procedures; and/or

(ii) All collected paint chip samples shall be analyzed according to paragraph (f) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(5) The risk assessor shall prepare a lead hazard screen report, which shall include the following information:

(i) The information required in a risk assessment report as specified in paragraph (d) of this section, including
paragraphs (d)(11)(i) through (d)(11)(xiv), and excluding paragraphs (d)(11)(xv) through (d)(11)(xviii) of this section. Additionally, any background information collected pursuant to paragraph (c)(2)(i) of this section shall be included in the risk assessment report; and

(ii) Recommendations, if warranted, for a follow-up risk assessment, and as appropriate, any further actions.

(d) Risk assessment. (1) A risk assessment shall be conducted only by a person certified by EPA as a risk assessor and, if conducted, must be conducted according to the procedures in this paragraph.

(2) A visual inspection for risk assessment of the residential dwelling or child-occupied facility shall be undertaken to locate the existence of deteriorated paint, assess the extent and causes of the deterioration, and other potential lead-based paint hazards.

(3) Background information regarding the physical characteristics of the residential dwelling or child-occupied facility and occupant use patterns that may cause lead-based paint exposure to one or more children age 6 years and under shall be collected.

(4) Each surface with deteriorated paint, which is determined, using documented methodologies, to be in poor condition and to have a distinct painting history, shall be tested for the presence of lead. Each other surface determined, using documented methodologies, to be a potential lead-based paint hazard and having a distinct painting history, shall also be tested for the presence of lead.

(5) In residential dwellings, dust samples (either composite or single-surface samples) from the window and floor shall be collected in all living areas where one or more children, age 6 and under, are most likely to come into contact with dust.

(6) For multi-family dwellings and child-occupied facilities, the samples required in paragraph (d)(4) of this section shall be taken. In addition, window and floor dust samples (either composite or single-surface samples) shall be collected in the following locations:

(i) Common areas adjacent to the sampled residential dwelling or child-occupied facility; and

(ii) Other common areas in the building where the risk assessor determines that one or more children, age 6 and under, are likely to come into contact with dust.

(7) For child-occupied facilities, window and floor dust samples (either composite or single-surface samples) shall be collected in each room, hallway or stairwell utilized by one or more children, age 6 and under, and in other common areas in the child-occupied facility where the risk assessor determines one or more children, age 6 and under, are likely to come into contact with dust.

(8) Soil samples shall be collected and analyzed for lead concentrations in the following locations:

(i) Exterior play areas where bare soil is present; and

(ii) Drip lines or foundation areas where bare soil is present.

(9) Any paint, dust, or soil sampling or testing shall be conducted using documented methodologies that incorporate adequate quality control procedures.

(10) Any collected paint chip, dust, or soil samples shall be analyzed according to paragraph (f) of this section to determine if they contain detectable levels of lead that can be quantified numerically.

(11) The certified risk assessor shall prepare a risk assessment report which shall include the following information:

(i) Date of assessment.

(ii) Address of each building.

(iii) Date of construction of buildings.

(iv) Apartment number (if applicable).

(v) Name, address, and telephone number of each owner of each building.

(vi) Name, signature, and certification of the certified risk assessor conducting the assessment.

(vii) Name, address, and telephone number of the certified firm employing each certified risk assessor if applicable.

(viii) Name, address, and telephone number of each recognized laboratory conducting analysis of collected samples.

(ix) Results of the visual inspection.

(x) Testing method and sampling procedure for paint analysis employed.

(xi) Specific locations of each painted component tested for the presence of lead.

(xii) All data collected from on-site testing, including quality control data and, if used, the serial number of any XRF device.

(xiii) All results of laboratory analysis on collected paint, soil, and dust samples.

(xiv) Any other sampling results.

(xv) Any background information collected pursuant to paragraph (d)(3) of this section.

(xvi) To the extent that they are used as part of the lead-based paint hazard determination, the results of any previous inspections or analyses for the presence of lead-based paint, or other assessments of lead-based paint-related hazards.

(xvii) A description of the location, type, and severity of identified lead-based paint hazards and any other potential lead hazards.

(xviii) A description of interim controls and/or abatement options for each identified lead-based paint hazard and a suggested prioritization for addressing each hazard. If the use of an encapsulant or enclosure is recommended, the report shall recommend a maintenance and monitoring schedule for the encapsulant or enclosure.

(e) Abatement. (1) An abatement shall be conducted only by an individual certified by EPA, and if conducted, shall be conducted according to the procedures in this paragraph.

(2) A certified supervisor is required for each abatement project and shall be onsite during all site preparation and during the post-abatement cleanup of work areas. At all other times when abatement activities are being conducted, the certified supervisor shall be onsite or available by telephone, pager or answering service, and able to be present at the work site in no more than 2 hours.

(3) The certified supervisor and the certified firm employing the supervisor shall ensure that all abatement activities are conducted according to the requirements of this section and all applicable Federal, State, and local requirements.

(4) Notification of the commencement of lead-based paint abatement activities in a residential dwelling or child-occupied facility as a result of a Federal, State, or local order shall be given to EPA prior to the commencement of abatement activities. The procedure for this notification will be developed by EPA prior to August 31, 1998.

(5) A written occupant protection plan shall be developed for all abatement projects and shall be prepared according to the following procedures:

(i) The occupant protection plan shall be unique to each residential dwelling or child-occupied facility and be developed prior to the abatement. The occupant protection plan shall describe the measures and management procedures that will be taken during the abatement to protect the building occupants from exposure to any lead-based paint hazards.

(ii) A certified supervisor or project designer shall prepare the occupant protection plan.

(6) The work practices listed below shall be restricted during an abatement as follows:

(i) Open-flame burning or torching of lead-based paint is prohibited;
(ii) Machine sanding or grinding or abrasive blasting or sandblasting of lead-based paint is prohibited unless used with High Efficiency Particulate Air (HEPA) exhaust control which removes particles of 0.3 microns or larger from the air at 99.97 percent or greater efficiency;

(iii) Dry scraping of lead-based paint is permitted only in conjunction with heat guns or around electrical outlets or when treating defective paint spots totaling no more than 2 square feet in any one room, hallway or stairwell or totaling no more than 20 square feet on exterior surfaces; and

(iv) Operating a heat gun on lead-based paint is permitted only at temperatures below 1100 degrees Fahrenheit.

(7) If conducted, soil abatement shall be conducted in one of the following ways:

(i) If soil is removed, the lead-contaminated soil shall be replaced with soil that is not lead-contaminated; or

(ii) If soil is not removed, the lead-contaminated soil shall be permanently covered, as defined in § 745.223.

(8) The following post-abatement clearance procedures shall be performed only by a certified inspector or risk assessor:

(i) Following an abatement, a visual inspection shall be performed to determine if deteriorated painted surfaces and/or visible amounts of dust, debris or residue are still present. If deteriorated painted surfaces or visible amounts of dust, debris or residue are present, the procedures must be eliminated prior to the continuation of the clearance procedures.

(ii) Following the visual inspection and any post-abatement cleanup required by paragraph (e)(8)(i) of this section, clearance sampling for lead-contaminated soil shall be conducted. Clearance sampling may be conducted by employing single-surface sampling or composite sampling techniques.

(iii) Dust samples for clearance purposes shall be taken using documented methodologies that incorporate adequate quality control procedures.

(iv) Dust samples for clearance purposes shall be taken a minimum of 1 hour after completion of final post-abatement cleanup activities.

(v) The following post-abatement clearance activities shall be conducted as appropriate based upon the extent or manner of abatement activities conducted in or to the residential dwelling or child-occupied facility:

(A) Any abatement with containment between abated and unabated areas, one dust sample shall be taken from one window (if available) and one dust sample shall be taken from the floor of no less than four rooms, hallways or stairwells within the containment area. In addition, one dust sample shall be taken from the floor outside the containment area. If there are less than four rooms, hallways or stairwells within the containment area, then all rooms, hallways or stairwells shall be sampled.

(B) A post-conducting an abatement with no containment, two dust samples shall be taken from no less than four rooms, hallways or stairwells in the residential dwelling or child-occupied facility. One dust sample shall be taken from one window (if available) and one dust sample shall be taken from the floor of each room, hallway or stairwell selected. If there are less than four rooms, hallways or stairwells within the residential dwelling or child-occupied facility then all rooms, hallways or stairwells shall be sampled.

(C) Following an exterior paint abatement, an inspection shall be conducted. All horizontal surfaces in the outdoor living area closest to the abated surface shall be found to be cleaned of visible dust and debris. In addition, a visual inspection shall be conducted to determine the presence of paint chips on the drainless or next to the foundation below any exterior surface abated. If paint chips are present, they must be removed from the site and properly disposed of, according to all applicable Federal, State and local requirements.

(D) The rooms, hallways or stairwells selected for sampling shall be selected according to documented methodologies.

(E) The certified inspector or risk assessor shall compare the residual lead level (as determined by the laboratory analysis) from each dust sample with applicable clearance levels for lead in dust for floors and windows. If the residual lead levels in a dust sample exceed the clearance levels, all the components represented by the failed sample shall be relabeled and retested until clearance levels are met.

(F) In a multi-family dwelling with similarly constructed and maintained residential dwellings, random sampling for the purposes of clearance may be conducted provided:

(i) The certified individual who abates or cleans the residential dwellings do not know which residential dwelling will be selected for the random sample.

(ii) A sufficient number of residential dwellings are selected for dust sampling to provide a 95 percent level of confidence that no more than 5 percent or 50 of the residential dwellings (whichever is smaller) in the randomly sampled population exceed the appropriate clearance levels.

(iii) The randomly selected residential dwellings shall be sampled and evaluated for clearance according to the procedures found in paragraph (e)(8) of this section.

(10) An abatement report shall be prepared by a certified supervisor or project designer. The abatement report shall include the following information:

(i) Start and completion dates of abatement.

(ii) The name and address of each certified firm conducting the abatement and the name of each supervisor assigned to the abatement project.

(iii) The occupant protection plan prepared pursuant to paragraph (e)(5) of this section.

(iv) The name, address, and signature of each certified risk assessor or inspector conducting clearance sampling and the date of clearance testing.

(v) The results of clearance testing and all soil analyses (if applicable) and the name of each recognized laboratory that conducted the analyses.

(vi) A detailed written description of the abatement, including abatement methods used, locations of rooms and/or components where abatement occurred, reason for selecting particular abatement methods for each component, and any suggested monitoring of encapsulants or enclosures.

(f) Collection and laboratory analysis of samples. Any paint chip, dust, or soil samples collected pursuant to the work practice standards contained in this section shall be:

(1) Collected by persons certified by EPA as an inspector or risk assessor; and

(2) Analyzed by a laboratory recognized by EPA pursuant to section 405(b) of TSCA as being capable of performing analyses for lead compounds in paint chip, dust, and soil samples.

(g) Composite dust sampling. Composite dust sampling may only be conducted in the situations specified in paragraphs (c) through (e) of this section. If such sampling is conducted, the following conditions shall apply:

(1) Composite dust samples shall consist of at least two subsamples;

(2) Every component that is being tested shall included in the sampling; and

(3) Composite dust samples shall not consist of subsamples from more than one type of component.

(h) Recordkeeping. All reports or plans required in this section shall be maintained by the certified firm or individual who prepared the report for
§ 745.227 Inspections. EPA may conduct reasonable inspections pursuant to the provisions of section 11 of TSCA (15 U.S.C. 2610) to ensure compliance with this subpart.

§ 745.239 Effective dates. This subpart L shall apply in any State or Indian Country that does not have an authorized program under subpart Q, effective August 31, 1998. In such States or Indian Country:

(a) Training programs shall not provide, offer or claim to provide training or refresher training for certification without accreditation from EPA pursuant to § 745.225 on or after March 1, 1999.

(b) No individual or firm shall perform, offer, or claim to perform lead-based paint activities, as defined in this subpart, without certification from EPA. The provisions of §§ 745.227 on or after August 30, 1999, and § 745.233 and the following sections of this subpart shall apply starting on or after August 30, 1999.

Subparts M-P [Reserved]

Subpart Q—State and Indian Tribal Programs

§ 745.320 Scope and purpose. This subpart establishes the requirements that State or Tribal programs must meet for authorization by the Administrator to administer and enforce the standards, regulations, or other requirements established under TSCA section 402 and/or section 406 and establishes the procedures EPA will follow in approving, revising, and withdrawing approval of State or Tribal programs.

(a) For State or Tribal lead-based paint training and certification programs, a State or Indian Tribe may seek authorization to administer and enforce §§ 745.225, 745.226, and 745.227. The provisions of §§ 745.220, 745.223, 745.233, 745.235, 745.237, and 745.239 shall be applicable for the purposes of such program authorization.

(b) For State or Tribal pre-renovation notification programs, a State or Indian Tribe may seek authorization to administer and enforce regulations developed pursuant to TSCA section 406. The provisions of §§ 745.220, 745.223, 745.233, 745.235, 745.237, and 745.239 shall be applicable for the purposes of such program authorization.

(c) (1) A summary of the State or Tribal program application content and procedures shall include:

(i) A transmittal letter from the State Governor or Tribal Chairperson (or equivalent official) requesting program approval.

(ii) A summary of the State or Tribal program. This summary will be used to

(d) A State or Indian Tribe applying for program authorization may seek either intermediate approval or final approval of the compliance and enforcement portion of the State or Tribal lead-based paint program pursuant to the procedures at § 745.327(a).

(e) State or Tribal submissions for program authorization shall comply with the procedures set out in this subpart.

(f) Any State or Tribal program approved by the Administrator under this subpart shall at all times comply with the requirements of this subpart.

(g) In many cases States will lack authority to regulate activities in Indian Country. This lack of authority does not impair a State’s ability to obtain full program authorization in accordance with this subpart. EPA will administer the program in Indian Country if neither the State nor Indian Tribe has been granted program authorization by EPA.

§ 745.323 Definitions. The definitions in subpart A apply to this subpart. In addition, the definitions in § 745.223 and the following definitions apply:

Indian Country means (1) all land within the limits of any American Indian reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of any patent, and including rights-of-way running throughout the reservation; (2) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or outside the limits of a State; and (3) all Indian allotments, the Indian titles which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, nation, or community recognized by the Secretary of the Interior and exercising substantial governmental duties and powers.
provide notice to residents of the State or Tribe.

(iii) A description of the State or Tribal program in accordance with paragraph (b) of this section.

(iv) An Attorney General’s or Tribal Counsel’s (or equivalent) statement in accordance with paragraph (c) of this section.

(v) Copies of all applicable State or Tribal statutes, regulations, and other materials that provide the State or Indian Tribe with the authority to administer and enforce a lead-based paint program.

(4) After submitting an application, the Agency will publish a Federal Register notice that contains an announcement of the receipt of the State or Tribal application, the summary of the program as provided by the State or Tribe, and a request for public comments to be mailed to the appropriate EPA Regional Office. This comment period shall last for no less than 45 days. EPA will consider these comments during its review of the State or Tribal application.

(5) Within 60 days of submission of a State or Tribal application, EPA will, if requested, conduct a public hearing in each State or Indian Country seeking program authorization and will consider all comments submitted at that hearing during the review of the State or Tribal application.

(b) Program description. A State or Indian Tribe seeking to administer and enforce a program under this subpart must submit a description of the program. The description of the State or Tribal program must include:

(1)(i) The name of the State or Tribal agency that is or will be responsible for administering and enforcing the program, the name of the official in that agency designated as the point of contact with EPA, and addresses and phone numbers where this official can be contacted.

(ii) Where more than one agency is or will be responsible for administering and enforcing the program, the State or Indian Tribe must designate a primary agency to oversee and coordinate administration and enforcement of the program and serve as the primary contact with EPA.

(iii) In the event that more than one agency is or will be responsible for administering and enforcing the program, the application must also include a description of the functions to be performed by each agency. The description shall explain and how the program will be coordinated by the primary agency, and how the program will be consistent and effective administration of the lead-based paint training accreditation and certification program within the State or Indian Tribe.

(2) To demonstrate that the State or Tribal program is at least as protective as the Federal program, fulfilling the criteria in paragraph (e)(2)(i) of this section, the State or Tribal application must include:

(i) A description of the program that demonstrates that the program contains all of the elements specified in §745.325, §745.326, or both; and

(ii) An analysis of the State or Tribal program that compares the program to the Federal program in subpart L of this part, regulations developed pursuant to TSCA section 406, or both. This analysis shall demonstrate how the program is, in the State’s or Indian Tribe’s assessment, at least as protective as the elements in the Federal program at subpart L of this part, regulations developed pursuant to TSCA section 406, or both. EPA will use this analysis to evaluate the protective of the State or Tribal program in making its determination pursuant to paragraph (e)(2)(i) of this section.

(3) To demonstrate that the State or Tribal program provides adequate enforcement, fulfilling the criteria in paragraph (e)(2)(i) of this section, the State or Tribal application must include a description of the State or Tribal lead-based paint compliance and enforcement program that demonstrates that the program contains all of the elements specified at §745.327. This description shall include copies of all policies, certifications, plans, reports, and other materials that demonstrate that the State or Tribal program contains all of the elements specified at §745.327.

