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Tuesday
December 17, 1996

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Federal Register
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Presidential Documents

Title 3—

The President

Executive Order 13030 of December 12, 1996

Administration of Foreign Assistance and Related Functions and Arms Export Controls

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to delegate certain authority to the Secretary of State, it is hereby ordered as follows:

Section 1. Section 1–201(a)(13) of Executive Order 12163, as amended, is further amended by

(a) inserting ‘‘, and sections 620G(b) and 620H(b) as added by the Antiterrorism and Effective Death Penalty Act of 1996, (Public Law 104–132)’’ before ‘‘of’’; and

(b) inserting ‘‘, as well as section 573 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994 (Public Law 103–87), section 563 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995 (Public Law 103–306), section 552 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996 (Public Law 104–107), and similar provisions of law’’ after ‘‘Act’’.

Sec. 2. Section 1 of Executive Order 11958, as amended, is further amended by

(a) redesignating subsections (n) through (r) as subsections (o) through (s), respectively; and

(b) inserting the following after subsection (m): ‘‘(n) Those under Section 40A of the Act, as added by the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132), to the Secretary of State.’’.

Sec. 3. Section 1(a)(2) of Executive Order 12884 is amended by

(a) deleting ‘‘and’’ before ‘‘(3)’’; and

(b) inserting ‘‘, and (5)’’ after ‘‘(3)’’.

THE WHITE HOUSE,
December 12, 1996.

[FR Doc. 96–32128
Filed 12–16–96; 8:45 am]
Billing code 3195–01–P

Federal Register

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Part V

The President

Executive Order 13031—Federal Alternative Fueled Vehicle Leadership

Federal Register
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Presidential Documents

Title 3—

The President

Executive Order 13031 of December 13, 1996

Federal Alternative Fueled Vehicle Leadership

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Energy Policy and Conservation Act, as amended (42 U.S.C. 6201 *et seq.*), the Energy Policy Act of 1992 (Public Law 102–486) (''the Act''), and section 301 of title 3, United States Code, and with the knowledge that the use of alternative fueled motor vehicles will, in many applications, reduce the Nation's dependence on oil, and may create jobs by providing an economic stimulus for domestic industry, and may improve the Nation's air quality by reducing pollutants in the atmosphere, it is hereby ordered as follows:

Section 1. *Federal Leadership and Goals.* (a) The purpose of this order is to ensure that the Federal Government exercise leadership in the use of alternative fueled vehicles (AFVs). To that end, each Federal agency shall develop and implement aggressive plans to fulfill the alternative fueled vehicle acquisition requirements established by the Act. The Act generally requires that, of the vehicles acquired by each agency for its fleets, subject to certain conditions specified in section 303(b)(1) of the Act, 25 percent should be AFVs in fiscal year (FY) 1996, 33 percent in FY 1997, 50 percent in FY 1998, and 75 percent in FY 1999 and thereafter. These requirements apply to all agencies, regardless of whether they lease vehicles from the General Services Administration (GSA) or acquire them elsewhere. That section also defines which Federal agency vehicles are covered by the AFV acquisition requirements; this order applies to the same vehicles, which are primarily general-use vehicles located in metropolitan statistical areas with populations of 250,000 or more.

(b) To the extent practicable, agencies shall use alternative fuels in all vehicles capable of using them. Agencies shall continue to work together in interagency committees recommended by the Federal Fleet Conversion Task Force established by Executive Order 12844 of April 21, 1993, to coordinate their vehicle acquisitions and placement.

Sec. 2. *Submission of Agency Plans and Reports on Statutory Compliance.* (a) Sixty (60) days after the date of this Executive order, and annually thereafter as part of its budget submission to the Director of the Office of Management and Budget, each agency shall submit a report on its compliance with sections 303 and 304 of the Act. A copy of the report shall also be submitted to the Secretary of Energy and to the Administrator of General Services. The report shall state whether the agency is in compliance with the Act, and substantiate that statement with quantitative data including numbers and types of vehicles acquired and the level of their use. At a minimum, the report shall indicate the number of vehicles acquired or converted for each fuel type and vehicle class, and the total number of vehicles of each fuel type operated by the agency. The Director of the Office of Management and Budget shall issue further reporting guidance as necessary.

(b) If an agency has failed to meet the statutory requirements, it shall include in its report an explanation for such failure and a plan, consistent with the agency's current and requested budgets, for achieving compliance with the Act. The plan shall include alternative sources of suitable AFVs if the agency's primary vehicle supplier is unable to meet the AFV requirements.

(c) The Secretary of the Department of Energy and the Administrator of General Services shall cooperatively analyze the agency AFV reports and acquisition plans, and shall submit jointly a summary report to the Director of the Office of Management and Budget.

Sec. 3. *Exceptions for Law-Enforcement, Emergency, and National Defense Vehicles.* Section 303 of the Act allows exemptions to the acquisition requirements for law-enforcement, emergency, and vehicles acquired and used for military purposes that the Secretary of Defense has certified must be exempt for national security reasons. Law enforcement vehicles shall include vehicles used for protective activities. Each agency that acquires or utilizes any such vehicles shall include in its report an explanation of why an exemption is claimed with respect to such vehicles.

Sec. 4. *Fulfilling the Acquisition Requirement.* (a) Agencies may acquire alternative fueled vehicles to meet the requirements of this order through lease from GSA, acquisition of original equipment manufacturer models, commercial lease, conversion of conventionally fueled vehicles, or any combination of these approaches. All vehicles, including those converted for alternative fuel use, shall comply with all applicable Federal and State emissions and safety standards.

(b) Based on its own plans and the plans and reports submitted by other agencies, the Administrator of General Services shall provide planning information to potential AFV suppliers to assist in production planning. After consulting with AFV suppliers, the Administrator of General Services shall provide to Federal agencies information on the production plans of AFV suppliers well in advance of budget and ordering cycles.

(c) As required by section 305 of the Act, the Secretary of Energy, in cooperation with the Administrator of General Services, shall continue to provide technical assistance to other Federal agencies that acquire alternative fueled vehicles and shall facilitate the coordination of the Federal Government's alternative fueled vehicle program.