(4)(i) The program description for an Indian Tribe shall also include a map, legal description, or other information sufficient to identify the geographical extent of the territory over which the Indian Tribe exercises jurisdiction.

(ii) The program description for an Indian Tribe shall also include a demonstration that the Indian Tribe:

(A) Is recognized by the Secretary of the Interior;

(B) has an existing government exercising substantial governmental duties and powers;

(C) has adequate civil regulatory jurisdiction (as shown in the Tribal legal certification in paragraph (c)(2) of this section) over the subject matter and entities regulated.

(D) is reasonably expected to be capable of administering the Federal program for which it is seeking authorization.

(iii) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraphs (b)(4)(ii)(A) and (B) of this section for another EPA program, the Indian Tribe need provide only that information unique to the lead-based paint program required by paragraphs (b)(4)(ii)(C) and (D) of this section.

(c) Attorney General’s statement. (1) A State or Indian Tribe must submit a written statement signed by the Attorney General or Tribal Counsel (equivalent) certifying that the laws and regulations of the State or Indian Tribe provide adequate legal authority to administer and enforce the State or Tribal program. This statement shall include citations to the specific statutes and regulations providing that legal authority.

(2) The Tribal legal certification (the equivalent to the Attorney General’s statement) may also be submitted and signed by an independent attorney retained by the Indian Tribe for representation in matters before EPA or the courts pertaining to the Indian Tribe’s program. This statement shall include an assertion that the attorney has the authority to represent the Indian Tribe with respect to the Indian Tribe’s authorization application.

(3) If a State application seeks approval of its program to operate in Indian Country, the required legal certification shall include an analysis of the applicant’s authority to implement its provisions in Indian Country. The applicant shall include a map delineating the area over which it seeks to operate the program.

(d) Program certification. (1) At the time of submitting an application, a State may also certify to the Administrator that the State program meets the requirements contained in paragraphs (b)(4)(ii) and (e)(2)(ii) of this section.

(2) If this certification is contained in a State’s application, the program shall be deemed to be authorized by EPA until such time as the Administrator disapproves the program application or withdraws the program authorization. A program shall not be deemed authorized pursuant to this subpart to the extent that jurisdiction is asserted over Indian Country, including non-member fee lands within an Indian reservation.

(3) If the application does not contain such certification, the State program will be authorized only after the Administrator authorizes the program in accordance with paragraph (e) of this section.

(4) This certification shall take the form of a letter from the Governor or the Attorney General to the Administrator. The certification shall reference the program analysis in paragraph (b)(3) of
this section as the basis for concluding that the State program is at least as protective as the Federal program, and provides adequate enforcement.

(e) EPA approval. (1) EPA will fully review and consider all portions of a State or Tribal application.

(2) Within 180 days of receipt of a complete State or Tribal application, the Administrator shall either authorize the program or disapprove the application. The Administrator shall authorize the program, after notice and the opportunity for public comment and a public hearing, only if the Administrator finds that:

(i) In the case of an application to authorize the State or Indian Tribe to administer and enforce the provisions of subpart L of this part, the State or Tribal program is at least as protective of human health and the environment as the corresponding Federal program under subpart L of this part; and/or

(ii) The State or Tribal program provides adequate enforcement.

(3) EPA shall notify in writing the State or Indian Tribe of the Administrator’s decision to authorize the State or Tribal program or disapprove the State’s or Indian Tribe’s application.

(4) If the State or Indian Tribe applies for authorization of State or Tribal programs under both subpart L and regulations developed pursuant to TSCA section 406, the State or Tribal program is at least as protective of human health and the environment as the Federal regulations developed pursuant to TSCA section 406.

(ii) The State or Tribal program provides adequate enforcement.

(3) EPA shall notify in writing the State or Indian Tribe of the Administrator’s decision to authorize the State or Tribal program or disapprove the State’s or Indian Tribe’s application.

(4) If the State or Indian Tribe applies for authorization of State or Tribal programs under both subpart L and regulations developed pursuant to TSCA section 406, EPA may, as appropriate, authorize one program and disapprove the other.

(f) EPA administration and enforcement. (1) If a State or Indian Tribe does not have an authorized program to administer and enforce subpart L of this part in effect by August 31, 1998, the Administrator shall, by such date, establish and enforce the provisions of subpart L of this part as the Federal program for that State or Indian Country.

(2) If a State or Indian Tribe does not have an authorized program to administer and enforce regulations developed pursuant to TSCA section 406 in effect by August 31, 1998, the Administrator shall, by such date, establish and enforce the provisions of regulations developed pursuant to TSCA section 406 as the Federal program for that State or Indian Country.

(3) Upon authorization of a State or Tribal program, pursuant to paragraph (d) or (e) of this section, it shall be an unlawful act under sections 15 and 409 of TSCA for any person to fail or refuse to comply with any requirements of such program.

(g) Oversight. EPA shall periodically evaluate the adequacy of a State’s or Indian Tribe’s implementation and enforcement of its authorized programs. (h) Reports. Beginning 12 months after the date of program authorization, the primary agency for each State or Indian Tribe that has an authorized program shall submit a written report to the EPA Regional Administrator for the Region in which the State or Indian Tribe is located. This report shall be submitted at least once every 12 months for the first 3 years after program authorization. If these reports demonstrate successful program implementation, the Agency will automatically extend the reporting interval to every 2 years. If the subsequent reports demonstrate problems with implementation, EPA will require a return to annual reporting until the reports demonstrate successful program implementation, at which time the Agency will extend the reporting interval to every 2 years.

The report shall include the following information:

(1) Any significant changes in the content or administration of the State or Tribal program implemented since the previous reporting period; and

(2) All information regarding the lead-based paint enforcement and compliance activities listed at §745.327(d) “Summary on Progress and Performance.”

(i) Withdrawal of authorization. (1) If EPA concludes that a State or Indian Tribe is not administering and enforcing an authorized program in compliance with the standards, regulations, and other requirements of sections 401 through 412 of TSCA and this subpart, the Administrator shall notify the primary agency for the State or Indian Tribe in writing and indicate EPA’s intent to withdraw authorization of the program.

(2) The Notice of Intent to Withdraw shall:

(i) Identify the program aspects that EPA believes are inadequate and provide a factual basis for such findings.

(ii) Include copies of relevant documents.

(iii) Provide an opportunity for the State or Indian Tribe to respond either in writing or at a meeting with appropriate EPA officials.

(3) EPA may request that an informal conference be held between representatives of the State or Indian Tribe and EPA officials.

(4) Prior to issuance of a withdrawal, a State or Indian Tribe may request that EPA hold a public hearing. At this hearing, EPA, the State or Indian Tribe, and the public may present facts bearing on whether the State’s or Indian Tribe’s authorization should be withdrawn.

(5) If EPA finds that deficiencies warranting withdrawal did not exist or were corrected by the State or Indian Tribe, EPA may rescind its Notice of Intent to Withdraw authorization.

(6) Where EPA finds that deficiencies in the State or Tribal program exist that warrant withdrawal, an agreement to correct the deficiencies shall be jointly prepared by the State or Indian Tribe and EPA. The agreement shall describe the deficiencies found in the program, specify the steps the State or Indian Tribe has taken or will take to remedy the deficiencies, and establish a schedule, no longer than 180 days, for any remedial action to be initiated.

(7) If the State or Indian Tribe does not respond within 60 days of issuance of the Notice of Intent to Withdraw or an agreement is not reached within 180 days after EPA determines that a State or Indian Tribe is not in compliance with the Federal program, the Agency shall issue an order withdrawing the State’s or Indian Tribe’s authorization.

(8) By the date of such order, the Administrator shall establish and enforce the provisions of subpart L of this part or regulations developed pursuant to TSCA section 406, or both, as the Federal program for that State or Indian Country.

§745.325 Lead-based paint activities: State and Tribal program requirements.

(a) Program elements. To receive authorization from EPA, a State or Tribal program must contain at least the following program elements for lead-based paint activities:

(1) Procedures and requirements for the accreditation of lead-based paint activities training programs.

(2) Procedures and requirements for the certification of individuals engaged in lead-based paint activities.

(3) Work practice standards for the conduct of lead-based paint activities.

(4) Requirements that all lead-based paint activities be conducted by appropriately certified contractors.

(5) Development of the appropriate infrastructure or government capacity to effectively carry out a State or Tribal program.

(b) Accreditation of training programs. The State or Indian Tribe must have either:
(1) Procedures and requirements for the accreditation of training programs that establish:
   (i) Requirements for the accreditation of training programs, including but not limited to:
       (A) Training curriculum requirements.
       (B) Training hour requirements.
       (C) Hands-on training requirements.
       (D) Trainer competency and proficiency requirements.
       (E) Requirements for training program quality control.
   (ii) Procedures for the re-accreditation of training programs.
   (iii) Procedures for the oversight of training programs.
   (iv) Procedures for the suspension, revocation, or modification of training programs.
   (v) Procedures or regulations, for the purposes of certification, for the acceptance of training offered by an accredited training provider in a State or Tribe authorized by EPA.
   (c) Certification of individuals. The State or Indian Tribe must have requirements for the certification of individuals that:
      (1) Ensure that certified individuals:
          (i) Are trained by an accredited training program; and
          (ii) Possess appropriate education or experience qualifications for certification.
      (2) Establish procedures for recertification.
      (3) Require the conduct of lead-based paint activities in accordance with work practice standards established by the State or Indian Tribe.
      (4) Establish procedures for the suspension, revocation, or modification of certifications.
      (5) Establish requirements and procedures for the administration of a third-party certification exam.
      (d) Work practice standards for the conduct of lead-based paint activities. The State or Indian Tribe must have requirements or standards that ensure that lead-based paint activities are conducted reliably, effectively, and safely. At a minimum the State's or Indian Tribe's work practice standards for conducting inspections, risk assessments, and abatements must contain the requirements specified in paragraphs (d)(1), (d)(2), and (d)(3) of this section.
      (1) The work practice standards for the inspection for the presence of lead-based paint must require that:
          (i) Inspections are conducted only by individuals certified by the appropriate State or Tribal authority to conduct inspections.
          (ii) Inspections are conducted in a way that identifies the presence of lead-based paint on painted surfaces within the interior or on the exterior of a residential dwelling or child-occupied facility.
          (iii) Inspections are conducted in a way that uses documented methodologies that incorporate adequate quality control procedures.
          (iv) A report is developed that clearly documents the results of the inspection.
          (v) Records are retained by the certified inspector or the firm.
      (2) The work practice standards for risk assessment must require that:
          (i) Risk assessments are conducted only by individuals certified by the appropriate State or Tribal authority to conduct risk assessments.
          (ii) Risk assessments are conducted in a way that identifies and reports the presence of lead-based paint hazards.
          (iii) Risk assessments consist of, at least:
              (A) An assessment, including a visual inspection, of the physical characteristics of the residential dwelling or child-occupied facility; and
              (B) Environmental sampling for lead in paint, dust, and soil.
          (iv) The risk assessor develops a report that clearly presents the results of the assessment and recommendations for the control or elimination of all identified hazards.
          (v) The certified risk assessor or the firm retains the appropriate records.
      (3) The work practice standards for abatement must require that:
          (i) Abatements are conducted only by individuals certified by the appropriate State or Tribal authority to conduct or supervise abatements.
          (ii) Abatements permanently eliminate lead-based paint hazards and are conducted in a way that does not increase the hazards of lead-based paint to the occupants of the dwelling or child-occupied facility.
          (iii) Abatements include post-abatement lead in dust clearance sampling and conformance with clearance levels established or adopted by the State or Indian Tribe.
          (iv) The abatement contractor develops a report that describes areas of the residential dwelling or child-occupied facility abated and the techniques employed.
          (v) The certified abatement contractor or the firm retains appropriate records.

§ 745.326 Pre-renovation notification: State and Tribal program requirements.

(a) Program elements. To receive authorization from EPA, a State or Tribal program must contain the following program elements for pre-renovation clearance:

(1) Procedures and requirements for the distribution of lead hazard information to owners and occupants of target housing before renovations for compensation; and

(2) An approved lead hazard information pamphlet meeting the requirements of section 406 of TSCA, as determined by EPA. EPA will provide States or Tribes with guidance on what is necessary for a State or Tribal pamphlet approval application.

(b) Program to distribute lead information. To be considered at least as protective as the Federal requirements for pre-renovation distribution of information, the State or Indian Tribe must have procedures and requirements that establish:

(1) Clear standards for identifying home improvement activities that trigger the pamphlet distribution requirements; and

(2) Procedures for distributing the lead hazard information to owners and occupants of the housing prior to renovation activities.

(c) Distribution of acceptable lead hazard information. To be considered at least as protective as the Federal requirements for the distribution of a lead hazard information pamphlet, the State or Indian Tribe must either:

(1) Distribute the lead hazard information pamphlet developed by EPA under section 406(a) of TSCA, titled Protect Your Family from Lead in Your Home; or

(2) Distribute an alternate pamphlet or package of lead hazard information that has been submitted by the State or Tribe, reviewed by EPA, and approved by EPA for use in that State or Tribe. Such information must meet the content requirements prescribed by section 406(a) of TSCA, and be in a format that is readable to the diverse audience of housing owners and occupants in that State or Tribe.

§ 745.327 State or Indian Tribal lead-based paint compliance and enforcement programs.

(a) Approval of compliance and enforcement programs. A State or Indian Tribe seeking authorization of a lead-based paint program can apply for and receive either interim or final approval of the compliance and enforcement program portion of its lead-based paint program. Indian Tribes are not required to exercise criminal enforcement jurisdiction as a condition for program authorization.

(1) Interim approval. Interim approval of the compliance and enforcement program portion of the State or Tribal lead-based paint program may be granted by EPA only once, and subject to a specific expiration date.
(i) To be considered adequate for purposes of obtaining interim approval for the compliance and enforcement program portion of a State or Tribal lead-based paint program, a State or Indian Tribe must, in its application described at § 745.324(a):

(A) Demonstrate it has the legal authority and ability to immediately implement the elements in paragraph (b) of this section. This demonstration shall include a statement that the State or Indian Tribe, during the interim approval period, shall carry out a level of compliance monitoring and enforcement necessary to ensure that the State or Indian Tribe addresses any significant risks posed by noncompliance with lead-based paint activity requirements.

(B) Present a plan with time frames identified for implementing each element in paragraph (c) of this section. All elements of paragraph (c) of this section must be implemented no later than 3 years from the date of EPA’s interim approval of the compliance and enforcement program portion of a State or Tribal lead-based paint program. A statement of resources must be included in the State or Tribal plan which identifies what resources the State or Indian Tribe intends to devote to the administration of its lead-based paint compliance and enforcement program.

(C) Agree to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at paragraph (d) of this section.

(ii) Any interim approval granted by EPA for the compliance and enforcement program portion of a State or Tribal lead-based paint program will expire no later than 3 years from the date of EPA’s interim approval. One hundred and eighty days prior to this expiration date, a State or Indian Tribe shall apply to EPA for final approval of the compliance and enforcement program portion of a State or Tribal lead-based paint program. Final approval shall be given to any State or Indian Tribe which has in place all of the elements of paragraphs (b), (c), and (d) of this section. If a State or Indian Tribe does not receive final approval for the compliance and enforcement program portion of a State or Tribal lead-based paint program by the date 3 years after the date of EPA’s interim approval, the Administrator shall, by such date, initiate the process to withdraw the State or Indian Tribe’s authorization pursuant to § 745.324(i).

(ii) Final approval of the compliance and enforcement program portion of a State or Tribal lead-based paint program can be granted by EPA either through the application process described at § 745.324(a) or, for States or Indian Tribes which previously received interim approval as described in paragraph (a)(1) of this section, through a separate application addressing only the compliance and enforcement program portion of a State or Tribal lead-based paint program.

(i) For the compliance and enforcement program to be considered adequate for final approval through the application described at § 745.324(a), a State or Indian Tribe must, in its application:

(A) Demonstrate it has the legal authority and ability to immediately implement the elements in paragraphs (b) and (c) of this section.

(B) Submit a statement of resources which identifies what resources the State or Indian Tribe intends to devote to the administration of its lead-based paint compliance and enforcement program.

(C) Agree to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at paragraph (d) of this section.

(ii) For States or Indian Tribes which previously received interim approval as described in paragraph (a)(1) of this section, in order for the State or Tribal compliance and enforcement program to be considered adequate for final approval through a separate application addressing only the compliance and enforcement program portion of a State or Tribal lead-based paint program, a State or Indian Tribe must, in its application:

(A) Demonstrate that it has the legal authority and ability to immediately implement the elements in paragraphs (b) and (c) of this section.

(B) Submit a statement which identifies the resources the State or Indian Tribe intends to devote to the administration of its lead-based paint compliance and enforcement program.

(C) Agree to submit to EPA the Summary on Progress and Performance of lead-based paint compliance and enforcement activities as described at paragraph (d) of this section.

(D) To the extent not previously submitted through the application described at § 745.324(a), submit copies of all applicable State or Tribal statutes, regulations, standards, and other material that provide the State or Indian Tribe with authority to administer and enforce the lead-based paint compliance and enforcement program, and copies of the policies, certifications, plans, reports, and any other documents that demonstrate that the program meets the requirements established in paragraphs (b) and (c) of this section.

(b) Standards, regulations, and authority. The standards, regulations, and authority described in paragraphs (b)(1) through (b)(4) of this section are part of the required elements for the compliance and enforcement program portion of a State or Tribal lead-based paint program.

(1) Lead-based paint activities and requirements. State or Tribal lead-based paint compliance and enforcement programs will be considered adequate if the State or Indian Tribe demonstrates, in its application at § 745.324(a), that it has established a lead-based paint program containing the following requirements:

(i) Accreditation of training programs as described at § 745.325(b).

(ii) Certification of individuals engaged in lead-based paint activities as described at § 745.325(c).

(iii) Standards for the conduct of lead-based paint activities as described at § 745.325(d); and, as appropriate,

(iv) Requirements that regulate the conduct of pre-renovation notification activities as described at § 745.326.

(2) Authority to enter. State or Tribal officials must be able to enter premises or facilities where those engaged in training for lead-based paint activities conduct business.

(i) For the purposes of enforcing a pre-renovation notification program, State or Tribal officials must be able to enter a renovator’s place of business.

(ii) State or Tribal officials must have authority to take samples and review records as part of the lead-based paint activities inspection process.

(3) Flexible remedies. A State or Tribal lead-based paint compliance and enforcement program must provide for a diverse and flexible array of enforcement remedies. At a minimum, the remedies that must be reflected in an enforcement response policy must include the following:

(i) Warning letters, Notices of Noncompliance, Notices of Violation, or the equivalent;

(ii) Administrative or civil actions, including penalty authority (e.g., accreditation or certification suspension, revocation, or modification); and

(iii) Authority to apply criminal sanctions or other criminal authority using existing State or Tribal laws, as applicable.
(4) Adequate resources. An application must include a statement that identifies the resources that will be devoted by the State or Indian Tribe to the administration of the State or Tribal lead-based paint compliance and enforcement program. This statement must address fiscal and personnel resources that will be devoted to the program.

(c) Performance elements. The performance elements described in paragraphs (c)(1) through (c)(7) of this section are part of the required elements for the compliance and enforcement program portion of a State or Tribal lead-based paint program.

(1) Training. A State or Tribal lead-based paint compliance and enforcement program must implement a process for training enforcement and inspection personnel and ensure that enforcement personnel and inspectors are well trained. Enforcement personnel must understand case development procedures and the maintenance of proper case files. Inspectors must successfully demonstrate knowledge of the requirements of the particular discipline (e.g., abatement supervisor, and/or abatement worker, and/or lead-based paint inspector, and/or risk assessor, and/or project designer) for which they have compliance monitoring and enforcement responsibilities. Inspectors must also be trained in violation discovery, methods of obtaining consent, evidence gathering, preservation of evidence and chain-of-custody, and sampling procedures. A State or Tribal lead-based paint compliance and enforcement program must also implement a process for the continuing education of enforcement and inspection personnel.

(2) Compliance assistance. A State or Tribal lead-based paint compliance and enforcement program must provide compliance assistance to the public and the regulated community to facilitate awareness and understanding of and compliance with State or Tribal requirements governing the conduct of lead-based paint activities. The type and nature of this assistance can be defined by the State or Indian Tribe to achieve this goal.

(3) Sampling techniques. A State or Tribal lead-based paint compliance and enforcement program must have the technological capability to ensure compliance with the lead-based paint program requirements. A State or Tribal application for approval of a lead-based paint program must show that the State or Indian Tribe is technologically capable of conducting a lead-based paint compliance and enforcement program. The State or Tribal program must have access to the facilities and equipment necessary to perform sampling and laboratory analysis as needed. This laboratory facility must be a recognized laboratory as defined at §745.223, or the State or Tribal program must implement a quality assurance program that ensures appropriate quality of laboratory personnel and protects the integrity of analytical data.

(4) Tracking tips and complaints. A State or Tribal lead-based paint compliance and enforcement program must demonstrate the ability to process and react to tips and complaints or other information indicating a violation.

(5) Targeting inspections. A State or Tribal lead-based paint compliance and enforcement program must demonstrate the ability to target inspections to ensure compliance with the lead-based paint program requirements. Such targeting must include a method for obtaining and using notifications of commencement of abatement activities.

(6) Follow up to inspection reports. A State or Tribal lead-based paint compliance and enforcement program must demonstrate the ability to reasonably, and in a timely manner, process and follow-up on inspection reports and other information generated through enforcement-related activities associated with a lead-based paint program. The State or Tribal program must be in a position to ensure correction of violations and, as appropriate, effectively develop and issue enforcement remedies/responses to follow up on the identification of violations.

(7) Compliance monitoring and enforcement. A State or Tribal lead-based paint compliance and enforcement program must demonstrate, in its application for approval, that it is in a position to implement a compliance monitoring and enforcement program. Such a compliance monitoring and enforcement program must ensure correction of violations, and encompass either planned and/or responsive lead-based paint compliance inspections and development/issuance of State or Tribal enforcement responses which are appropriate to the violations.

(d) Summary on Progress and Performance. The Summary on Progress and Performance described below is part of the required elements for the compliance and enforcement program portion of a State or Tribal lead-based paint program. A State or Tribal lead-based paint compliance and enforcement program must submit to the appropriate EPA Regional Administrator a report which summarizes the results of implementing the State or Tribal lead-based paint compliance and enforcement program, including a summary of the scope of the regulated community within the State or Indian Tribe (which would include the number of individuals and firms certified in lead-based paint activities and the number of training programs accredited), the inspections conducted, enforcement actions taken, compliance assistance provided, and the level of resources committed by the State or Indian Tribe to these activities. The report shall be submitted according to the requirements at §745.324(h).

(e) Memorandum of Agreement. An Indian Tribe that obtains program approval must establish a Memorandum of Agreement with the Regional Administrator. The Memorandum of Agreement shall be executed by the Indian Tribe's counterpart to the State Director (e.g., the Director of Tribal Environmental Office, Program or Agency). The Memorandum of Agreement must include provisions for the timely and appropriate referral to the Regional Administrator for those criminal enforcement matters where that Indian Tribe does not have the authority (e.g., those addressing criminal violations by non-Indians or violations meriting penalties over $5,000). The Agreement must also identify any enforcement agreements that may exist between the Indian Tribe and any State.

§745.330 Grants.

The Administrator, or a designated equivalent, may make grants to States and Indian Tribes, that meet the requirements of §745.324(e)(2)(i) and (e)(2)(ii), under section 404(g) of TSCA to develop and carry out programs authorized pursuant to this subpart. Grants made under this section are subject to the requirements of 40 CFR part 31.

§745.339 Effective dates.

States and Indian Tribes may seek authorization to administer and enforce subpart L pursuant to this subpart effective October 28, 1996.
Part XII

Environmental Protection Agency

40 CFR Part 125
Modification of Secondary Treatment Requirements for Discharges Into Marine Waters; Final Rule
Modification of Secondary Treatment Requirements for Discharges Into Marine Waters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: EPA is promulgating a final amendment to the regulations which implement section 301(h) of the Clean Water Act (CWA” or “Act”). Section 301(h) provides for waivers of secondary treatment requirements for discharges into marine waters by publicly owned treatment works (POTWs) that demonstrate their compliance with the 301(h) criteria. This final amendment promulgates without change a previously proposed rule to amend the 301(h) regulations to remove a certain restriction on the eligibility of 301(h) POTWs to request a longer-than-monthly averaging period to calculate compliance with the Act’s requirement to remove a minimum of 30 percent of the biochemical oxygen demanding material (BOD) in the influent. EPA determined that this restriction should be eliminated to provide additional flexibility to POTWs in demonstrating compliance with the requirements for a waiver. As a result of this amendment, all 45 applicants for a 301(h) waiver will be able to request a longer than monthly averaging period for calculating compliance with the BOD removal requirement.

EFFECTIVE DATE: These regulations take effect on September 30, 1996. In accordance with 40 CFR 23.2, the Administrator’s promulgation occurs at 1:00 p.m. EDT on September 12, 1996.

ADDRESS: Copies of comments submitted and the docket for this rulemaking are available for review at EPA’s Water Docket; Room 2216 MAll, 401 M Street, SW, Washington, DC 20460. For access to the Docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m., Monday through Friday, excluding legal holidays, for an appointment. The EPA public information regulation (40 CFR part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Virginia Fox-Norse, Office of Wetlands, Oceans and Watersheds, Oceans and Coastal Protection Division (4504F), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; (202) 260–8448.

SUPPLEMENTARY INFORMATION:

I. Regulated entities

The entities potentially affected by today’s action are those publicly owned treatment works that discharge into marine waters and that have applied under section 301(h) of the Clean Water Act, 33 U.S.C. § 1311(h), for a waiver of secondary treatment requirements. Regulated categories and entities include:

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<tr>
<th>Category</th>
<th>Examples of regulated entities</th>
</tr>
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<td>Local governments ....</td>
<td>Publicly owned treatment works SIC Code 4952.</td>
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(Although EPA is using the term “regulated” entities, the effect of today’s action is generally to relax the regulatory restrictions on these entities.) This table, however, is only a guide and is not intended to be exhaustive. You should consult today’s final regulations themselves to determine their full impact and applicability. If you have further questions about whether today’s action affects your regulatory obligations, contact the person or persons listed above (see FOR FURTHER INFORMATION CONTACT section).

II. Today’s Final Action

On February 4, 1987, Congress passed the Water Quality Act of 1987 (WQA) (Pub. L. 100-4), which amended CWA section 301(h) in several important respects. Among other things, the WQA added a new section 301(h)(9), which requires that:

At the time the 301(h) modification becomes effective, the applicant will be discharging effluent which has received at least primary or equivalent treatment.

Section 301(h)(9) of the CWA defines primary or equivalent treatment as:

- Treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biochemical oxygen demanding material (BOD) and of the suspended solids (SS) in the treatment works influent, and disinfection, where appropriate.

EPA published final regulations implementing the WQA amendments to section 301(h) on August 9, 1994 (59 FR 40642). Among other things, the regulations added 40 CFR 125.60(c), which provided flexibility to POTWs, in certain specified circumstances, to use a longer-than-monthly (not to exceed yearly) averaging period to calculate compliance with the 30-percent removal requirement for BOD. However, under the second sentence of § 125.60(c)(1) (the “eligibility provision”), facilities that had demonstrated an ability to achieve 30 percent removal of BOD on a monthly average basis over the calendar year prior to August 9, 1994, (the date the rule was published) were excluded from eligibility to apply for this longer-than-monthly averaging period. In December, 1994, four Alaskan municipalities filed a petition for review of the final regulations in the U.S. Court of Appeals for the Ninth Circuit. (Anchorage Water & Wastewater Utility, et al. v. U.S. EPA, No. 94–70913 (9th Cir.).) The petitioners claim that the eligibility provision should be eliminated from the regulations.

After reexamining the need for the eligibility provision, EPA published a proposed rule to delete it. [61 FR 7404, February 27, 1996.] The Agency received only six comments on this proposal, from five POTWs, including the four petitioners in the lawsuit, and one State wastewater control association. All commenters firmly supported the proposed rule’s deletion of the eligibility provision. Accordingly, EPA is today promulgating a final rule that, as proposed, deletes the eligibility provision.

Several of the commenters also offered some technical information to explain why they feel they cannot or will not be able in the future to meet the BOD removal requirement on a monthly basis. These latter remarks are not comments on the eligibility provision, and are thus outside the scope of this particular rulemaking action. We have forwarded this information to the appropriate EPA Regional offices for their information.

As a result of today’s final rule, a POTW’s historical data cannot cause the POTW to be automatically ineligible for longer-than-monthly averaging. However, the Agency emphasizes that removing the eligibility provision does not automatically provide any POTW with a longer averaging period for determining compliance with the 30-percent removal requirement for BOD. Instead, it simply allows all POTWs to request a longer averaging period in its permit application. Under the amended regulations, POTWs who apply will continue to be required to demonstrate to the satisfaction of the Regional Administrator that a longer period is warranted in order to be granted relief from the requirement to meet BOD removal on a monthly basis. The Regional Administrator will still consider the historical data and could base a decision to grant or deny the longer averaging period on the whole or in part on these data. EPA also notes that even if it grants a longer averaging
period, the required frequency of monitoring for BOD will remain the same as if the period for calculating compliance for BOD removal were the monthly average basis.

The remaining provisions of the 301(h) regulations remain in full force and effect, and are not the subject of this final rule.

III. Supporting Documentation

Analyses under E.O. 12866, the Unfunded Mandates Reform Act of 1995, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

Today’s action simply removes provisions of an existing rule from the CFR that limit the ability of affected POTWs to request flexibility in calculating compliance with removal requirements for BOD. Therefore, this action has no regulatory impact and is not a “significant” regulatory action within the meaning of E.O. 12866, and no regulatory impact analysis is required.

This action also does not impose any Federal mandate on State, local or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995. For the same reasons, pursuant to the Regulatory Flexibility Act, I certify that this action will not have a significant economic impact on a substantial number of small entities. Finally, deletion of these provisions from the CFR does not affect requirements under the Paperwork Reduction Act.

Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today’s Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 125

Environmental protection, Marine point source discharges, Reporting and recordkeeping, Waste treatment and disposal, Water pollution control.

Dated: August 21, 1996.

Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, part 125 of title 40, chapter I of the Code of Federal Regulations is amended as set forth below:

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 125 continues to read as follows:

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq., unless otherwise noted.

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

2. Section 125.60 is amended by removing paragraph (c)(1); by redesignating paragraphs (c)(2) and (c)(3) as (c)(1) and (c)(2); and by revising the introductory text of newly redesignated paragraph (c)(1) to read as follows:

§ 125.60 Primary or equivalent treatment requirements.

(c)(1) An applicant may request that the demonstration of compliance with the requirement under paragraph (b) of this section to provide 30 percent removal of BOD be allowed on an averaging basis different from monthly (e.g., quarterly), subject to the demonstrations provided in paragraphs (c)(1)(i), (ii) and (iii) of this section. The Administrator may approve such requests if the applicant demonstrates to the Administrator’s satisfaction that:

* * * * *
Part XIII

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20
Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird Hunting Regulations; Final Rule
DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
50 CFR Part 20
RIN 1018-AD69

Migratory Bird Hunting; Final Frameworks for Early-Season Migratory Bird Hunting Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule prescribes final early-season frameworks which States, Puerto Rico, and the Virgin Islands may select season dates, limits, and other options for the 1996–97 migratory bird hunting seasons. Early seasons are those which generally open prior to October 1. The effect of this final rule is to facilitate the selection of hunting seasons by the States and Territories to further the annual establishment of the early-season migratory bird hunting regulations. These selections will be published in the Federal Register as amendments to §§ 20.101 through 20.107, and § 20.109 of title 50 CFR part 20.

EFFECTIVE DATE: This rule takes effect on August 29, 1996.

ADDRESSES: States and Territories should send their season selections to: Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240. The Public may inspect comments during normal business hours in room 634, Arlington Square Building, 4401 N. Fairfax Drive, Arlington, Virginia.


SUPPLEMENTARY INFORMATION:

Regulations Schedule for 1996


On June 27, 1996, the Service held a public hearing in Washington, DC, as announced in the March 22 and June 14 Federal Registers to review the status of migratory shore and upland game birds. The Service discussed hunting regulations for these species and for other early seasons. On July 22, 1996, the Service published in the Federal Register (61 FR 37994) a fourth document specifically dealing with proposed early-season frameworks for the 1996–97 season. This document also extended the public comment period to August 1, 1996, for early-season proposals. This rulemaking establishes final frameworks for early-season migratory bird hunting regulations for the 1996–97 season.

Review of Flyway Council Recommendations, Public Comments and the Service’s Responses

As of August 9, 1996, the Service had received 199 written comments; 25 of these specifically addressed early-season issues. The Service also received recommendations from all four Flyway Councils. Early-season comments are summarized and discussed in the order used in the March 22 Federal Register. Only the numbered items pertaining to early seasons for which comments were received are included. Flyway Council recommendations shown below include only those involving changes from the 1995–96 early-season frameworks. For those topics where a Council recommendation is not shown, the Council supported continuing the same frameworks as in 1995–96.

General

Public Hearing Comments: Mr. Dale Bartlett, representing the Humane Society of the United States (HSUS), expressed concern that the Service continues to establish liberal hunting regulations on species without adequate data. HSUS claims the Service acted too quickly to liberalize duck hunting regulations since the populations of many species remain below goals set by the North American Waterfowl Management Plan (NAWMP). HSUS is frustrated with the failure of the Service to close seasons on species in decline such as woodcock, coastal populations of band-tailed pigeon, white-winged doves in Arizona, and mourning doves in the Western Management Unit. HSUS believes that bag limits and season lengths on several species of webless migratory birds are ridiculously high and flies in the face of the principles of wise and ethical use of the resource. They also recommend that the Service require all seasons to open at noon during mid-week to reduce large kills. They further urged the Service to disallow one-half hour before sunrise shooting.