Sec. 5. *Vehicle Reporting Credits.* The gains in air quality and energy security that this order seeks to achieve will be even larger if medium- and heavy-duty vehicles are operated on alternative fuels, and if ''zero-emissions vehicles'' (ZEVs) are used. Therefore, for the purposes of this order, agencies may acquire medium- or heavy-duty dedicated alternative fueled vehicles or ZEVs to meet their AFV acquisition requirements, and they shall be given credits for compliance with their AFV targets as follows. Each medium-duty and ZEV shall count the same as two light-duty AFVs, and each dedicated alternative fueled heavy-duty vehicle shall count as three light-duty AFVs. The ZEV credits may be combined with vehicle size credits. The Director of the Office of Management and Budget, in consultation with the Secretary of Energy, shall issue detailed guidance on the classification and reporting of medium-duty, heavy-duty, and ZEVs. In the reports mandated in section 2 of this order, medium- and heavy-duty AFVs and ZEVs shall be identified separately from light-duty vehicles.

Sec. 6. *Funding Alternative Fueled Vehicle Acquisition.* (a) The Department of Energy will no longer request or require specific appropriations to fund the incremental costs of alternative fueled vehicles, including any incremental costs associated with acquisition and disposal, for other agencies. Agencies shall formulate their compliance plans based on existing and requested funds, but shall not be exempt from the requirements of the Act or this order due to limited appropriations.

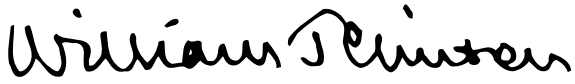
(b) An exception regarding funding assistance shall be made for electric vehicles, which are in an earlier stage of development than other alternative fueled vehicles. The Secretary of Energy shall establish a program beginning in FY 1997 to provide partial funding assistance for agency purchases of electric vehicles. Up to $10,000 or one-half the incremental cost over a comparable gasoline-powered vehicle, whichever is less, may be provided as funding assistance for each electric vehicle, subject to the availability of funds.

Sec. 7. *Agency Cooperation with Stakeholders on Alternative Fueled Vehicle Placement and Refueling Capabilities.* The Secretary of Energy shall work with agencies procuring AFVs to coordinate the placement of their vehicles with the placement of similar vehicles by nonfederal alternative fuel stakeholders. Federal planning and acquisition efforts shall be coordinated with the efforts of the Department of Energy's ''Clean Cities'' participants, private industry fuel suppliers, and fleet operators, and State and local governments to ensure that adequate private sector refueling capabilities exist or will exist wherever Federal fleet alternative fueled vehicles are located. Each agency's fleet managers shall work with appropriate organizations at their respective locations, whether in a ''Clean Cities'' location or not, on initiatives to promote alternative fueled vehicle use and expansion of refueling infrastructure.

Sec. 8. *Definitions.* For the purpose of this order, the terms ''agency,'' ''alternative fueled vehicle,'' and ''alternative fuel'' have the same meaning given such terms in sections 151 and 301 of the Act.

Sec. 9. *Executive Order 12844.* This order supersedes Executive Order 12844.

Sec. 10. *Judicial Review.* This order is not intended to, and does not, create any right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.



THE WHITE HOUSE,
December 13, 1996.

[FR Doc. 96–32195
Filed 12–16–96; 11:26 am]
Billing code 3195–01–P

Rules and Regulations

Federal Register
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OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 410

RIN: 3206–AF99

Training

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations governing Federal employee training. The regulations implement provisions of the Federal Workforce Restructuring Act, dated March 30, 1994 and provisions of the Federal Reports Elimination and Sunset Act of 1995, dated December 21, 1995; incorporate former provisionally retained FPM Letters; and reflect OPM's response to agency requests to restructure 5 CFR part 410. The rules provide agencies additional flexibility by implementing the National Performance Review recommendations to reduce restrictions on training and make it a more responsive management tool.

EFFECTIVE DATE: This rule becomes effective on December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Judith Lombard, 202–606–2431, E-MAIL jmlombar@opm.gov, or FAX 202–606–2394.

SUPPLEMENTARY INFORMATION: Under section 4118 of title 5, United States Code, as amended, OPM is responsible for prescribing regulations for the training of Government employees. Inconsistencies between current training law and previously published regulations caused confusion and led Federal managers, employees, and training officials to operate under outdated, and unnecessary regulations. OPM found that delay in issuing updated regulations would be contrary to public interest, and published an interim revision of its regulations in the May 13, 1996, Federal Register (61 FR 21947–21953) for a 30-day public comment period.

Comments were received from 14 sources, including one labor organization and one individual. OPM reviewed the comments with members of the Human Resource Development Council's Policy and Legislation Subcommittee, and collaborated with them on OPM's response. The following summarizes the comments, suggestions and actions taken in each subpart.

Subpart A—General Provisions

Section 410.101—Definitions. The labor organization felt training was adequately defined in section 4101 of title 5, United States Code, and that the clarifying language in § 410.101(c) of the interim regulation was restrictive and should be stricken. Response: Since similar information is included in § 410.204, options for developing employees, the definition has been revised to read: ''Training has the meaning given to the term in section 4101 of title 5, United States Code.''

Subpart B—Planning for Training

Section 410.202—Integrating employee training and development with agency strategic plans. One agency suggested that accountability and cost-benefit be added to § 410.202(a)(1) by adding alignment of training plans to agency performance indicators. Response: Although the idea has merit, it places a regulatory burden on training operations that properly belongs to other levels of the organization as well. We believe that the existing language is sufficient and that additional language is unnecessary.

Section 410.202(b)(1)—Agency human resource development programs. One agency suggested that accountability and cost-benefit be included by adding that human resource development plans should represent targeted investments in the workforce that are cost-beneficial and make efficient use of resources. Response: We believe the existing language is sufficient to assure accountability and efficiency and that additional language is unnecessary.

Subpart C—Establishing and Implementing Training Programs

Section 410.302—Responsibilities of the head of an agency.

1. One agency proposed that the word ''procedures'' in § 410.302(a) (1) and (2) is more onerous and burdensome than the word ''policy'' and recommended that the word procedures be dropped. Response: The wording in the interim regulation could be interpreted to mean that the agencies had to prescribe procedures, which was not our intent. Previously published 5 CFR part 410 regulations used the phrase, ''shall prescribe procedures as are necessary to assure * * *''. This wording gives agencies the flexibility to determine when procedures are necessary. We have changed § 410.302 of the interim regulations to include the ''as are necessary to ensure'' phrase.

2. One agency felt the subsection on training Presidential appointees represented a departure from FPM 410–34 which delegated OPM's training approval authority to heads of agencies. The agency asked that the requirement in § 410.302(c) for agency heads to submit requests for their own training to OPM be eliminated. Response: The President delegated authority to OPM to approve the training of Presidential appointees. The FPM letter delegated that authority, with conditions, to agency heads. Because we believed that self-review constituted a conflict of interest, the FPM letter required agency heads to have their training requests reviewed by OPM. Subsections 401.302 (b) and (c) of the interim regulation delegate authority to approve training of Presidential appointees under the conditions of the FPM Letter. Because we continue to believe that self-review constitutes a conflict of interest, heads of agencies shall continue to submit requests for their non-Government sponsored training to OPM for review.

3. Another agency suggested that the responsibility of the head of an agency to maintain records of the agency's training plans, expenditures and activities be included in subsection § 410.302. Response: This is clarifying suggestion which we have adopted. The text has been revised by adding a subsection: ''(d) The head of the agency shall establish the form and manner of maintaining agency records related to training plans, expenditures, and activities.''

4. An agency also suggested that the requirement from § 410.310(b) for the agency head to publish written procedures on continued service

agreement be added to § 410.302. Response: This is a clarifying suggestion which we have adopted. The text has been revised by adding a subsection: ''(e) The head of the agency shall establish written procedures which include the minimum requirements for continued service agreement. (See also 5 CFR 410.310.)''

Section 410.304—Funding training programs. One agency recommended including a statement which indicates that funding for employee training and development is an investment in the future of the individual and the organization. Response: The statement has merit, but it is a philosophical idea which OPM is not including in regulation.

Section 410.305—Establishing and using interagency training. One agency asked for clarification of interagency training and agencies eligible for interagency training. Response: OPM has no objection to further clarifying this subsection by revising it to read: ''Executive departments, independent establishments, Government corporations subject to chapter 91 of title 31, the Library of Congress, and the Government Printing Office may provide or share training programs developed for its employees to employees of other agencies under section 4102 of title 5, United States Code, when this would result in better training, improved service, or savings to the Government. Section 302(d) of Executive Order 11348 allows agencies excluded from section 4102 of title 5, United States Code, to also receive interagency training when this would result in better training, improved service, or savings to the Government. Section 201(e) of Executive Order 11348 provides for the Office of Personnel Management coordination of interagency training conducted by and for agencies (including agencies and portions of agencies excepted by section 4102(a) of Title 5, United States Code).''

Section 410.306(b)—Training persons on Intergovernmental Personnel Act (IPA) mobility assignments. One agency asked that OPM clarify this subsection by stating if the authority to assign individuals on mobility agreements to training applies to both non-Federal persons on IPA appointment or on detail to a Federal agency. Response: Since this authority is not specified elsewhere, OPM agrees that it should be clarified here. This subsection has been revised to read: ''(b) Persons on Intergovernmental Personnel Act mobility assignments may be assigned to training if that is in the interest of the Government.

(1) A State or local government employee given an appointment in a Federal agency under the authority of section 3374(b) of title 5 of the United States Code, is deemed an employee of the Federal agency. The agency may provide training for the State or local government employee as it does for other agency employees.

(2) A State or local government employee on detail to a Federal agency under the authority of section 3374(c) of title 5 of the United States Code, is not deemed an employee of the Federal agency. However, the detailed State or local government employee may be admitted to training programs the agency has established for Federal personnel and may be trained in the rules, practices, procedures and/or systems pertaining to the Federal government.''

Section 410.307—Training for promotion. 1. One agency asked for guidance on when training agreements are necessary for accelerated promotions. Another agency asked that reference be made in § 410.307 and § 410.308 to the Modified Qualification provision contained in OPM's Qualification Standards Operating Manual. Response: OPM agrees that it is helpful (i) to refer to agency authority to modify qualifications and to provide intensive training so employees may acquire qualifications at an accelerated rate, and (ii) to refer to time in grade regulations. We are merging § 410.307 and § 410.308 into a single section, retitling the section, adding a new paragraph (a) as shown below, and renumbering the subpart. The new paragraph reads as follows:

Section 410.307—Training for promotion or placement in other positions.

(a) General. In determining whether to provide training under this section, agencies should take into account:

(1) Agency authority to modify qualification requirements in certain situations as provided in the OPM Operating Manual for Qualification Standards for General Schedule Positions;

(2) Agency authority to establish training programs that provide intensive and directly job-related training to substitute for all or part of the experience (but not education, licensing, certification, or other specific credentials), required by OPM qualification standards. Such training programs may be established to provide employees with the opportunity to acquire the experience and knowledge, skills, and abilities necessary to qualify for another position (including at a higher grade) at an accelerated rate; and

(3) Time-in-grade restrictions on advancement (see 5 CFR 300.603(b)(6)).''

2. To further clarify training an employee subject to grade or pay retention to qualify for another position, we have amended the language in the former § 410.308 and renumbered it § 410.307(c)(1). It reads, ''(1) Grade or pay retention. Under the authority of 5 U.S.C. 4103 and 5 U.S.C. 5364, an agency may train an employee to meet the qualification requirements of another position in the agency if the new position is at or below the retained grade or the grade of the position the employee held before pay retention.''