Mr. Don Kraege, representing the Pacific Flyway Council, expressed appreciation for the Service’s efforts to enhance cooperative waterfowl management.

Mr. Joe Kramer, representing the Central Flyway Council, reviewed recommendations passed by the Council regarding establishment of this year’s migratory bird hunting regulations. He supported the proposed expansion of the Rocky Mountain Greater Sandhill Crane hunt area in Wyoming. Reviewing status information on blue- and green-winged teal populations, he indicated this year’s combined spring-breeding population of about 8.9 million was a record high level and the projected fall flight will probably be the largest ever recorded. He indicated that the Central and Mississippi Flyway Councils would complete a more comprehensive harvest approach for these seasonal data.

Mr. Charles D. Kelley, representing the Southeastern Association of Fish and Wildlife Agencies, commended the Service for its efforts in developing the Harvest Information Program, which will provide improved harvest estimates for a number of species.

Ms. Anne Muller, representing the Committee to Abolish Sport Hunting, and its affiliate, the Coalition to Prevent the Destruction of Canada Geese, requested public hearings be held during evening hours to increase public attendance.

Mr. Peter Muller, also representing the Committee to Abolish Sport Hunting, requested that the Service maintain and enforce strict waterfowl baiting regulations.

Written Comments: The Humane Society recommended all seasons open...
at noon, mid-week, to reduce the large kills associated with the traditional Saturday openings. They also recommend that hunting during the one-half hour before sunrise be eliminated and wounded but unretrieved birds count towards the daily bag limit.

1. Ducks

The categories used to discuss issues related to duck harvest management are as follows: (A) General Harvest Strategy, (B) Framework Dates, (C) Season Length, (D) Closed Seasons, (E) Bag Limits, (F) Zones and Split Seasons, and (G) Special Seasons/Species Management. Only those categories containing substantial recommendations are included below.

F. Zones and Splits

Written Comments: The Maine Department of Inland Fisheries and Wildlife commented the Service for allowing a duck zone boundary modification but expressed displeasure with the Service's failure to authorize an experimental third zone in Maine. They contended there was no biological justification to deny this request. They further suggested the guidelines should not be "a hard-and-fast rule" and should be modified to account for the geographic scale of any particular State. Two individuals from Maine also provided comments supporting Maine's request for a third zone.

The Indiana Department of Natural Resources and three individuals supported Indiana's proposal to change zone boundaries during the 1996 open season.

The Kansas Department of Wildlife and Parks submitted an alternate duck hunting zone proposal for 1996 to 2000. This proposal replaced one submitted previously which did not meet the Service's criteria.

The Wyoming Game and Fish Department (Wyoming), commenting on the policy governing the use of zone and split seasons for duck seasons, requested an exception from the policy that precludes the use of non-contiguous zone boundaries. Wyoming contended the Service should be more flexible to accommodate the State's complex physiographies. Wyoming recommended the Service reevaluate its policy prior to the next zones/splits open season in 2001.

Service Response: In 1990, the Service established guidelines for the use of zones and split seasons for duck hunting (Federal Register, 55 FR 38901) following endorsement of the Flyway Councils and Technical Sections. The primary purpose of the guidelines was to provide a framework for controlling the proliferation of changes in zone and split options, which compromise our ability to measure impacts of various regulatory changes on harvest. The guidelines were not developed preferentially according to the geographic size of any State, but rather, were administered equally to all States. The Service believes that the guidelines must be applied fairly and consistently to all States in order to prevent further proliferations in zone/split configurations. However, the Service will review these concerns prior to the next scheduled open season in 2001.

In the July 22, 1996, Federal Register, the Service indicated the boundary changes proposed by Indiana did not meet the Service's guidelines for zones and split seasons for the 1996-2000 period, and requested the State revise its proposal accordingly. Subsequently, Indiana indicated they would retain the current boundaries.

Kansas’ original proposal was within the established guidelines and is approved for the 1996-2001 period. The Service also accepts the amended zone/split proposal for the Central Flyway portion of Wyoming. Although Wyoming modified its proposal to meet the language of the guidelines, the Service believes it may also circumvent the intent of the guidelines with respect to the use of non-contiguous zone boundaries. Current zone/split guidelines prohibit the use of non-contiguous zone boundaries. The Service will conduct a cooperative review of the guidelines with the Councils prior to the next open season, and if at that time any modification in the guidelines does not allow the Wyoming configuration, then “grandfather” status will not be granted.

G. Special Seasons/Species Management

i. September Teal Seasons

Council Recommendations: The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended a 5-day experimental September teal season be offered to the production States of Iowa, Michigan, Minnesota, and Wisconsin for a 3-year period. The Committee recommended a daily bag limit of 4 teal with sunrise to sunset shooting hours. The Central Flyway Council recommended a harvest strategy of linking regulatory packages developed for the September teal season with those developed for the regular duck season under the Adaptive Harvest Management process. For 1996, the Council recommended either a "restrictive" package of 5 days with a daily bag limit of 3 teal, a "moderate" package of 9 days with a daily bag limit of 4 teal, or a "liberal" package of 16 days with a daily bag limit of 5 teal.

Written Comments: The Central Flyway Council and the Texas Parks and Wildlife Department recommended a 16-day September teal season with a 5-bird daily bag limit for 1996. The Council supported the preparation of a cooperatively developed teal management plan, but did not wish to delay implementation of more liberal regulations until plan completion.

An individual from Texas requested a 16-day September teal season with a 5-teal daily bag limit, or alternatively a 16-day season with a 4-teal daily bag limit.

Public Hearing Comments: Mr. Joe Kramer representing the Central Flyway Council indicated that the Central and Mississippi Flyway Councils would complete a more comprehensive harvest approach for special teal seasons by March 1997.

Service Response: The Service previously determined in the Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (SEIS 88) that proposals for expansion of existing special regulations require a comprehensive evaluation plan. The plan must contain study objectives, experimental design, decision criteria, and identification of data needs. The Service believes the proper approach for permitting experimental expansions would be to design a comprehensive study that would evaluate the cumulative impacts of all teal-season hunting opportunities, in both production and non-production States, on teal and other ducks. The proposals recommended by the Flyways are disjunct, with one containing an evaluation plan (Mississippi Flyway) and the other (Central Flyway) absent one. As such, these proposals represent a fragmented approach to expanding and evaluating teal-season hunting opportunities, which is inconsistent with the desire of the Service. Future consideration by the Service of any proposal to expand teal-season hunting opportunities will take into account the evaluation plan, the manpower and funding requirements necessary to implement the plan, and the priority of this issue relative to other Service programs.

iv. September Duck Seasons

Council Recommendations: The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended a 5-day experimental September duck season be offered to the production States of Iowa, Michigan, Minnesota, and Wisconsin for a 3-year period. The Committee recommended a daily bag limit of 3 teal with sunrise to sunset shooting hours. The Central Flyway Council recommended a harvest strategy of linking regulatory packages developed for the September teal season with those developed for the regular duck season under the Adaptive Harvest Management process. For 1996, the Council recommended either a...
season in September, starting no earlier than the Saturday nearest September 14. The remainder of the Iowa regular duck season could begin no earlier than October 10.

Service Response: The Service previously determined in SEIS 88 that the extension of framework dates into September for Iowa's September duck season was a type of special season. The original evaluation of this season suggested little impact on duck species other than teal. However, the Service notes the original evaluation did not include information from the periods requested in the proposal, so inferences about effects of the proposed changes on duck populations are not clear. More importantly, the Service believes that mixed-species special seasons (as defined in the context of SEIS 88) are not a preferred management approach, and does not wish to entertain refinements to this season or foster expansions of this type of season into other States.

3. Sea Ducks

Public Hearing Comments: Mr. Dale Bartlett, representing the Humane Society, proposed sea duck seasons be closed or severely restricted until adequate data on population status and species biology are available.

Written Comments: The Humane Society recommended this season either be closed or severely restricted until more complete information on biology and population status is available. They repeated their concern regarding seasonal limits on sea ducks which they deem too liberal, considering the adequacy of data on population status and biology.

Service Response: The Service continues to be concerned about the status of sea ducks and the potential impact that increased hunting activity could have on these species. While there is no special season on sea ducks in the Pacific Flyway, Alaska has a sea duck limit that is additional to the limit on other ducks. In recognition of the need for additional information on these species, the Service prepared a report in June of 1993 on sea duck and merganser hunting seasons, status, and harvests in Alaska and the Pacific Flyway coastal States. The Service prepared this document for use by the Service and the Pacific Flyway Council in evaluating the effects of these seasons on these ducks. A report describing the status of sea ducks in the Atlantic Flyway was completed in April of 1994. There are ongoing cooperative efforts to summarize additional information on sea ducks. However, the Service still emphasizes the importance of completing the sea duck management plan. Furthermore, the Service considers improvements in survey capabilities for these species to be extremely important for future management actions. In 1993, the Service reduced bag limits on scoters from 7 to 4 within an overall 7-bird sea duck limit. The Service will continue to monitor these species and notes that further harvest restrictions may be necessary.

4. Canada Geese

A. Special Seasons

Council Recommendations: The Atlantic Flyway Council recommended the frameworks for September Canada goose seasons in the Atlantic Flyway be modified as follows:
- September 1–15: Montezuma region of New York, Lake Champlain region of New York and Vermont, Maryland (Caroline, Cecil, Dorchester, and Talbot Counties), South Carolina, and Delaware.
- September 1–20: North Carolina (Currituck, Camden, Pasquotank, Perquimans, Chowan, Bertie, Washington, Tyrrell, Dare, and Hyde Counties).
- September 1–25: Remaining portion of Flyway, except Georgia and Florida.

The Lower-Region Regulations Committee of the Mississippi Flyway Council recommended the Service continue to closely monitor the impacts of early Canada goose seasons, including both special seasons and September openings of regular seasons, to insure that cumulative impacts do not adversely affect migrant Canada geese and to insure that special seasons adhere to the criteria established by the Service.

The Upper-Region Regulations Committee of the Mississippi Flyway Council, the Central Flyway Council, and the Pacific Flyway Council made several September Canada goose seasons recommendations. All of the recommendations were within the established criteria for special Canada goose seasons published in the August 29, 1995, Federal Register (60 FR 45020).

Public Hearing Comments: Mr. Dale Bartlett, representing the Humane Society expressed concern about the general direction of the Service towards resident Canada goose management.

Mr. Joe Kramer, representing the Southeastern Association of Fish and Wildlife Agencies, stated that he appreciated the Service’s recognition of the problems caused by rapidly-expanding populations of giant Canada geese and the need to work toward solving them.

Ms. Anne Muller, representing the Committee to Abolish Sport Hunting, and its affiliate, the Coalition to Prevent the Destruction of Canada Geese, said State and Federal wildlife agencies are exploiting wild Canada geese to supply hunters with more targets by increasing resident goose populations on wildlife management areas in every State. Further, she objected to the roundup and shipment of geese by game agencies personnel to slaughter houses to feed the poor, and believed this action violates the rights of the general citizenry. Finally, she requested the Service directly involve communities to help resolve nuisance Canada goose conflicts.

Mr. Peter Muller, representing the Committee to Abolish Sport Hunting, expressed concern that the special Canada goose seasons currently held in New York and New Jersey were responsible for the decline of migrant geese nesting in northern Quebec. He questioned whether the criteria allowing 10 and 20 percent harvest of migrant geese during the special early and late seasons, respectively, were too liberal. Further, he argued that statistics regarding this goose population were highly dubious since very little banding had occurred on the breeding ground to accurately determine the racial composition of the harvest. He indicated little is known regarding the interactions between resident and migrant goose and recommended suspension of these seasons until more information regarding population affiliation is available. To assess the beneficial effects of these liberal hunting seasons on resident Canada geese, he asked the Service to develop an Environmental Impact Statement (EIS).

Dr. Ann Stirling Frisch expressed opposition to a proposed new hunt area for special early Canada goose seasons in Wisconsin. Dr. Frisch suggested such seasons are ineffective in controlling local Canada goose populations, that habitat management was a preferable alternative to hunting seasons, and that other lethal means of control were undesirable. She further stated that National Environmental Policy Act (NEPA) requirements were not met in establishing such seasons.

Written Comments: Ms. Anne Muller, representing the Committee to Abolish Sport Hunting, and its affiliate, the Coalition to Prevent the Destruction of Canada Geese, said State and Federal wildlife agencies are exploiting wild Canada geese to supply hunters with more targets by increasing resident goose populations on wildlife management areas in every State. Further, she objected to the roundup and shipment of geese by game agencies personnel to slaughter houses to feed the poor, and believed this action violates the rights of the general citizenry. Finally, she requested the Service directly involve communities to help resolve nuisance Canada goose conflicts.

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frameworks for September Canada goose seasons in the Atlantic Flyway to September 25.

The Pennsylvania Game Commission objected to the Service’s decision to limit the special Canada goose season in Crawford County to September 1-15 rather than extending it to September 25 as requested by the Atlantic Flyway Council. They indicated data is available to support the extension. Subsequently, in a follow-up response, Pennsylvania provided additional data from observations of neck-banded Canada geese to assess the potential harvest of migrant Canada geese in Crawford County during September 1-25 period.

The New York Department of Environmental Conservation appreciated the Service’s extension of the framework’s closing date to September 25 in most areas of the Atlantic Flyway but expressed concern that the extension was only temporary and would be discontinued when regular seasons are reinstated. They question the Service’s desire to reinstate the existing criteria if the harvest of migrants during this period meets the established criteria and provides additional harvest pressure on resident geese.

The New Jersey Division of Fish, Game and Wildlife commented that numbers of resident Canada geese have exceeded the cultural carrying capacity with humans, in some areas, and urged the Service to grant a September 30 framework extension to the special September Canada goose season. They further requested that this season be operational rather than experimental. They indicated that several years of intensive neck-collar observations have been conducted to justify this extension, and the extension would result in an estimated harvest of less than 3 percent migrant geese.

Four individuals and one petition containing 108 signatures opposed a new September Canada goose season in Wisconsin.

Service Response: The Service recognizes the problems caused by increasing populations of resident Canada geese and the continuing concern for the status of certain migratory flocks. As the Service has stated previously, it is committed to targeting these special seasons at locally breeding and/or injurious Canada goose populations that nest primarily within the conterminous United States. However, the Service does not wish to increase the composition of migrants in the harvest beyond that which is currently identified in the criteria for these seasons.

Overall, the Service concurs with the Atlantic Flyway’s recommendation to modify the frameworks for special early Canada goose seasons in the Atlantic Flyway and is granting the Atlantic Flyway a temporary exemption to the special early Canada goose season criteria. Specifically, the Service is allowing States in the Atlantic Flyway to extend the framework closing date from September 15 to September 25, except in certain areas where migrant geese are known to arrive early. Seasons extending beyond September 25 are classified as experimental. In addition, the Service is approving the extension of the framework closing date to September 25 for Crawford County, Pennsylvania, on an experimental basis, based on the observational neck collar data submitted by Pennsylvania. The Service is granting this temporary exemption for the Atlantic Flyway because of the suspension of the regular season on Atlantic Population Canada geese and the Flyway’s need for greater flexibility in dealing with increasing numbers of resident Canada geese. The exemption is proposed to remain in effect until the regular season on migrant Canada geese is reinstated. The Service encourages all States selecting framework dates after September 15 to continue with data-gathering and monitoring efforts in order to further evaluate any proportional changes in the harvest of migrant geese.

Wisconsin has held a special September Canada goose season for several years. This year, the Wisconsin Department of Natural Resources requested that the open area for the season be expanded. The Service concurs with that request, and the larger area is included in the frameworks herein.

B. Regular Seasons

Council Recommendations: The Upper-Region Regulations Committee of the Mississippi Flyway Council recommended a September 21 framework opening date for the regular goose season in the Upper Peninsula of Michigan and statewide in Wisconsin.

The Pacific Flyway Council reiterated its 1995 recommendation that Alaska, Oregon, and Washington take actions to reduce the harvest of dusky Canada geese.

Service Response: Regarding the Pacific Flyway Council’s recommendation, the Service recognizes this need and proposes establishing uniform criteria to measure the harvest of dusky Canada geese in Washington’s and Oregon’s Quota Zones. The Service solicits input from the Council and other parties in the development of these criteria for the 1996-97 season.

9. Sandhill Cranes

Council Recommendations: The Central Flyway Council recommended Wyoming’s sandhill crane hunt area expand to include Park and Big Horn Counties.

The Pacific Flyway Council recommended season modifications in Montana and Wyoming. In Montana, the Council recommended a new hunt zone in the Ovando-Helmville area. In Wyoming, the Council recommended expanding the season from 3 to 8 days, increasing the number of permits, and establishing a new hunt zone in Park and Big Horn Counties.

Service Response: The Service concurs with the Council’s recommendations.

12. Rails

Written Comments: The Humane Society believes that bag limits for sora and Virginia rails are extremely high.

Service Response: Available information indicates that harvest pressure on rails is relatively light and there is no evidence to suggest the frameworks provided are not appropriate.

14. Woodcock

The Service is increasingly concerned about the gradual long-term declines in woodcock populations in the Eastern and Central management regions. Although habitat changes appear to be the primary cause of the declines, the Service believes that hunting regulations should be commensurate with the woodcock population status and rates of declines. The Service seeks active participation by the Atlantic and Mississippi Flyway Councils in the development of short and long-term woodcock harvest management strategies, which identify the circumstances under which additional harvest restrictions should be implemented and what those restrictions should be.

18. Alaska

Council Recommendations: The Pacific Flyway Council recommended the establishment of separate basic limits for geese. For dark geese, the Council recommended a basic daily bag limit of 4, with 8 in possession. For light geese, the Council recommended a daily bag limit of 3, with 6 in possession. The proposed limits would be subject to area restrictions for Canada geese and limits for brant and emperor geese would remain separate.
Public Hearing Comments: Mr. Dale Bartlett, representing the Humane Society strongly recommended that opening dates in Alaska be delayed at least 2 weeks to allow birds to leave their natal marshes.

Written Comments: The Humane Society of the United States recommends that the opening date for all seasons in Alaska be delayed by 2 weeks so that young birds are able to leave natal marshes before being subjected to hunting pressure.

Service Response: The Service agrees with the Council’s recommendation regarding the establishment of separate basic limits for geese.

It is important to note that in Alaska, hunting pressure on migratory birds is comparatively light. Many northern species migrate from the State before seasons open there in September and there is no evidence to indicate regulated hunting has adversely impacted local populations.

19. Hawaii

Written Comments: The Hawaii Division of Forestry and Wildlife (Hawaii) requested an extension in the mourning dove framework closing date from January 15 to January 21 and an increase in the season length from 70 days to 85 days. Hawaii requests this to accommodate their traditional opening date of the first Saturday in November and their closing date of either the third Saturday in January or Martin Luther King Day, whichever occurs later.

Service Response: In recent years, outside dates for Hawaii have been between September 1 and January 15, consistent with frameworks established in other management units. However, due to natural calendar cycle, Hawaii’s traditional season dates fall outside of established framework dates on the average of once every 7 years. The Service recognizes Hawaii’s uniqueness relative to the conterminous United States and agrees some flexibility should be employed. The Service further notes Hawaii’s season length and daily bag limit have traditionally been far more conservative than those allowed by Federal frameworks. Thus, to accommodate Hawaii’s request, the Service agrees to shift the outside dates to October 1 and January 31. The Service notes that in the South Zone of Texas, framework dates are shifted to September 20 and January 25. Regarding Hawaii’s request for an increase in the season length, the Service reminds Hawaii that the season may be split into three segments.

Public Comment Invited

The Service intends that adopted final rules be as responsive as possible to all concerned interests, and wants to obtain the comments and suggestions from all interested areas of the public, as well as other governmental agencies. Such comments, and any additional information received, may lead to final regulations that differ from these proposals. However, special circumstances involved in the establishment of these regulations limit the amount of time the Service can allow for public comment. Specifically, two considerations compress the time in which the rulemaking process must operate: (1) the need to establish final rules at a point early enough in the summer to allow affected State agencies to appropriately adjust their licensing and regulatory mechanisms; and (2) the unavailability, before mid-June, of specific, reliable data on this year’s status of some waterfowl and migratory shore and upland game bird populations. Therefore, the Service believes allowing comment periods past the dates specified is contrary to public interest.

Comment Procedure

It is the policy of the Department of the Interior to afford the public an opportunity to participate in the rulemaking process, whenever practical. Accordingly, interested persons may participate by submitting written comments to the Chief, MBMO, at the address listed under the caption ADDRESSES. The public may inspect comments during normal business hours at the Service’s office address listed under the caption ADDRESSES. The Service will consider all relevant comments received and will try to acknowledge received comments, but may not provide an individual response to each commenter.

NEPA Consideration

NEPA considerations are covered by the programmatic document, “Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88-14),” filed with EPA on June 9, 1988. The Service published a Notice of Availability in the June 16, 1988, Federal Register (53 FR 22582). The Service published its Record of Decision on August 18, 1988 (53 FR 31341). Copies of these documents are available from the Service at the address indicated under the caption ADDRESSES.

Endangered Species Act Consideration

As in the past, the Service designs hunting regulations to remove or alleviate chances of conflict between migratory game bird hunting seasons and the protection and conservation of endangered and threatened species. Consultations have been conducted to ensure that actions resulting from these regulatory proposals will not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. Findings from these consultations are included in a biological opinion and may cause modification of some regulatory measures previously proposed. The final frameworks reflect any modifications. The Service’s biological opinion resulting from its Section 7 consultation are public documents available for public inspection in the Service’s Division of Endangered Species and MBMO, at the address indicated under the caption ADDRESSES.

Regulatory Flexibility Act; Executive Order (E.O.) 12866 and the Paperwork Reduction Act

In the March 22, 1996, Federal Register, the Service reported measures it took to comply with requirements of the Regulatory Flexibility Act and E.O. 12866. One measure was to prepare a Small Entity Flexibility Analysis (Analysis) in 1996 documenting the significant beneficial economic effect on a substantial number of small entities. The Analysis estimated that migratory bird hunters would spend between $254 and $592 million at small businesses. Copies of the Analysis are available upon request from the Office of Migratory Bird Management. This rule was reviewed under E.O. 12866.

The Department examined these proposed regulations under the Paperwork Reduction Act of 1995. The various information collection requirements are utilized in the formulation of migratory game bird hunting regulations. OMB has approved these information collection requirements and assigned clearance numbers 1018-0015 and 1018-0023.

Regulations Promulgation

The rulemaking process for migratory game bird hunting must, by its nature, operate under severe time constraints. However, the Service intends that the public be given the greatest possible opportunity to comment on the regulations. Thus, when the preliminary proposed rulemaking was published, the Service established what it believed
were the longest periods possible for public comment. In doing this, the Service recognized that when the comment period closed, time would be of the essence. That is, if there were a delay in the effective date of these regulations after this final rulemaking, the States would have insufficient time to select season dates and limits; to communicate those selections to the Service; and to establish and publicize the necessary regulations and procedures to implement their decisions.

Therefore, the Service, under authority of the Migratory Bird Treaty Act (July 3, 1918), as amended, (16 U.S.C. 703–711), prescribes final frameworks setting forth the species to be hunted, the daily bag and possession limits, the shooting hours, the season lengths, the earliest opening and latest closing season dates, and hunting areas, from which State conservation agency officials may select hunting season dates and other options. Upon receipt of season and option selections from these officials, the Service will publish in the Federal Register a final rulemaking amending 50 CFR part 20 to reflect seasons, limits, and shooting hours for the conterminous United States for the 1996–97 season.

The Service therefore finds that “good cause” exists, within the terms of 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, and these frameworks will, therefore, take effect immediately upon publication.

Unfunded Mandates

The Service has determined and certifies in compliance with the requirements of the Unfunded Mandates Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities.

Civil Justice Reform - Executive Order 12988

The Department, in promulgating this proposed rule, has determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.


Dated: August 19, 1996
George T. Frampton, Jr.
Assistant Secretary for Fish and Wildlife and Parks

Final Regulations Frameworks for 1996–97 Early Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of Interior approved the following proposed frameworks which prescribe season lengths, bag limits, shooting hours, and outside dates within which States may select seasons for certain migratory game birds between September 1, 1996, and March 10, 1997.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry): Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are twice the daily bag limit.

Area, Zone, and Unit Descriptions: Geographic descriptions are contained in a later portion of this document.

Special September Teal Season

Outside Dates: Between September 1 and September 30, an open season on all species of teal may be selected by Alabama, Arkansas, Colorado (Central Flyway portion only), Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico (Central Flyway portion only), Ohio, Oklahoma, Tennessee, and Texas in areas delineated by State regulations.

Hunting Seasons and Daily Bag Limits: Not to exceed 9 consecutive days, with a daily bag limit of 4 teal. Shooting Hours: One-half hour before sunrise to sunset, except in Arkansas, Illinois, Indiana, Missouri, and Ohio, where the hours are from sunrise to sunset.

Special September Duck Seasons

Florida: An experimental 5-consecutive-day season may be selected in September. The daily bag limit may not exceed 4 teal and wood ducks in the aggregate.

Kentucky and Tennessee: In lieu of a special September teal season, an experimental 5-consecutive-day season may be selected in September. The daily bag limit may not exceed 4 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks.

Iowa: Iowa may hold up to 5 days of its regular duck hunting season in September. All ducks which are legal during the regular duck season may be taken during the September segment of the season. The September season segment may commence no earlier than the Saturday nearest September 20 (September 21, 1996), with daily bag and possession limits being the same as those in effect last year. The remainder of the regular duck season may not begin before October 15.

Scoter, Eider, and Oldsquaw Ducks (Atlantic Flyway)

Outside Dates: Between September 15 and January 20.

Hunting Seasons and Daily Bag Limits: Not to exceed 107 days, with a daily bag limit of 7, singly or in the aggregate of the listed sea-duck species, of which no more than 4 may be scoters.

Daily Bag Limits During the Regular Duck Season: Within the special sea duck areas, during the regular duck season in the Atlantic Flyway, States may choose to allow the above sea duck limits in addition to the limits applying to other ducks during the regular duck season. In all other areas, sea ducks may be taken only during the regular open season for ducks and must be included in the regular duck season daily bag and possession limits.

Areas: In all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in New Jersey, South Carolina, and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, North Carolina and Virginia; and provided that any such areas have been described, delineated, and designated as special sea-duck hunting areas under the hunting regulations adopted by the respective States.

Special Early Canada Goose Seasons

Atlantic Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1–15 may be selected for the Montezuma Region of New York; the Lake Champlain Region of New York and Vermont; the Counties of Caroline, Cecil, Dorchester, and Talbot in Maryland; Delaware; and Crawford County in Pennsylvania. Seasons not to
permit for the special season.

sandhill crane season.

concurrent with the September portion of the following conditions:

1. This season is subject to the hunting regulations.

2. All participants must have a valid State permit and the total number of permits issued is not to exceed 110 for this zone. The daily bag limit is 2 and the possession limit is 6.

Idaho may select a 15-day season in the special East Canada Goose Zone as described in State regulations during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Oregon may select a special Canada goose season of up to 15 days during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Washington may select a special Canada goose season of up to 15 days during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Idaho may select a 15-day season in the special East Canada Goose Zone as described in State regulations during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Daily Bag Limits: To not exceed 5 Canada geese.

Experimental Seasons

Experimental Canada goose seasons of up to 30 days during September 1-30 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by Illinois, Indiana, Iowa, Michigan (except in the Upper Peninsula, where the season may not extend beyond September 10, and in Huron, Saginaw and Tuscola Counties, where no special season may be held), Minnesota, Missouri, Ohio, Tennessee, and Wisconsin. The daily bag limit may not exceed 5 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Central Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by South Dakota. The daily bag limit may not exceed 5 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Pacific Flyway

General Seasons

Wyoming may select an 8-day season on Canada geese between September 1-15. This season is subject to the following conditions:

1. Where applicable, the season must be concurrent with the September portion of the sandhill crane season.

2. All participants must have a valid State permit for the special season.

3. A daily bag limit of 2, with season and possession limits of 6 will apply to the special season.

Oregon may select a special Canada goose season of up to 15 days during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Washington may select a special Canada goose season of up to 15 days during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Idaho may select a 15-day season in the special East Canada Goose Zone as described in State regulations during the period September 1-15. Daily bag limits not to exceed 3 Canada geese with 6 in possession.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1-15 may be selected by New Jersey, North Carolina (except in the Northeast Hunting Unit), and South Carolina. Experimental Canada goose seasons of up to 25 days during September 1-25 may be selected in Crawford County, Pennsylvania. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State’s hunting regulations.

Daily Bag Limits: To not exceed 5 Canada geese.
of the two species. The season is closed in the remainder of the Pacific Flyway.

Common Snipe
Outside Dates: During the special white-winged dove season, which may be held concurrently with the mourning dove season, the daily bag limit may not exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

Mourning Doves
Outside Dates: Between September 1 and January 15, except as otherwise provided, States may select hunting seasons and daily bag limits as follows:

- Eastern Management Unit (All States east of the Mississippi River, and Louisiana)
- Central Management Unit (Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming)
- Western Management Unit (Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington)

Hunting Seasons and Daily Bag Limits: Not more than 2 and 2 band-tailed pigeons, respectively.

Permit Requirement: The appropriate State agency must issue permits or participate in the Migratory Bird Harvest Information Program.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

American Woodcock
Outside Dates: States in the Atlantic Flyway may select hunting seasons between October 1 and January 31. States in the Central and Mississippi Flyways may select hunting seasons between September 1 and January 31.

Hunting Seasons and Daily Bag Limits: In the Atlantic Flyway, seasons may not exceed 45 days, with a daily bag limit of 3; in the Central and Mississippi Flyways, seasons may not exceed 65 days, with a daily bag limit of 5. Seasons may be split into two segments.

Zoning: New Jersey may select seasons in each of two zones. The season in each zone may not exceed 35 days.

Band-tailed Pigeons
Pacific Coast States (California, Oregon, Washington, and Nevada)

Outside Dates: Between September 15 and January 1.

Hunting Seasons and Daily Bag Limits: Not more than 9 consecutive days, with bag and possession limits of 2 and 2 band-tailed pigeons, respectively.

Permit Requirement: The appropriate State agency must issue permits or participate in the Migratory Bird Harvest Information Program.

Zoning: California may select hunting seasons not to exceed 9 consecutive days in each of two zones. The season in the North Zone must close by October 7.

Four-Corners States (Arizona, Colorado, New Mexico, and Utah)

Outside Dates: Between September 1 and November 30.

Hunting Seasons and Daily Bag Limits: Not more than 30 consecutive days, with a daily bag limit of 5 band-tailed pigeons.

Permit Requirement: The appropriate State agency must issue permits or participate in the Migratory Bird Harvest Information Program.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

Mourning Doves
Outside Dates: Between September 1 and January 15, except as otherwise provided, States may select hunting seasons and daily bag limits as follows:

- Eastern Management Unit (All States east of the Mississippi River, and Louisiana)
- Central Management Unit (Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming)
- Western Management Unit (Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington)

Hunting Seasons and Daily Bag Limits: Not more than 2 and 2 band-tailed pigeons, respectively.

Permit Requirement: The appropriate State agency must issue permits or participate in the Migratory Bird Harvest Information Program.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

White-winged and White-tipped Doves

Hunting Seasons and Daily Bag Limits:

- Exceeding 10 white-winged, and white-tipped doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves.
- D. Except as noted above, regulations for bag and possession limits, season length, and shooting hours must be uniform within each hunting zone.

- Arizona and California - Not more than 60 days which may be split between two periods, September 1-15 and November 1-January 15. In Arizona, during the first segment of the season, the daily bag limit is 10 mourning and white-winged doves in the aggregate, of which no more than 6 may be white-winged doves. During the remainder of the season, the daily bag limit is restricted to 10 mourning doves. In California, the daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate.

White-winged and White-tipped Doves

Hunting Seasons and Daily Bag Limits:

- Exceeding 10 white-winged, and white-tipped doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves.
- D. Except as noted above, regulations for bag and possession limits, season length, and shooting hours must be uniform within each hunting zone.

- Arizona and California - Not more than 60 days which may be split between two periods, September 1-15 and November 1-January 15. In Arizona, during the first segment of the season, the daily bag limit is 10 mourning and white-winged doves in the aggregate, of which no more than 6 may be white-winged doves. During the remainder of the season, the daily bag limit is restricted to 10 mourning doves. In California, the daily bag limit may not exceed 10 mourning and white-winged doves in the aggregate.
alternative) in the aggregate, of which no more than 6 may be white-winged doves and no more than 2 may be white-tipped doves.

In addition, Texas may also select a hunting season of not more than 4 days for the special white-winged dove area of the South Zone between September 1 and September 19. The daily bag limit may not exceed 10 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves.

Alaska

Outside Dates: Between September 1 and January 26.

Hunting Seasons: Alaska may select 107 consecutive days for waterfowl, sandhill cranes, and common snipe in each of five zones. The season may be split without penalty in the Kodiak Zone. The seasons in each zone must be concurrent.

Closures: The season is closed on Canada geese from Unimak Pass westward in the Aleutian Island chain. The hunting season is closed on Aleutian Canada geese, emperor geese, spectacled eiders, and Steller’s eiders.