3. One agency also suggested adding some guidance about employer paid educational expenses and tax liability to § 410.307. Response: This area is subject to tax law which will change this year. OPM feels it is a matter better explained in a handbook or in guidance. The subsection will not be revised to address tax liability for Government paid educational expenses.

Section 410.309(a)—Prohibition on training to obtain an academic degree. One agency felt that the language in the interim regulation, § 410.309(a)(2), prohibited an agency from providing graduate and post graduate level academic training for its employees who must register for entire degree programs at certain desired institutions or not at all. The agency noted that former OPM guidance existed in this area and requested that this subsection be revised to reflect permitted agency actions. Response: It was not OPM's intent to place new restrictions on agencies. We have renumbered that section as § 410.308 and revised § 410.308(a)(2) to read:

''(2)(i) The prohibition on academic degree in 5 U.S.C. 4107(a)(2) is not to be construed as limiting the authority of agencies to approve and pay for training expenses to develop knowledge, skills, and abilities directly related to improved individual performance. If, in the accomplishment of such training, an employee receives an academic degree, the degree is an incidental by-product of the training.

(ii) Paying an additional rate of tuition because a student is a degree candidate is prohibited. An agency is only authorized to pay the tuition and fees charged for a nondegree student, even though the employee is enrolled as a degree candidate. If it is not possible to distinguish between costs associated with the acquisition of knowledge and skills and the costs associated with the acquisition of an academic degree at an institution, an agency is authorized to pay in full the tuition of an employee

participating in an authorized program of training at that institution.''

Section 410.309(b)—Degree training to relieve recruitment and retention problems.

1. Two agencies thought that interim regulation § 410.309(b) was too long, addressed non-training issues, and should be rewritten. Response: OPM agrees that the subsection is quite long, but it is guidance for implementing an exception to training law that applies to staffing as well as to training. Since the guidance only appears in 5 CFR part 410, we will retain it to assure Governmentwide uniformity in making exceptions to the statute.

2. An individual asked that OPM include persons with disabilities, including disabled veterans, in accordance with the requirements of titles 5, 29, and 38 to § 410.309(b) in the interim regulation. Response: Although the suggestion has merit, the current language reflects what is stated in training law. Since § 410.302(a) specifies that selection for training shall be made without regard to handicapping condition, OPM feels it is unnecessary to include it in this subsection.

3. One agency asked that interim regulation § 410.309(g)(2) be eliminated, suggesting it is inconsistent with the policy on personnel recordkeeping which allows agencies to determine the types and kinds of training that should be documented in an employee's individual record. Response: OPM does not feel that the language is inconsistent with filing rules. § 410.309(g)(2) asks that agencies keep records on individual employees assigned to training under this section. As a good management practice, we believe agencies should keep this information for a reasonable length of time. Where the records are maintained is a matter of agency discretion.

Section 410.310—Agreements to continue in service.

1. The labor organization asked that the words ''reasonably and not in a arbitrary and capricious manner'' be added to the sentence in interim regulation § 410.310(a) about establishing agency policy for continued service agreements. Response: Since agency policies and procedures must be established, and administered, in a uniform and non-arbitrary manner, OPM believes the additional language is unnecessary. However, OPM has renumbered the section as § 410.309.

2. One agency pointed out that interim regulation § 410.310(b)(2) contains the statement that the ''period of service will equal three times the length of the training.'' The agency correctly notes that this places a condition on continued service agreements that was not previously in regulation. Response: It was not OPM's intent to be more restrictive in this area. OPM has renumbered the section as § 410.309(b)(2) and revised it to read: ''(2) An employee selected for training subject to an agency continued service agreement must sign an agreement to continue in service after training prior to starting the training. The period of service will equal at least three times the length of the training.''

3. Another agency asked for guidance on how to use continued service agreements in interim regulation § 410.310 for short term, but high priced training. Response: OPM feels this is a matter for agencies to address, if desired, in their internal policies and procedures for continued service agreements.

Section 410.311—Computing time in training. One agency asked what was meant by interim regulation § 410.311(a) and (b). Specifically, the agency questioned documenting leave without pay (LWOP) hours used for training. It asked, ''Since training is official duty, how can the person attending the training be on LWOP?'' Response: This provision is included for agencies that need to compute time of employees in training for continued service agreements. Continued service agreements cover training expenses (other than salary) for which the agency may require repayment. Agencies may grant employees LWOP for the purpose of training and may pay all, some or none of the costs of the training. If an agency pays for the training, it may subject the employee to a continued service agreement. OPM agrees that clarifying language is needed. We have renumbered this subsection as § 410.310 and revised it to read, ''For the purpose of computing time in training for continued service agreements under section 4108 of title 5, United States Code:''

Section 410.312—Records. Five agencies commented on 5 CFR 410.312, keeping records of individual employees' training. Two asked for clarification on the type of training data to keep, what its format should be, how it should be filed, and how long it should be retained. A third asked that the regulations specify that training of less than eight hours need not be recorded if the agency so chooses. A fourth said the language was unclear. The fifth suggested rewording the subsection. Response: OPM has determined that agencies shall no longer file training documents permanently in Official Personnel Folders. Agency policy should address the filing and retention of training documents to meet the agency's needs for internal review and control. To clarify this authority, OPM has renumbered the section as 5 CFR 410.311 and revised it to read: ''Agencies shall retain, in such form and manner as the agency head considers appropriate, a record of training events authorized under this subpart for a reasonable period of time.''

Subpart D—Paying for Training Expenses

Section 410.402—Paying premium pay.

1. One agency pointed out that meaning of § 410.402(b)(2), exemption to prohibition on premium pay for training at night, is not consistent with previous OPM regulations. Response: We agree, and OPM has revised it to read: ''an employee given training at night because situations that he or she must learn to handle occur only at night shall be paid by the applicable premium pay.''

2. The labor organization felt that § 410.402(d)(1) and (2), exception to prohibition premium pay for employees nonexempt from the Fair Labor Standards Act, were inconsistent with § 551.423(a)(2). The organization suggested eliminating § 410.402(d)(2) and revising § 410.402(d) to read: ''(d) Overtime pay under that Fair Labor Standards Act (FLSA). Time spent in training for preparing for training outside regular working hours shall be considered hours of work for the purpose of computing FLSA overtime if an agency requires the training (See also 5 CFR 551.423.)'' Response: OPM has determined that the language is correct as written, but is adding a reference to Department of Labor regulations on the subject, 29 CFR 785.27 through 785.32 that may help clarify any questions. To clarify the regulations, we are amending the regulation to read:

''(d) Overtime pay under the Fair Labor Standards Act (FLSA). (1) Time spent in training or preparing for training outside regular working hours shall be considered hours of work for the purpose of computing FLSA overtime if an agency requires the training to bring performance up to a fully successful, or equivalent level or to provide knowledge or skills to perform new duties and responsibilities in the employee's current position. (See also 5 CFR 551.423 and 29 CFR 785.27 through 785.32.)

(2) Time spent in training or preparing for training outside the employee's regular working hours for the following purposes is not hours of work:

(i) Training to improve a nonexempt employee's performance in his or her current position above a fully successful, or equivalent level, provided such training is undertaken with the knowledge that the employee's performance or continued retention in his or her current position will not be adversely affected by nonenrollment in the training program; or

(ii) Training to provide a nonexempt employee with additional knowledge or skills for reassignment to another position or advancement to a higher grade in another position, even if such training is directed by the agency. (See also 29 CFR 785.27 through 785.32).''

3. Two agencies asked that OPM address the issue of overtime pay for travel to and from training assignments in the regulations. Response: Compensation for travel is subject to compensation law and regulations. OPM addresses compensation for travel in 5 CFR 550.112(g) and 5 CFR 551.422. However, OPM has no objection to referencing travel for training regulations in 5 CFR part 410. We have added § 410.402(e), which reads:

''(e) Compensation for time spent traveling to and from training. (1) Compensation provisions are contained in 5 CFR 550.112(g) for time spent traveling for employees subject to title 5 of the United States Code.

(2) Compensation provisions are contained in 5 CFR 551.422 for time spent traveling for employees covered by the Fair Labor Standards Act. (See also 29 CFR 785.33 through 785.41.)''

Section 410.403—Subsistence payments for extended training assignments. Two agencies asked for additional clarification of agency authority to pay training expenses under training law. Since training law provides for paying expenses of temporary duty training assignments not found in other law, OPM agrees with the comments and has retitled this subsection and revised it to read:

Section 410.403—Payments for temporary duty training assignments.

Section 4109(a)(2) of title 5, United States Code, provides that an agency may pay, or reimburse an employee for, all or a part of the necessary expenses of training, including the necessary costs of travel; per diem expenses; or limited relocation expenses including transportation of the immediate family, household goods and personal effects.

(a) If an agency chooses to pay per diem, or in unusual circumstances the actual subsistence, expenses for an employee on a temporary duty training assignment, payment must be in accordance with 41 CFR part 301–7 or 41 CFR part 301–8 (or, for commissioned officers of the National Oceanic and Atmospheric Administration, in accordance with sections 404 and 405 of title 37, United States Code, and the Joint Federal Travel Regulations for the Uniformed Services).

(b) An agency may pay a reduced per diem rate, such as a standardized payment less than the maximum per diem rate for a geographical area. If a reduced or standardized per diem rate was not authorized in advance of the travel and the fees paid to a training institution include lodging or meal costs, an appropriate deduction shall be made from the total per diem rate payable on the travel voucher (see 41 CFR 301–7.12).

(c) An agency may pay limited relocation expenses for the transportation of the employee's immediate family, household goods and personal effects, including packing, crating, temporarily storing, draying, and unpacking the household goods in accordance with section 5724 of title 5, United States Code (or, for commissioned officers of the National Oceanic and Atmospheric Administration, in accordance with sections 406 and 409 of title 37, United States Code, and the Joint Federal Travel Regulations for the Uniformed Services). Limited relocation expenses are payable only when the estimated costs of transportation and related services are less than the estimated aggregate per diem or actual subsistence expense payments for the period of training. An employee selected for temporary duty training may receive travel and per diem (or actual subsistence expenses) for the period of the assignment or payment of limited relocation expenses, but not both.''

Section 410.404—Determining if a conference is a training activity. Two agencies said the wording of the interim regulation was too broad to be of much assistance in determining if a conference is a training activity. Both suggested further clarification. Response: OPM agrees that the language is too broad and has revised the subsection to read:

''Agencies may sponsor an employee's attendance at a conference as a developmental assignment under section 4110 of title 5, United States Code, when—

(a) The announced purpose of the conference is educational or instructional;

(b) More than half of the time is scheduled for a planned, organized exchange of information between presenters and audience which meets the definition of training in section 4101 of title 5, United States Code;

(c) The content of the conference is germane to improving individual and/or organizational performance, and

(d) Developmental benefits will be derived through the employee's attendance.''

Section 410.406—Records of training expenses. One agency suggested revising the subsection so that it would read similarly to other subsections on recordkeeping. Response: For uniformity, the subsection has been revised to read: ''Agencies shall retain, in such form and manner as the agency head considers appropriate, a record of payments made for travel, tuition, fees and other necessary training expenses for a reasonable period of time.''

Subpart E—Accepting Contributions, Awards, and Payments From Non-Government Organizations

OPM received no comments on this subpart.

Subpart F—Evaluating Training

Section 410.601—Responsibility of the head of an agency to evaluate training. One agency suggested that cost-effectiveness be added to this subsection. Response: Since evaluating cost-effectiveness is an inherent component of evaluation, we believe the additional language is unnecessary.

Section 410.602—Records. One agency suggested revising the subsection so that it would read similarly to others on recordkeeping. Response: For uniformity, this subsection has been revised to read: ''An agency head shall retain records of these evaluations in such form and manner as the agency head considers appropriate.''