Daily Bag and Possession limits:

- Ducks - A basic daily bag limit of 7 and a possession limit of 21 ducks. Daily bag and possession limits in the North Zone are 10 and 30, and in the Gulf Coast Zone they are 8 and 24, respectively. The basic limits may include no more than 1 canvasback daily and 3 in possession.
- In addition to the basic limit, there is a daily bag limit of 15 and a possession limit of 50 doves in the aggregate, of which no more than 5 may be mourning doves and 2 may be white-tipped doves.
- Sandhill cranes - A daily bag limit of 3.
- Tundra swans - Open seasons for tundra swans may be selected subject to the following conditions:
  1. No more than 300 permits may be issued in GMU 22, authorizing each permittee to take 1 tundra swan per season.
  2. No more than 500 permits may be issued during the operational season in GMU 18. No more than 1 tundra swan may be taken per permit.
  3. The seasons must be concurrent with other migratory bird seasons.
  4. The appropriate State agency must issue permits, obtain harvest and hunter-participation data, and report the results of this hunt to the Service by June 1 of the following year.

Hunting Seasons:

- Light Geese - A basic daily bag limit of 3 and a possession limit of 6.
- Dark Geese - A basic daily bag limit of 4 and a possession limit of 8.
- Dark-goose seasons are subject to the following restrictions:
  1. In Units 9(e) and 18, the limits for Canada geese are 1 daily and 2 in possession.
  2. In Units 5 and 6, the taking of Canada geese is permitted from September 28 through December 16. Middleton Island is closed to the taking of Canada geese.
  3. In Unit 10 (except Unimak Island), the taking of Canada geese is prohibited.
- Brant - A daily bag limit of 2.
- Common snipe - A daily bag limit of 8.

Puerto Rico

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days (70 under the alternative) for mourning doves.

Bag Limits: Not to exceed 15 (12 under the alternative) mourning doves. Note: Mourning doves may be taken in Hawaii in accordance with the hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

Ducks

Outside Dates: Between December 1 and January 31.

Hunting Seasons: Not more than 55 consecutive days.

Daily Bag Limits: Not to exceed 5.

Special Falconry Regulations

Falconry is a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29(k). These States may select an extended season for taking migratory game birds in accordance with the following:

Extended Seasons: For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons shall not exceed 107 days for any species of any species in a geographical area. Each extended season may be divided into a maximum of 3 segments.

Framework Dates: Seasons must fall between September 1 and March 10. Daily Bag and Possession Limits: Falconry daily bag and possession limits for all permitted migratory game birds shall not exceed 3 and 6 birds, respectively, singly or in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in all States, including those that do not select an extended falconry season.

Regular Seasons: General hunting regulations, including seasons and...
hunting hours, apply to falconry in each State listed in 50 CFR 21.29(k). Regular-season bag and possession limits do not apply to falconry. The falconry bag limit is not in addition to gun limits.

Area, Unit, and Zone Descriptions

Central Flyway portion of the following States consists of:

- Colorado: That area lying east of the Continental Divide.
- New Mexico: That area lying east of the Continental Divide but outside the Jicarilla Apache Indian Reservation.
- Wyoming: That area lying east of the Continental Divide and excluding the Great Divide Portion.
- The remaining portions of these States are in the Pacific Flyway.

Mourning and White-winged Doves

Alabama
- North Zone - Remainder of the State.

California
- White-winged Dove Open Areas - Imperial, Riverside, and San Bernardino Counties.

Florida
- Northwest Zone - The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).
- South Zone - Remainder of State.

Georgia
- Northern Zone - That portion of the State lying north of a line running west to east along U.S. Highway 280 from Columbus to Wilcox County, thence southward along the western border of Wilcox County; thence east along the southern border of Wilcox County to the Ocmulgee River, thence north along the Ocmulgee River to Highway 280, thence east along Highway 280 to the Little Ocmulgee River; thence southward along the Little Ocmulgee River to the Ocmulgee River; thence southwesterly along the Ocmulgee River to the western border of the Jeff Davis County; thence south along the western border of Jeff Davis County; thence east along the southern border of Jeff Davis and Appling Counties; thence north along the eastern border of Appling County, to the Altamaha River; thence east to the eastern border of Tattnall County; thence north along the eastern border of Tattnall County; thence north along the western border of Evans to Candler County; thence west along the southern border of Candler County to the Ohooppee River; thence north along the western border of Candler County to Bulloch County; thence north along the western border of Bulloch County to U.S. Highway 301; thence northeast along U.S. Highway 301 to the South Carolina line.
- South Zone - Remainder of the State.

Louisiana
- North Zone - That portion of the State north of Interstate Highway 10 from the Texas State line to Baton Rouge, Interstate Highway 12 from Baton Rouge to Slidell, and Interstate Highway 10 from Slidell to the Mississippi State line.
- South Zone - The remainder of the State.

Mississippi
- South Zone - The Counties of Forrest, George, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Pearl River, Perry, Pike, Stone, and Walthall.
- North Zone - Remainder of the State.

Nevada
- Nevada
- White-winged Dove Open Areas - Clark and Nye Counties.

Texas
- North Zone - That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I-10 at Fort Hancock; east along I-10 to I-20; northeast along I-20 to I-30 at Fort Worth; northeast along I-30 to the Texas-Arkansas State line.
- South Zone - That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to San Antonio; then east on I-10 to Orange, Texas.
- Special White-winged Dove Area in the South Zone - That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to Uvalde; south on U.S. 83 to TX 44; east along TX 44 to TX 16 at Freer; south along TX 16 to TX 285 at Hebbronville; east along TX 285 to FM 1017; southwest along FM 1017 to TX 186 at Linn; east along TX 186 to the Mansfielb Channel at Fort Mansfield; east along the Mansfield Channel to the Gulf of Mexico.
- Area with additional restrictions - Cameron, Hidalgo, Starr, and Willacy Counties.

Central Zone - That portion of the State lying between the North and South Zones.

Band-tailed Pigeons

California
- North Zone - Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.
- South Zone - The remainder of the State.

New Mexico
- North Zone - North of a line following U.S. 60 from the Arizona State line east to I-25 at Socorro and then south along I-25 from Socorro to the Texas State line.
- South Zone - Remainder of the State.

Washington
- Western Washington - The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

Woodcock

New Jersey
- North Zone - That portion of the State north of NJ 70.
- South Zone - The remainder of the State.

Special September Goose Seasons

Atlantic Flyway

Connecticut
- North Zone - That portion of the State north of I-95.

Maryland
- Eastern Unit - Anne Arundel, Calvert, Caroline, Cecil, Charles, Dorchester, Harford, St. Marys, Somerset, Talbot, Wicomico, and Worcester Counties, and those portions of Baltimore, Howard, and Prince Georges Counties east of I-95.
- Western Unit - Allegany, Carroll, Frederick, Garrett, Montgomery, and Washington Counties, and those portions of Baltimore, Howard, and Prince Georges Counties east of I-95.

Massachusetts
- Western Zone - That portion of the State west of a line extending south from the Vermont border on I-91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut border.
- Central Zone - That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire border on I-95 to U.S. 1, south on U.S. 1 to I-93, south on I-93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I-195, west to the Rhode Island border; except the waters, and the lands 150 yards inland from the high-water
mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center St.-Elm St. bridge shall be in the Coastal Zone.

Coastal Zone - That portion of Massachusetts east and south of the Central Zone.

New Hampshire
Early-season Hunt Unit - Cheshire, Hillsborough, Rockingham, and Strafford Counties.

New York
Lake Champlain Zone - The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keeseville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Long Island Zone - That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I-95, and their tidal waters.

Western Zone - That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, and south along I-81 to the Pennsylvania border, except for the Montezuma Zone.

Montezuma Zone - Those portions of Cayuga, Seneca, Ontario, Wayne, and Oswego Counties north of U.S. Route 20, east of NY State Route 14, south of NY State Route 104, and west of NY State Route 34.

Northeastern Zone - That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I-81, south along I-81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I-87, north along I-87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone - That portion of the State outside of the Northeastern Zone and north of a line extending east from the Iowa border along Illinois Highway 92 to Interstate Highway 280, east along I-280 to I-80, then east along I-80 to the Indiana border.

Northeast Zone - Cook, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, and Will Counties.

Iowa
North Zone: That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State 37, southeast along State 37 to U.S. Highway 59, south along U.S. 59 to Interstate Highway 80, then east along I-80 to the Illinois border.

South Zone: The remainder of Iowa.

Minnesota
Twin Cities Metropolitan Canada Goose Zone -
A. All of Hennepin and Ramsey Counties.
B. In Anoka County, all of Columbus Township lying south of County State Aid Highway (CSAH) 18, Anoka County; all of the cities of Ramsey, Andover, Anoka, Coon Rapids, Spring Lake Park, Fridley, Hilltop, Columbia Heights, Blaine, Lexington, Circle Pines, Lino Lakes, and Centerville; and all of the city of Ham Lake except that portion lying north of CSAH 18 and east of U.S. Highway 65.
C. That part of Carver County lying north and east of the following described line: Beginning at the northeast corner of San Francisco Township; thence west along the north boundary of San Francisco Township to the eastern boundary of Dahlgren Township; thence north along the eastern boundary of Dahlgren Township to U.S. Highway 212; thence west along U.S. Highway 212 to State Trunk Highway (STH) 284; thence north on STH 284 to County State Aid Highway (CSAH) 10; thence north and west on CSAH 10 to CSAH 30; thence north and west on CSAH 30 to STH 25; thence east and north on STH 25 to CSAH 10; thence north on CSAH 10 to the Carver County line.
D. In Scott County, all of the cities of Shakopee, Savage, Prior Lake, and Jordan, and all of the Townships of Jackson, Louisville, St. Lawrence, Sand Creek, Spring Lake, and Credit River.
F. That portion of Washington County lying south of the following described line: Beginning at County State Aid Highway (CSAH) 2 on the west boundary of the county; thence east on CSAH 2 to U.S. Highway 61; thence south on U.S. Highway 61 to State Trunk Highway (STH) 97; thence east on STH 97 to the intersection of STH 97 and STH 95; thence due east to the east boundary of the state.

Northwest Goose Zone (included for reference only, not a special Goose Season Zone) - That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Four Goose Zone - That portion of the state encompassed by a line extending north from the Iowa border along U.S. Interstate Highway 35 to the south boundary of the Twin Cities Metropolitan Canada Goose Zone, then west and north along the boundary of the Twin Cities Metropolitan Canada Goose Zone to U.S. Interstate 94, then west and north on U.S. Interstate 94 to the North Dakota border.

Two Goose Zone - That portion of the state to the north of a line extending east from the North Dakota border along U.S. Interstate 94 to the boundary of the Twin Cities Metropolitan Canada Goose Zone, then north and east along the Twin Cities Metropolitan Canada Goose Zone boundary to the Wisconsin border, except the Northwest Goose Zone and that portion of the State encompassed by a line extending north from the Iowa border along U.S. Interstate 35 to the south boundary of the Twin Cities Metropolitan Canada Goose Zone, then east on the Twin Cities Metropolitan Canada Goose Zone boundary to the Wisconsin border.

Tennessee
Middle Tennessee Zone - Those portions of Houston, Humphreys, Montgomery, Perry, and Wayne Counties east of State Highway 13; and Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Hickman, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Moore, Robertson, Rutherford, Smith, Sumner, Trousdale, Williamson, and Wilson Counties.
Cumberland Plateau Zone - Bledsoe, Bradley, Clay, Cumberland, Dekalb, Fentress, Grundy, Hamilton, Jackson, Marion, McMinn, Meigs, Morgan, Overton, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Van Buren, Warren, and White Counties.


Wisconsin

Early-Season Subzone A - That portion of the State encompassed by a line beginning at the Lake Michigan shore in Sheboygan, then west along State Highway 23 to State 67, southerly along State 67 to County Highway E in Sheboygan County, southerly along County E to State 28, south and west along State 28 to U.S. Highway 41, southerly along U.S. 41 to State 33, westerly along State 33 to County Highway U in Washington County, southerly along County U to County N, southeasterly along County N to State 60, westerly along State 60 to County Highway P in Dodge County, southerly along County P to County O, westerly along County O to State 109, south and west along State 109 to State 26, southerly along State 26 to U.S. 12, southerly along U.S. 12 to State 89, southerly along State 89 to U.S. 14, southerly along U.S. 14 to the Illinois border, east along the Illinois border to the Michigan border in Lake Michigan, north along the Michigan border in Lake Michigan to a point directly east of State 23 in Sheboygan, then west along that line to the point of beginning on the Lake Michigan shore in Sheboygan.

Early-Season Subzone B - That portion of the State between Early-Season Subzone A and a line beginning at the intersection of U.S. Highway 141 and the Michigan border near Niagara, then south along U.S. 141 to State Highway 22, west and southwest along State 22 to U.S. 45, south along U.S. 45 to State 22, west and south along State 22 to State 120, south along State 120 to U.S. 10, south along U.S. 10 to State 49, south along State 49 to State 23, west along State 23 to State 73, south along State 73 to State 60, west along State 60 to State 23, south along State 23 to State 11, east along State 11 to State 78, then south along State 78 to the Illinois border.

Central Flyway

South Dakota

Unit A - Deuel, Hamlin, Codington, and Davi Counties.

Unit B - Brookings, Clark, Kingsbury, and Lake Counties and those portions of Moody County west of I-29 and Miner County east of SD Highway 25.

Pacific Flyway

Idaho

East Zone - Bonneville, Caribou, Fremont and Teton Counties.

Oregon

Northwest Zone - Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Polk, Multnomah, Tillamook, Washington, and Yamhill Counties.

Southwest Zone - Coos, Curry, Douglas, Jackson, Josephine, and Klamath Counties.

East Zone - Baker, Gilliam, Malheur, Morrow, Sherman, Umatilla, Union, and Wasco Counties.

Washington

Southwest Zone - Clark, Cowlitz, Pacific, and Wahkiakum Counties.

East Zone - Asotin, Benton, Columbia, Garfield, Klickitat, and Whitman Counties.

Wyoming

Bear River Area - That portion of Lincoln County described in State regulations.

Salt River Area - That portion of Lincoln County described in State regulations.

Farson-Edon Area - Those portions of Sweetwater and Sublette Counties described in State regulations.

Teton Area - Those portions of Teton County described in State regulations.

Ducks

Mississippi Flyway

Iowa

North Zone: That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State 37, southeast along State 37 to U.S. Highway 59, south along U.S. 59 to Interstate Highway 80, then east along I-80 to the Illinois border.

South Zone: The remainder of Iowa.

Sandhill Cranes

Central Flyway

Colorado

Regular-Season Open Area - The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas

Regular Season Open Area - That portion of the State west of a line beginning at the Oklahoma border, north on I-35 to Wichita, north on I-135 to Salina, and north on U.S. 81 to the Nebraska border.

New Mexico

Regular-Season Open Area - Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

Middle Rio Grande Valley Area - The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

Southwest Zone - Sierra, Luna, and Dona Ana Counties.

Oklahoma

Regular-Season Open Area - That portion of the State west of I-35.

Texas

Regular-Season Open Area - That portion of the State west of a line from the International Toll Bridge at Brownsville along U.S. 77 to Victoria; U.S. 87 to Placedo; Farm Road 616 to Blessing; State 35 to Alvin; State 6 to U.S. 290; U.S. 290 to Austin; I-35 to the Texas-Oklahoma border.

North Dakota

Regular-Season Open Area - That portion of the State west of U.S. 281.

South Dakota

Regular-Season Open Area - That portion of the State west of U.S. 281.

Montana

Regular-Season Open Area - The Central Flyway portion of the State except that area south of I-90 and west of the Bighorn River.

Wyoming

Regular-Season Open Area - Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties.

Riverton-Boysen Unit - Portions of Fremont County.

Park and Bighorn County Unit - Portions of Park and Bighorn Counties.

Pacific Flyway

Arizona

Special-Season Area - Game Management Units 30A, 30B, 31, and 32.

Montana

Special-Season Area - See State regulations.

Utah

Special-Season Area - Rich County.

Wyoming

Bear River Area - That portion of Lincoln County described in State regulations.

Salt River Area - That portion of Lincoln County described in State regulations.

Farson-Edon Area - Those portions of Sweetwater and Sublette Counties described in State regulations.

Teton Area - Those portions of Teton County described in State regulations.

All Migratory Game Birds in Alaska

North Zone - State Game Management Units 11-13 and 17-26.

Gulf Coast Zone - State Game Management Units 5-7, 9, 14-16, and 10 - Unimak Island only.
Southeast Zone - State Game Management Units 1-4.  
Pribilof and Aleutian Islands Zone - State Game Management Unit 10 - except Unimak Island. 
Kodiak Zone - State Game Management Unit 13. 

All Migratory Birds in the Virgin Islands
Ruth Cay Closure Area - The island of Ruth Cay, just south of St. Croix. 
All Migratory Birds in Puerto Rico
Municipality of Culebra Closure Area - All of the municipality of Culebra.  
Desecheo Island Closure Area - All of Desecheo Island. 
Mona Island Closure Area - All of Mona Island. 
El Verde Closure Area - Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for one kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public. 

Cidra Municipality and adjacent areas
- All of Cidra Municipality and portions of Aguas, Buenas, Caguas, Cayer, and Comerio Municipalities as encompassed within the following boundary: beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of beginning.  