Subpart G—Reports

Section 410.701—Reports. One agency suggested that subpart G be renamed ''Records and Reports'' and be rewritten to incorporate the several sections on recordkeeping (§ 410.312, § 410.406, § 410.503, and § 410.602). Another agency recommended that the requirement for agencies to provide information to OPM in the form that OPM prescribes be dropped. Response: The structure of the regulation has been left intact. However, for clarity, the subsection has been revised to cite the recordkeeping provisions. Section 4118(a)(7) of title 5 United States Code, requires the agencies to submit reports to the Office of Personnel Management on the results and effects of training programs and plans and economies resulting therefrom, including estimates of costs of training. Although OPM will

work with the agencies regarding the form of these reports, OPM, as part of its oversight responsibilities, must retain its authority to prescribe the form of the reports. Section 410.701 has been revised to read: ''Each agency shall maintain records of its training plans, expenditures and activities as required in § 410.302(d), § 410.312, § 410.406, § 410.503, and § 410.602 and report its plans, expenditures and activities to the Office of Personnel Management at such times and in such form as the Office prescribes.''

Regulatory Flexibility Act

I certify that these regulations will not have significant economic impact on a substantial number of small entities because they affect only Federal employees and agencies.

List of Subjects in 5 CFR Part 410

Education, Government employees.

U.S. Office of Personnel Management,
James B. King,
Director.

Accordingly, the Office of Personnel Management is revising 5 CFR part 410 as follows:

PART 410—TRAINING

Subpart A—General Provisions

Subpart B—Planning for Training

Subpart C—Establishing and Implementing Training Programs

Subpart D—Paying for Training Expenses

Subpart E—Accepting Contributions, Awards, and Payments From Non-Government Organizations

Subpart F—Evaluating Training

Subpart G—Reports

Authority: 5 U.S.C. 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275.

Subpart A—General Provisions

§ 410.101 Definitions.

In this part:

(a) *Agency, employee, Government, Government facility,* and *non-Government facility* have the meanings given these terms in section 4101 of title 5, United States Code.

(b) Exceptions to organizations and employees covered by this subpart include:

(1) Those named in section 4102 of title 5, United States Code, and

(2) The U.S. Postal Service and Postal Rate Commission and their employees, as provided in Pub. L. 91–375, enacted August 12, 1970.

(c) *Training* has the meaning given to the term in section 4101 of title 5, United States Code.

(d) *Mission-related training* is training that supports agency goals by improving organizational performance at any appropriate level in the agency, as determined by the head of the agency. This includes training that:

(1) Supports the agency's strategic plan and performance objectives;

(2) Improves an employee's current job performance;

(3) Allows for expansion or enhancement of an employee's current job;

(4) Enables an employee to perform needed or potentially needed duties outside the current job at the same level of responsibility; or

(5) Meets organizational needs in response to human resource plans and re-engineering, downsizing, restructuring, and/or program changes.

(e) *Retraining* means training and development provided to address an individual's skills obsolescence in the current position and/or training and development to prepare an individual for a different occupation, in the same agency, in another Government agency, or in the private sector.

(f) *Continued service agreement* has the meaning given to service agreements in section 4108 of title 5, United States Code.

(g) *Interagency training* means training provided by one agency for other agencies or shared by two or more agencies.

(h) *State and local government* have the meanings given to these terms by section 4762 of title 42, United States Code.

Subpart B—Planning for Training

§ 410.201 Responsibilities of the head of an agency.

As stated in section 4103 of title 5, United States Code, and in Executive Order 11348, the head of each agency shall:

(a) Establish, budget for, operate, maintain, and evaluate a program or programs, and a plan or plans thereunder, for training agency employees by, in, and through Government and non-Government facilities;

(b) Determine policies governing employee training, including a statement of broad purposes for agency training, the assignment of responsibility for seeing that these purposes are achieved, and the delegation of training approval authority to the lowest possible level; and

(c) Establish priorities for training employees and provide for funds and staff according to these priorities.

§ 410.202 Integrating employee training and development with agency strategic plans.

(a) Agencies shall include mission-related training and development in agency strategic planning to ensure that:

(1) Agency training strategies and activities contribute to mission accomplishment; and

(2) Organizational performance goals are met.

(b) Agency human resource development programs and plans should:

(1) Improve employee and organizational performance; and

(2) Build and support an agency workforce capable of achieving agency mission and performance goals.

§ 410.203 Assessing organizational, occupational, and individual needs.

(a) *Assessment.* Section 303 of Executive Order 11348 specifies the responsibility of heads of agencies to assess agency training needs annually.

(b) *Method.* The method an agency uses to conduct training needs assessment shall meet the requirements of chapter 41 of title 5, United States Code, Executive Order 11348, and this subpart.

§ 410.204 Options for developing employees.

Agencies may use a full range of options to meet their mission-related organizational and employee development needs, such as classroom training, on-the-job training, technology-based training, satellite training, employees' self-development activities, coaching, mentoring, career development counseling, details, rotational assignments, cross training, and developmental activities at retreats and conferences.

Subpart C—Establishing and Implementing Training Programs

§ 410.301 Scope and general conduct of training programs.

(a) Authority. The requirements for establishing training programs and plans are found in section 4103(a) of title 5, United States Code, and Executive Order 11348.

(b) Alignment with other human resource functions. Training programs established by agencies under chapter 41 of title 5, United States Code, should be integrated with other personnel management and operating activities, under administrative agreements as appropriate, to the maximum possible extent.

§ 410.302 Responsibilities of the head of an agency.

(a) Specific responsibilities. (1) The head of each agency shall prescribe procedures as are necessary to ensure that the selection of employees for training is made without regard to political preference, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights as provided by merit system principles set forth in 5 U.S.C. 2301 (b)(2).

(2) The head of each agency shall prescribe procedures as are necessary to ensure that the training facility and curriculum are accessible to employees with disabilities.

(3) The head of each agency shall not allow training in a facility that discriminates in the admission or treatment of students.

(b)(1) Training of Presidential appointees. The Office of Personnel Management delegates to the head of each agency authority to authorize training for officials appointed by the President. In exercising this authority, the head of an agency must ensure that the training is in compliance with chapter 41 of title 5, United States Code, and with this part. This authority may not be delegated to a subordinate.