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BILLING CODE 4310-55-F
The President

Proclamation 6914—To Modify the Allocation of Tariff-Rate Quotas for Certain Cheeses
By the President of the United States of America

A Proclamation

1. On January 1, 1995, Austria, Finland, and Sweden acceded to the European Communities (EC), and the EC customs union of 12 member countries ("EC-12") was enlarged to a customs union of 15 member countries ("EC-15"). At that time, the EC-12, Austria, Finland, and Sweden withdrew their tariff schedules under the World Trade Organization and applied the common external tariff of the EC-12 to imports into the EC-15. The United States and the EC then entered into negotiations under Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade 1994 to compensate the United States for the resulting increase in some tariffs on U.S. exports to Austria, Finland, and Sweden.

2. On July 22, 1996, the United States and the EC signed an agreement concluding the negotiations on compensation. To recognize the membership of Austria, Finland, and Sweden in the EC-15, the tariff-rate quota (TRQ) allocations for cheeses from these countries will become part of the total TRQ allocations for cheeses from the EC-15, but will be reserved for use by these countries through 1997.

3. Section 404(d)(3) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a tariff-rate quota for any agricultural product among supplying countries or customs areas and to modify any allocation as the President determines appropriate. Pursuant to section 404(d)(3) of the URAA, I have determined that it is appropriate to modify the TRQ allocations for cheeses by providing that the TRQ allocations for cheeses from Austria, Finland, and Sweden will become part of the total TRQ allocations for cheeses from the EC-15, but will be reserved for use by these countries through 1997.

4. Section 604 of the Trade Act of 1974, as amended ("Trade Act") (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTS) the substance of the relevant provisions of that Act, and of other Acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction. The modification of the TRQ allocations for cheeses is such an action.

5. In paragraph (3) of Proclamation 6763 of December 23, 1994, I delegated my authority under section 404(d)(3) of the Trade Act to the United States Trade Representative (USTR). I have determined that it is appropriate to authorize the USTR to embody in the HTS the substance of any action taken by the USTR under section 404(d)(3) of the URAA.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including but not limited to section 301 of title 3, United States Code, section 404(d)(3) of the URAA, and section 604 of the Trade Act do proclaim that:
(1) Additional U.S. notes to chapter 4 of the HTS are modified as specified in the Annex to this proclamation.

(2) The USTR is authorized to exercise my authority under section 604 of the Trade Act to embody in the HTS the substance of any actions taken by USTR under section 404(d)(3) of the URAA.

(3) Any provisions of previous proclamations and Executive orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

(4) This proclamation is effective on the date of signature of this proclamation, and the modifications to the HTS made by the Annex to this proclamation shall be effective on the dates that are specified in that Annex.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of August, in the year of our Lord nineteen hundred and ninety-six, and of the Independence of the United States of America the two hundred and twenty-first.

William J. Clinton

Billing code 3190-01-P
Annex

Modifications to the Harmonized Tariff Schedule of the United States (HTS)

Section A. Effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after the effective date of this proclamation:

1. The additional U.S. notes to chapter 4 are modified by deleting additional U.S. note 2 and by inserting the following new additional U.S. note 2 in lieu thereof:

   "(a) For the purposes of this schedule, the expression "EC 12" refers to articles the product of one of the following: Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain or the United Kingdom.

   (b) For the purposes of this schedule, the expression "EC 15" refers to articles the product of one of the following: Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden or the United Kingdom."

2. Additional U.S. note 16 to chapter 4 is modified by:
   (a) deleting from the list in such note the following countries and quantities:

      "Austria 832,000
      Finland 1,300,000
      Sweden 1,059,000"

   (b) deleting from the list in such note the expression "EC 12" and the quantity "21,056,000" set out opposite such expression and inserting in lieu thereof the expression "EC 15" and the quantity "24,247,000".

   (c) deleting the second paragraph in such note and inserting the following new paragraphs in lieu thereof:

      "If the quantitative limitations provided in this note for the EC 15, Austria shall have access to a quantity of not less than 832,000 kilograms, Finland shall have access to a quantity of not less than 1,300,000 kilograms, Portugal shall have access to a quantity of not less than 353,000 kilograms and Sweden shall have access to a quantity of not less than 1,059,000 kilograms.

      Of the quantitative limitations provided in this note for Israel, no more than 560,000 kilograms shall contain more than 3 percent by weight of butterfat."

3. Additional U.S. note 20 to chapter 4 is modified by:
   (a) deleting from the list in such note the following countries and quantities:

      "Austria 133,333
      Sweden 41,000"

   (b) deleting from the list in such note the expression "EC 12" and the quantity "5,448,000" set out opposite such expression and inserting in lieu thereof the expression "EC 15" and the quantity "5,622,333".

   (c) adding the following new second paragraph immediately after the list of countries and quantities in such note:

      "If the quantitative limitations provided in this note for the EC 15, Austria shall have access to a quantity of not less than 133,333 kilograms and Sweden shall have access to a quantity of not less than 41,000 kilograms."

4. Additional U.S. note 22 to chapter 4 is modified by:
   (a) deleting from the list in such note the following countries and quantities:

      "Austria 946,667
      Finland 1,000,000"

   (b) deleting from the list in such note the expression "EC 12" and the quantity "3,725,000" set out opposite such expression and inserting in lieu thereof the expression "EC 15" and the quantity "5,671,667".
Annex (continued)

Section A. Effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after the effective date of this proclamation: (con.)

4. Additional U.S. note 22 to chapter 4 is modified by: (con.)
(c). adding the following new second paragraph immediately after the list of countries and quantities in such note:

"Of the quantitative limitations provided in this note for the EC 15, Austria shall have access to a quantity of not less than 956,667 kilograms and Finland shall have access to a quantity of not less than 1,000,000 kilograms;"

5. Additional U.S. note 23 to chapter 4 is modified by:
(a). deleting from the list in such note the following country and quantity:

"Sweden 250,000"
(b). deleting from the list in such note the expression "EC 12" and the quantity "4,000,000" set out opposite such expression and inserting in lieu thereof the expression "EC 15" and the quantity "4,250,000";
(c). adding the following new second paragraph immediately after the list of countries and quantities in such note:

"Of the quantitative limitations provided in this note for the EC 15, Sweden shall have access to a quantity of not less than 250,000 kilograms;"

6. Additional U.S. note 25 to chapter 4 is modified by:
(a). deleting from the list in such note the following countries and quantities:

"Austria 6,353,333
Finland 0,200,000
Sweden 300,000"
(b). deleting from the list in such note the expression "EC 12" and the quantity "6,333,333" set out opposite such expression and inserting in lieu thereof the expression "EC 15" and the quantity "21,086,666";
(c). adding the following new second paragraph immediately after the list of countries and quantities in such note:

"Of the quantitative limitations provided in this note for the EC 15, Austria shall have access to a quantity of not less than 6,353,333 kilograms, Finland shall have access to a quantity of not less than 8,200,000 kilograms and Sweden shall have access to a quantity of not less than 300,000 kilograms;"

Section B. Modifications of the quantitative limitations provided in certain additional U.S. notes in the HTF.

On January 1 of each of the years in the following table, the additional U.S. note listed in the table is modified by deleting the quantitative limitation from such note for the country or expression listed in the table below for that note and inserting in lieu thereof for such country or expression the appropriate quantitative limitation listed in this table for the note:

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Australia</td>
<td>2,175,000</td>
<td>2,466,667</td>
<td>2,758,333</td>
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<td>Costa Rica</td>
<td>1,550,000</td>
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<td>EC 15</td>
<td>24,638,000</td>
<td>25,020,000</td>
<td>25,420,000</td>
<td>25,810,000</td>
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<td>Switzerland</td>
<td>1,470,000</td>
<td>1,553,333</td>
<td>1,636,667</td>
<td>1,720,000</td>
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<tr>
<td>Any country</td>
<td>300,000</td>
<td>300,000</td>
<td>300,000</td>
<td>300,000</td>
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<tr>
<td>2nd paragraph in such note: the access for Austria shall not be less than 923,000</td>
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</table>

## Annex (continued)

### Section B. Modifications of the quantitative limitations provided in certain additional U.S. notes in the HTS. (con.)

<table>
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<tr>
<td>2nd paragraph</td>
<td>5,789,000</td>
<td>5,955,667</td>
<td>6,122,333</td>
<td>6,209,000</td>
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<td>in such note: the access for Austria shall not be less than 200,000</td>
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<td>5,708,333</td>
<td>5,564,667</td>
<td>5,925,000</td>
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<td>in such note: the access for Austria shall not be less than 960,000</td>
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<td>2nd paragraph in such note: the access for Austria shall not be less than 21,240,000</td>
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<tbody>
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<td>2nd paragraph in such note: the access for Austria shall not be less than 6,390,000</td>
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### Section C. Effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 1998:

1. The additional U.S. notes to chapter 4 are modified by deleting additional U.S. note 2 and by inserting the following new additional U.S. note 2 in lieu thereof:

   "2. For the purposes of this schedule, the expression "EC 15" refers to articles the product of one of the following: Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden or the United Kingdom."

2. Additional U.S. note 16 to chapter 4 is modified by deleting the second paragraph in such note and inserting the following new paragraph in lieu thereof:

   "Of the quantitative limitations provided in this note for the EC 15, Portugal shall have access to a quantity of not less than 353,000 kilograms."

3. Additional U.S. note 17 to chapter 4 is modified by deleting from the list in such note the expression "EC 12" and inserting in lieu thereof the expression "EC 15."

4. Subdivision (a) of additional U.S. note 18 to chapter 4 is modified by deleting from the list in such subdivision the expression "EC 12" and inserting in lieu thereof the expression "EC 15."

5. Additional U.S. note 19 to chapter 4 is modified by deleting from the list in such note the expression "EC 12" and inserting in lieu thereof the expression "EC 15."

6. Additional U.S. note 20 to chapter 4 is modified by deleting the second paragraph (as added by item 3(c) of section A to this annex) from such note.
Annex (continued)

Section C. Effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 1995:

7. Additional U.S. note 21 to chapter 4 is modified by deleting from the list in such note the expression "EC 12" and inserting in lieu thereof the expression "EC 15".

8. Additional U.S. note 22 to chapter 4 is modified by deleting the second paragraph (as added by item 4(c) of section A to this annex) from such note.

9. Additional U.S. note 23 to chapter 4 is modified by deleting the second paragraph (as added by item 5(c) of section A to this annex) from such note.

10. Additional U.S. note 25 to chapter 4 is modified by deleting the second paragraph (as added by item 6(c) of section A to this annex) from such note.

Section D. Modifications of the quantitative limitations provided in certain additional U.S. notes in the HTS.

On January 1 of each of the years in the following table, the additional U.S. note listed in the table is modified by deleting the quantitative limitation from such note for the country or expression listed in the table below for that note and inserting in lieu thereof for such country or expression the appropriate quantitative limitation listed in this table for the note:

<table>
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<tr>
<th>Additional U.S. note</th>
<th>1998</th>
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<tr>
<td>Additional U.S. note 17 to chapter 4: Chile</td>
<td>53,333</td>
<td>66,667</td>
<td>80,000</td>
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<tr>
<td>EC 15</td>
<td>2,679,000</td>
<td>2,729,000</td>
<td>2,779,000</td>
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<td>Subdivision(s) of additional U.S. note 18 to chapter 4: Australia</td>
<td>2,033,333</td>
<td>2,241,667</td>
<td>2,450,000</td>
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<tr>
<td>Chile</td>
<td>144,667</td>
<td>183,333</td>
<td>220,000</td>
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<tr>
<td>EC 15</td>
<td>929,667</td>
<td>1,096,333</td>
<td>1,283,000</td>
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<tr>
<td>New Zealand</td>
<td>6,500,000</td>
<td>7,350,000</td>
<td>8,200,000</td>
</tr>
<tr>
<td>Additional U.S. note 19 to chapter 4: EC 15</td>
<td>320,667</td>
<td>337,333</td>
<td>354,000</td>
</tr>
<tr>
<td>Additional U.S. note 23 to chapter 4: EC 15</td>
<td>3,848,667</td>
<td>3,965,333</td>
<td>4,082,000</td>
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<tr>
<td>Romania</td>
<td>333,333</td>
<td>436,667</td>
<td>530,000</td>
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[FR Doc. 96-22253
Filed 8-28-96; 8:45 am]
Billing code 3190-01-C
Part XV

The President

Presidential Determinations Nos. 96–44 Through 96–49 of August 27, 1996—Reconfirmation of Findings With Respect to the Trade Agreements With Albania, Kyrgyzstan, Ukraine, Armenia, Moldova, and Georgia
Reconfirmation of Findings With Respect to the Trade Agreement With Albania

Memorandum for the United States Trade Representative

Since November 2, 1992, the United States of America and Albania have had in effect a bilateral Agreement on Trade Relations, in relation to which, pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I reconfirm that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement and that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are, and continuously have been, satisfactorily reciprocated by Albania.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

[FR Doc. 96-22323
Filed 8-28-96; 9:32 am]
Billing code 3190-01-M
Presidential Documents

Presidential Determination No. 96-45 of August 27, 1996

Reconfirmation of Findings With Respect to the Trade Agreement With Kyrgyzstan

Memorandum for the United States Trade Representative

Since August 21, 1992, the United States of America and Kyrgyzstan have had in effect a bilateral Agreement on Trade Relations, in relation to which, pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I reconfirm that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement and that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are, and continuously have been, satisfactorily reciprocated by Kyrgyzstan.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

William J. Clinton
Presidential Determination No. 96-46 of August 27, 1996

Reconfirmation of Findings With Respect to the Trade Agreement With Ukraine

Memorandum for the United States Trade Representative

Since June 23, 1992, the United States of America and Ukraine have had in effect a bilateral Agreement on Trade Relations, in relation to which, pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I reconfirm that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement and that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are, and continuously have been, satisfactorily reciprocated by Ukraine.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

[FR Doc. 96-22325
Filed 8-28-96; 9:33 am]
Billing code 3190-01-M
Presidential Documents

Presidential Determination No. 96-47 of August 27, 1996

Reconfirmation of Findings With Respect to the Trade Agreement With Armenia

Memorandum for the United States Trade Representative

Since April 7, 1992, the United States of America and Armenia have had in effect a bilateral Agreement on Trade Relations, in relation to which, pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I reconfirm that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement and that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are, and continuously have been, satisfactorily reciprocated by Armenia.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

William J. Clinton
Presidential Documents

Presidential Determination No. 96-48 of August 27, 1996

Reconfirmation of Findings With Respect to the Trade Agreement With Moldova

Memorandum for the United States Trade Representative

Since July 2, 1992, the United States of America and Moldova have had in effect a bilateral Agreement on Trade Relations, in relation to which, pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I reconfirm that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement and that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are, and continuously have been, satisfactorily reciprocated by Moldova.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

William J. Clinton
Presidential Documents

Presidential Determination No. 96-49 of August 27, 1996

Findings With Respect to the Trade Agreement With Georgia

Memorandum for the United States Trade Representative

Pursuant to my authority under subsection 405(b)(1) of the Trade Act of 1974 (19 U.S.C. 2435(b)(1)), I have determined that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfactorily reciprocated by Georgia. I have further found that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement on Trade Relations between the United States of America and Georgia.

You are authorized and directed to publish this memorandum in the Federal Register.

THE WHITE HOUSE,
Washington, August 27, 1996.

William J. Clinton
Reader Aids

Federal Register
Vol. 61, No. 169
Thursday, August 29, 1996

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Federal Register/Code of Federal Regulations
General Information, indexes and other finding aids
202–523–5227

Laws
Public Laws Update Services (numbers, dates, etc.) 523–6641
For additional information 523–5227

Presidential Documents
Executive orders and proclamations 523–5227
The United States Government Manual 523–5227

Other Services
Electronic and on-line services (voice) 523–4534
Privacy Act Compilation 523–3187
TDD for the hearing impaired 523–5229

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FEDERAL REGISTER PAGES AND DATES, AUGUST

<table>
<thead>
<tr>
<th>Page Numbers</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>40145–40288</td>
<td>1</td>
</tr>
<tr>
<td>40289–40504</td>
<td>2</td>
</tr>
<tr>
<td>40505–40716</td>
<td>5</td>
</tr>
<tr>
<td>40717–40948</td>
<td>6</td>
</tr>
<tr>
<td>40949–41292</td>
<td>7</td>
</tr>
<tr>
<td>41293–41482</td>
<td>8</td>
</tr>
<tr>
<td>41483–41728</td>
<td>9</td>
</tr>
<tr>
<td>41729–41948</td>
<td>12</td>
</tr>
<tr>
<td>41949–42136</td>
<td>13</td>
</tr>
<tr>
<td>42137–42370</td>
<td>14</td>
</tr>
<tr>
<td>42371–42528</td>
<td>15</td>
</tr>
<tr>
<td>42529–42772</td>
<td>16</td>
</tr>
<tr>
<td>42773–42964</td>
<td>19</td>
</tr>
<tr>
<td>42965–43136</td>
<td>20</td>
</tr>
<tr>
<td>43137–43300</td>
<td>21</td>
</tr>
<tr>
<td>43301–43410</td>
<td>22</td>
</tr>
<tr>
<td>43411–43646</td>
<td>23</td>
</tr>
<tr>
<td>43647–43936</td>
<td>26</td>
</tr>
<tr>
<td>43937–44144</td>
<td>27</td>
</tr>
<tr>
<td>44145–45318</td>
<td>28</td>
</tr>
<tr>
<td>45319–45870</td>
<td>29</td>
</tr>
</tbody>
</table>

CFR PARTS AFFECTED DURING AUGUST

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

<table>
<thead>
<tr>
<th>Proclamations:</th>
</tr>
</thead>
<tbody>
<tr>
<td>6913 ............. 44143</td>
</tr>
<tr>
<td>12143 (Superceded by EO 13014) .......... 42963</td>
</tr>
<tr>
<td>13013 .......... 41483</td>
</tr>
<tr>
<td>13015 .......... 43937</td>
</tr>
<tr>
<td>1966 .......... 43147</td>
</tr>
</tbody>
</table>

5 CFR

<table>
<thead>
<tr>
<th>Proposed Rules:</th>
</tr>
</thead>
<tbody>
<tr>
<td>531 .......... 40949, 42939, 43574</td>
</tr>
<tr>
<td>831 .......... 41714</td>
</tr>
<tr>
<td>841 .......... 41714</td>
</tr>
<tr>
<td>843 .......... 41714</td>
</tr>
<tr>
<td>844 .......... 41714</td>
</tr>
<tr>
<td>847 .......... 41714</td>
</tr>
<tr>
<td>1620 .......... 41485</td>
</tr>
<tr>
<td>2470 .......... 41293</td>
</tr>
<tr>
<td>2471 .......... 41293</td>
</tr>
<tr>
<td>2472 .......... 41293</td>
</tr>
<tr>
<td>2473 .......... 41293</td>
</tr>
<tr>
<td>2634 .......... 40145</td>
</tr>
<tr>
<td>2635 .......... 40950, 42965</td>
</tr>
<tr>
<td>Ch. LIV .......... 40500</td>
</tr>
<tr>
<td>Ch. LXVI .......... 40505</td>
</tr>
<tr>
<td>Ch. XXIV .......... 43411</td>
</tr>
</tbody>
</table>

4 CFR

<table>
<thead>
<tr>
<th>Proposed Rules:</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 ............. 42773</td>
</tr>
<tr>
<td>9 ............. 42773</td>
</tr>
<tr>
<td>19 ............. 42371</td>
</tr>
<tr>
<td>20 ............. 42371</td>
</tr>
<tr>
<td>22 ............. 40145</td>
</tr>
<tr>
<td>26 ............. 40145</td>
</tr>
<tr>
<td>31 ............. 40289</td>
</tr>
<tr>
<td>52 ............. 43939</td>
</tr>
<tr>
<td>400 ............. 40950, 42970</td>
</tr>
<tr>
<td>402 ............. 42979</td>
</tr>
<tr>
<td>457 .......... 41297, 44145</td>
</tr>
<tr>
<td>472 ............. 42137</td>
</tr>
<tr>
<td>663 ............. 41949</td>
</tr>
<tr>
<td>704 ............. 43943</td>
</tr>
<tr>
<td>800 ............. 43301</td>
</tr>
<tr>
<td>906 ............. 43139</td>
</tr>
<tr>
<td>911 ............. 43141</td>
</tr>
<tr>
<td>915 ............. 40290</td>
</tr>
<tr>
<td>920 ............. 40506</td>
</tr>
<tr>
<td>922 ............. 40954, 42988</td>
</tr>
<tr>
<td>923 ............. 40954</td>
</tr>
<tr>
<td>924 ............. 40954, 40956</td>
</tr>
<tr>
<td>927 ............. 42529</td>
</tr>
<tr>
<td>928 ............. 40146</td>
</tr>
<tr>
<td>929 ............. 41729</td>
</tr>
<tr>
<td>931 ............. 42291</td>
</tr>
<tr>
<td>932 ............. 40507</td>
</tr>
<tr>
<td>936 ............. 43140</td>
</tr>
<tr>
<td>944 ............. 40507, 43141</td>
</tr>
<tr>
<td>947 ............. 43144</td>
</tr>
<tr>
<td>948 ............. 43346</td>
</tr>
<tr>
<td>953 ............. 43146</td>
</tr>
<tr>
<td>956 ............. 44150</td>
</tr>
<tr>
<td>958 ............. 43415</td>
</tr>
<tr>
<td>981 ............. 42990</td>
</tr>
<tr>
<td>982 ............. 42991</td>
</tr>
<tr>
<td>985 ............. 40959</td>
</tr>
<tr>
<td>997 ............. 42993</td>
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<tr>
<td>998 ............. 42993</td>
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<tr>
<td>1005 ............. 41488</td>
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<tr>
<td>1007 ............. 41488</td>
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<tr>
<td>1011 ............. 41488</td>
</tr>
<tr>
<td>1046 ............. 42988</td>
</tr>
<tr>
<td>1410 ............. 43943</td>
</tr>
<tr>
<td>1467 ............. 42317</td>
</tr>
<tr>
<td>1703 ............. 42462</td>
</tr>
<tr>
<td>1944 ............. 42842</td>
</tr>
<tr>
<td>1980 ............. 43147</td>
</tr>
<tr>
<td>3411 ............. 45319</td>
</tr>
<tr>
<td>4000 ............. 42371</td>
</tr>
<tr>
<td>Proposed Rules:</td>
</tr>
<tr>
<td>231 ............. 40081, 42396</td>
</tr>
<tr>
<td>220 ............. 40481, 42396</td>
</tr>
<tr>
<td>225 ............. 42396</td>
</tr>
<tr>
<td>226 ............. 40481, 42396</td>
</tr>
<tr>
<td>300 ............. 42565</td>
</tr>
<tr>
<td>301 ............. 40354, 40361, 41990, 42824</td>
</tr>
<tr>
<td>319 ............. 40362, 42565</td>
</tr>
<tr>
<td>457 .......... 41527, 41531, 43999, 45329</td>
</tr>
<tr>
<td>Ch. LIV .......... 40500</td>
</tr>
<tr>
<td>Ch. LXVI .......... 40505</td>
</tr>
<tr>
<td>Ch. XXIV .......... 43411</td>
</tr>
<tr>
<td>Proposed Rules:</td>
</tr>
<tr>
<td>591 .......... 41746</td>
</tr>
</tbody>
</table>
REMINDERS
The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT TODAY

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Onions (sweet) grown in Washington and Oregon; published 8-28-96

AGRICULTURE DEPARTMENT
Cooperative State Research, Education, and Extension Service
Grants:
National research initiative competitive grants program; published 8-29-96

COMMERCE DEPARTMENT
Economic Development Administration
Simplification and streamlining regulations; Federal regulatory reform; correction; published 8-29-96

DEFENSE DEPARTMENT
Air Force Department
Air Force responsibilities for aircraft leased for airshows; CFR part removed; published 8-29-96
Air Force arresting systems; CFR part removed; published 8-29-96
Military training and schools:
Contractor employees training; CFR part removed; published 8-29-96
Special investigation: authority to administer oaths; CFR part removed; published 8-29-96

DEFENSE DEPARTMENT
Federal Acquisition Regulation (FAR):
Payment by electronic funds transfer; published 8-29-96

ENERGY DEPARTMENT
Elementary and secondary education:
Indian fellowship and professional development programs; payback provisions; published 8-30-96

ENVIRONMENTAL PROTECTION AGENCY
Clean Air Act:
State operating permits programs--Pennsylvania; published 7-30-96
Superfund program:
National oil and hazardous substances contingency plan--National priorities list update; published 8-29-96
Toxic substances:
Lead--Lead-based paint activities; requirements; published 8-29-96

FEDERAL COMMUNICATIONS COMMISSION
Radio stations; table of assignments:
California et al.; published 8-14-96
Telecommunications Act of 1996; implementation:
Common carrier services--Local competition provisions; published 8-29-96

GENERAL SERVICES ADMINISTRATION
Federal Acquisition Regulation (FAR):
Payment by electronic funds transfer; published 8-29-96

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Community facilities:
Base closure community redevelopment and homeless assistance; published 8-29-96

INTERIOR DEPARTMENT
Fish and Wildlife Service
Hunting and fishing:
Open areas list additions; published 8-29-96

Migratory bird hunting:
Early-season regulations (1996-1997); frameworks; published 8-29-96

LABOR DEPARTMENT
Federal Contract Compliance Programs Office
Affirmative action obligations of contractors and subcontractors for disabled veterans and Vietnam era veterans:
Invitation to self-identify; published 5-1-96
Americans with Disabilities Act; implementation:
Contractors and subcontractors; affirmative action and nondiscrimination obligations regarding individuals with disabilities; published 5-1-96

LABOR DEPARTMENT
Mine Safety and Health Administration
Coal mine safety and health:
Underground coal mines--Personal noise dosimeters use; published 8-29-96

LEGAL SERVICES CORPORATION
Aliens:
Legal assistance restrictions; published 8-29-96
Attorneys’ fees; published 8-29-96
Fund recipients; application of Federal law to use; published 8-29-96
Funding:
Non-Legal Services Corporation funds use; client identity and statement of facts; published 8-29-96

Lobbying and certain other activities; restrictions; published 8-29-96
Priorities in use of resources; published 8-29-96
Prisoner representation; published 8-29-96
Solicitation restrictions; published 8-29-96
Subgrants, fees, and dues:
Prohibition of use of funds for payment of membership dues to any private or nonprofit organization; published 8-29-96
Welfare reform; published 8-29-96

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Federal Acquisition Regulation (FAR):
Payment by electronic funds transfer; published 8-29-96

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Kiwifruit grown in California; comments due by 9-4-96; published 8-5-96
Marketing orders; expenses and assessment rates; comments due by 9-6-96; published 8-7-96

AGRICULTURE DEPARTMENT
Rural Utilities Service
Electric loans:
Electric borrowers; merger and consolidation policies; comments due by 9-6-96; published 8-7-96

COMMERCE DEPARTMENT
Patents:
Acquisition and protection of foreign rights in...
inventions, licensing of foreign patents acquired by Government, etc.

Federal regulatory reform; comments due by 9-6-96; published 8-7-96

COMMERCIAL DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Bering Sea and Aleutian Islands groundfish; comments due by 9-5-96; published 8-27-96
Summer flounder and soup; comments due by 9-3-96; published 8-6-96

COMMERCIAL DEPARTMENT
Patent and Trademark Office
Patents:
Acquisition and protection of foreign rights in inventions, licensing of foreign patents acquired by Government, etc.
Federal regulatory reform; comments due by 9-6-96; published 8-7-96

ENERGY DEPARTMENT
Conflict of interests; comments due by 9-3-96; published 7-5-96

ENVIRONMENTAL PROTECTION AGENCY
Air quality implementation plans; approval and promulgation; various States:
Michigan; comments due by 9-4-96; published 8-5-96
Missouri; comments due by 9-4-96; published 8-5-96
Air quality implementation plans; √ approval and promulgation; various States; air quality planning purposes; designation of areas:
Michigan; comments due by 9-4-96; published 8-5-96
Hazardous waste program authorizations:
Illinois; comments due by 9-4-96; published 8-5-96
Superfund program:
National oil and hazardous substances contingency plan--
National priorities list update; comments due by 9-3-96; published 8-2-96
Toxic chemical release reporting; community right-to-know--
Metal mining, coal mining, etc.: industry group list additions; comments due by 9-4-96; published 8-21-96
Water pollution; effluent guidelines for point source categories:
Leather tanning and finishing; comments due by 9-6-96; published 7-8-96
FEDERAL COMMUNICATIONS COMMISSION
Common carrier services:
Satellite communications-- Licensing procedures; comments due by 9-3-96; published 8-6-96
Telecommunications Act of 1996; implementation--
Telemessaging, electronic publishing, and alarm monitoring services; comments due by 9-4-96; published 7-29-96
Radio stations; table of assignments:
Mississippi; comments due by 9-3-96; published 8-15-96
Virginia; comments due by 9-3-96; published 8-23-96
FEDERAL DEPOSIT INSURANCE CORPORATION
Assessments:
Oakar institutions; interpretive rules; comments due by 9-3-96; published 7-3-96
Contractors suspension and exclusion and contracts termination; comments due by 9-3-96; published 7-5-96
FEDERAL ELECTION COMMISSION
Rulemaking petitions:
Democratic Senatorial Campaign Committee et al.; comments due by 9-6-96; published 8-7-96
FEDERAL HOUSING FINANCE BOARD
Federal home loan bank system:
Advances; terms and conditions; comments due by 9-3-96; published 8-2-96
FEDERAL RESERVE SYSTEM
Electronic fund transfers (Regulation E):
Home banking services disclosure; new accounts error resolution, and store-value cards, etc.; comments due by 9-6-96; published 7-17-96
GENERAL SERVICES ADMINISTRATION
Federal Information Resources Management Regulation:
Federal information processing multiple award schedule contracts; provisions removed; comments due by 9-6-96; published 7-8-96
HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
Administrative practice and procedure:
Miscellaneous amendments; Federal regulatory review; comments due by 9-3-96; published 6-4-96
Animal drugs, feeds, and related products:
Carcinogenicity testing of compounds used in food-producing animals; comments due by 9-3-96; published 6-20-96
HEALTH AND HUMAN SERVICES DEPARTMENT
Health Care Financing Administration
Medicare:
Physician fee schedule (1997 CY); payment policies; revisions; comments due by 9-3-96; published 7-2-96
HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Lead-based paint hazards in federally owned residential property and housing receiving Federal assistance; notification, evaluation, and reduction; comments due by 9-5-96; published 6-7-96
Mortgage and loan insurance program:
Single family mortgage insurance; loss mitigation procedures; comments due by 9-3-96; published 7-3-96
INTERIOR DEPARTMENT
Indian Affairs Bureau
Education:
Special education; Federal regulatory review; comments due by 9-3-96; published 7-2-96
Land and water:
Irrigation projects and programs; comments due by 9-3-96; published 7-5-96
Mineral materials disposal; bonding and certificates of deposit requirements; comments due by 9-3-96; published 8-2-96
INTERIOR DEPARTMENT
Fish and Wildlife Service
Migratory bird hunting:
Annual hunting regulations; and late season migratory bird hunting; comments due by 9-3-96; published 8-15-96
INTERIOR DEPARTMENT
National Park Service
Special regulations:
Voyageurs National Park, MN; aircraft operations; designation of areas; comments due by 9-5-96; published 5-8-96
INTERIOR DEPARTMENT
Surface Mining Reclamation and Enforcement Office
Permanent program and abandoned mine land reclamation plan submissions:
Oklahoma; comments due by 9-3-96; published 8-2-96
JUSTICE DEPARTMENT
Immigration and Naturalization Service
Immigration:
Visa waiver pilot program--Argentina; comments due by 9-6-96; published 7-8-96
Nationality:
Citizenship acquisition; equal treatment of women in conferring citizenship on children born abroad; comments due by 9-3-96; published 7-5-96
LABOR DEPARTMENT
Wage rates predetermination procedures; and construction and nonconstruction contracts; labor standards provisions:
Davis-Bacon helper regulations suspension continuations; comments due by 9-3-96; published 8-2-96
LABOR DEPARTMENT
Wage and Hour Division
Wage rates predetermination procedures; and construction and nonconstruction contracts; labor standards provisions:
Davis-Bacon helper regulations suspension continuations; comments due by 9-3-96; published 8-2-96
NUCLEAR REGULATORY COMMISSION
Agreement State licenses; recognition of areas under exclusive Federal jurisdiction within agreement State; comments due by 9-3-96; published 6-18-96
Rulemaking petitions:
Amersham Corp.; comments due by 9-3-96; published 6-18-96
University of Cincinnati; comments due by 9-4-96; published 6-21-96

POSTAL SERVICE
Domestic Mail Manual:
Mail classification reform; implementation standards; comments due by 9-5-96; published 8-15-96

TRANSPORTATION DEPARTMENT
Coast Guard
Pollution:
Tank vessel and facility response plans; hazardous substances response equipment; comments due by 9-3-96; published 5-3-96

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Airworthiness directives:
Aerospace Technologies of Australia Pty Ltd.; comments due by 9-6-96; published 7-8-96
Boeing; comments due by 9-3-96; published 7-5-96
Fokker; comments due by 9-3-96; published 7-24-96

RAYTHEON; comments due by 9-6-96; published 7-8-96

Class E airspace; comments due by 9-3-96; published 7-17-96

TREASURY DEPARTMENT
Internal Revenue Service
Income taxes:
Qualified small business stock; 50 percent exclusion for gain; comments due by 9-4-96; published 6-6-96
Section 467 rental agreements; comments due by 9-3-96; published 6-3-96