(2) Records. When exercising this delegation of authority, the head of an agency must maintain records that include:

(i) The name and position title of the official;

(ii) A description of the training, its location, vendor, cost, and duration; and

(iii) A statement justifying the training and describing how the official will apply it during his or her term of office.

(3) Review of delegation. Exercise of this authority is subject to U.S. Office of Personnel Management review.

(c)Training for the head of an agency. Since self-review constitutes a conflict of interest, heads of agencies must submit their own requests for training to the U.S. Office of Personnel Management for approval.

(d) The head of the agency shall establish the form and manner of maintaining agency records related to training plans, expenditures, and activities.

(e) The head of the agency shall establish written procedures which cover the minimum requirements for continued service agreements. (See also 5 CFR 410.310.)

§ 410.303 Employee responsibilities.

Employees are responsible for self-development, for successfully completing and applying authorized training, and for fulfilling continued service agreements. In addition, they share with their agencies the responsibility to identify training needed to improve individual and organizational performance and identify methods to meet those needs, effectively and efficiently.

§ 410.304 Funding training programs.

Section 4112 of title 5, United States Code, provides for agencies paying the costs of their training programs and plans from applicable appropriations or from other funds available. Training costs associated with program accomplishment may be funded by appropriations applicable to that program area. In addition, section 4109(a)(2) of title 5, United States Code, provides authority for agencies and employees to share the expenses of training.

§ 410.305 Establishing and using interagency training.

Executive departments, independent establishments, Government corporations subject to chapter 91 of title 31, the Library of Congress, and the Government Printing office may provide or share training programs developed for its employees of other agencies under section 4120 of title 5, United States Code, when this would result in better training, improved service, or savings to the Government. Section 302(d) of Executive Order 11348 allows agencies excluded from section 4102 of title 5, United States Code, to also receive interagency training when this would result in better training, improved service, or savings to the Government. Section 201(e) of Executive Order 11348 provides for the Office of Personnel Management to coordinate interagency training conducted by and for agencies (including agencies and portions of agencies excepted by section 4102(a) of Title 5, United States Code).

§ 410.306 Selecting and assigning employees to training.

(a) Each agency shall establish criteria for the fair and equitable selection and assignment of employees to training consistent with merit system principles specified in 5 U.S.C. 2301(b) (1) and (2).

(b) Persons on Intergovernmental Personnel Act mobility assignments may be assigned to training if that training is in the interest of the Government.

(1) A State or local government employee given an appointment in a Federal agency under the authority of section 3374(b) of title 5 of the United States Code, is deemed an employee of the Federal agency. The agency may provide training for the State or local government employee as it does for other agency employees.

(2) A State or local government employee on detail to a Federal agency under the authority of section 3374(c) of title 5 of the United States Code, is not deemed an employee of the Federal agency. However, the detailed State or local government employee may be admitted to training programs the agency has established for Federal personnel and may be trained in the rules, practices, procedures and/or systems pertaining to the Federal government.

(c) Subject to the prohibitions of § 410.309(a) of this part, an agency may pay all or part of the training expenses of students hired under the Student Career Experience Program (see 5 CFR 213.3202(d)(10).

§ 410.307 Training for promotion or placement in other positions.

(a) *General.* In determining whether to provide training under this section, agencies should take into account:

(1) Agency authority to modify qualification requirements in certain situations as provided in the OPM Operating Manual for Qualification Standards for General Schedule Positions;

(2) Agency authority to establish training programs that provide intensive and directly job-related training to substitute for all or part of the experience (but not education, licensing, certification, or other specific credentials), required by OPM qualification standards. Such training programs may be established to provide employees with the opportunity to acquire the experience and knowledge, skills, and abilities necessary to qualify for another position (including at a higher grade) at an accelerated rate; and

(3) Time-in-grade restrictions on advancement (see 5 CFR 300.603(b)(6)).

(b) *Training for promotion.* Under the authority of 5 U.S.C. 4103, and consistent with merit system principles set forth in 5 U.S.C. 2301(b)(1) and (2), an agency may provide training to non-temporary employees that in certain instances may lead to promotion. An agency must follow its competitive procedures under part 335 of this chapter when selecting a non-temporary employee for training that permits noncompetitive promotion after successful completion of the training.

(c) *Training for placement in other agency positions, in other agencies, or outside Government.*—(1) *Grade or pay retention.* Under the authority of 5 U.S.C. 4103 and 5 U.S.C. 5364, an agency may train an employee to meet the qualification requirements of another position in the agency if the new position is at or below the retained grade or the grade of the position the employee held before pay retention.

(2) *Training for placement in another agency.* Under the authority of 5 U.S.C. 4103(b), and consistent with merit system principles set forth in 5 U.S.C. 2301, an agency may train an employee to meet the qualification requirements of a position in another agency if the head of the agency determines that such training would be in the interest of the Government.

(i) Before undertaking any training under this section, the head of the agency shall determine that there exists a reasonable expectation of placement in another agency.

(ii) When selecting an employee for training under this section, the head of the agency shall consider:

(A) The extent to which the employee's current skills, knowledge, and abilities may be utilized in the new position;

(B) The employee's capability to learn skills and acquire knowledge and abilities needed in the new position; and

(C) The benefits to the Government which would result from retaining the employee in the Federal service.

(3) *Training displaced or surplus employees.* Displaced or surplus employees as defined in 5 CFR 330.604(b) and (f) may be eligible for training or retraining for positions outside Government through programs provided under 29 U.S.C. 1651, or similar authorities. An agency may use its appropriated funds for training displaced or surplus employees for positions outside Government only when specifically authorized by legislation to do so.

(4) *Career transition assistance plans.* Under 5 CFR 330.602, agencies are required to establish career transition assistance plans (CTAP) to provide career transition services to displaced and surplus employees.

(i) Under the authority of 5 U.S.C. 4109, an agency may:

(A) Train employees in the use of the CTAP services;

(B) Provide vocational and career assessment and counseling services;

(C) Train employees in job search skills, techniques, and strategies; and

(D) Pay for training related expenses as provided in 5 U.S.C. 4109(a)(2).

(ii) Agency CTAP's will include plans for retraining displaced or surplus employees covered by this part.

§ 410.308 Training to obtain an academic degree.

(a) *Prohibition.* (1) Under 5 U.S.C. 4107(a), an agency may not authorize training for an employee to obtain an academic degree, except for shortage occupations as defined in § 410.308(b).

(2)(i) The prohibition on academic degree in 5 U.S.C. 4107(a)(2) is not to be construed as limiting the authority of agencies to approve and pay for training expenses to develop knowledge, skills, and abilities directly related to improved individual performance. If, in the accomplishment of such training, an employee receives an academic degree, the degree is an incidental by-product of the training.

(ii) Paying an additional rate of tuition because a student is a degree candidate is prohibited. An agency is only authorized to pay the tuition and fees charged for a nondegree student, even though the employee is enrolled as a degree candidate. If it is not possible to distinguish between costs associated with the acquisition of knowledge and skills and the costs associated with the acquisition of an academic degree at an institution, an agency is authorized to pay in full the tuition of an employee participating in an authorized program of training at that institution.

(b) *Academic degree training to relieve recruitment and retention problems.* (1) 5 U.S.C. 4107(b) allows an agency to authorize academic degree training if the training:

(i) Is necessary to assist in recruiting or retaining employees in occupations in which the agency has or anticipates a shortage of qualified personnel, especially in occupations which it has determined involve skills critical to its mission, and

(ii) Meets the conditions of this section.

(2) In reviewing the need to provide training under this section, an agency shall give appropriate consideration to any special salary rate, student loan repayment, retention allowance, or other monetary inducement authorized by law already provided or being provided which contributes to the alleviation of the staffing problem in the occupation targeted by that training.

(3) In exercising the authority in this section, an agency shall, consistent with the merit system principles set forth in 5 U.S.C. 2301(b)(1) and (2), take into consideration the need to maintain a balanced workforce in which women and members of racial and ethnic minority groups are appropriately represented in the agency.

(4) The authority in this section shall not be exercised on behalf of any employee occupying, or seeking to qualify for appointment to, any position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

(5) An agency's policies established under § 410.201 of this part shall cover decisions to authorize training under this section, to ensure that:

(i) The determination to pay for degree training is made at a sufficiently high level so as to protect the Government's interest; and

(ii) The authority is used to address the agency's recruitment and retention problems expeditiously though appropriate delegations of authority.

(c) *Determining recruitment and retention problems.* For the purposes of this section, a recruitment or retention problem exists if the criteria for a recruitment bonus under 5 CFR 575.104(c)(2) or for a retention allowance under 5 CFR 575.305(c)(3) applies.

(1) *Recruitment problem.* Before determining that an agency has or anticipates a problem in the recruitment of qualified personnel for a particular position, an agency shall make a reasonable recruitment effort, including factors in 5 CFR 575.104(c)(2). In making a reasonable recruitment effort, an agency will consider the following:

(i) For a position in the competitive service, the results of requests for referral of eligibles from the appropriate competitive examination. For a position in the excepted service, the agency's objectives and staffing procedures.

(ii) Contacts with State Employment Service office(s) serving the locality concerned.

(iii) Contacts with academic institutions, technical and professional organizations, and other organizations likely to produce qualified candidates for the position, including women's and minority-group organizations.

(iv) The possibility of relieving the shortage through broader publicity and recruitment.

(v) The availability of qualified candidates within the agency's current work force.

(vi) The possibility of relieving the shortage through job engineering or training of current employees.

(2) *Retention problem.* Before determining that an agency has or anticipates a problem in the retention of qualified personnel in a particular occupation, an agency shall consider the factors in 5 CFR 575.305(c)(3) and:

(i) The ease with which an agency could replace the employee with someone of comparable background;

(ii) The current and projected vacancy rates in the occupation;

(iii) The rate of turnover in the occupation; and

(iv) Technological changes affecting the occupation and long-range predictions affecting staffing for the occupation.

(d) *Assessing continuing problems.* A reassessment of a ''continuing'' recruitment or retention problem shall be made periodically.

(e) *Authorizing training.* (1) An agency may authorize full or part-time training to address a recruitment problem if—

(i) The training qualifies an employee for a shortage position identified under paragraph (c)(1) of this section; and

(ii) The agency expects to place the employee in the shortage position after the training.

(2) Training may be authorized under this section for the purpose of retaining an employee in a shortage occupation identified under paragraph (c)(2) of this section, if it involves a course of study selected mainly for its potential contribution to effective performance in that occupation.

(3) Agencies shall select employees for academic degree training according to competitive procedures as specified in § 410.306.

(f) *Monitoring training.* An agency shall assess the contribution of training assignments under this section to resolving recruitment or retention problems in its shortage occupations.

(g) *Documentation.* (1) In exercising the authority in this section, an agency shall retain for a reasonable period:

(i) A record of employees assigned to training under this section; and

(ii) A record of findings that the recruitment or retention problem is a continuing one.

(2) As a separate record, the servicing personnel office shall keep the following information for each employee assigned to training under this section:

(i) Nature and justification for the shortage determination;

(ii) Kind of training (e.g., career experience program, continuing professional and technical education, retraining for occupational change); a description of the field of study; and the nature of any degree pursued under the training program; and

(iii) A written continued service agreement, if required.

§ 410.309 Agreements to continue in service.

(a) *Authority.* Continued service agreements are provided for in section 4108 of title 5, United States Code. Agencies have the authority to determine when such agreements will be required.

(b) *Requirements.* (1) The head of the agency shall establish written procedures which include the minimum requirements for continued service agreements. These requirements shall include procedures the agency considers necessary to protect the Government's interest should the employee fail to successfully complete training.

(2) An employee selected for training subject to an agency continued service agreement must sign an agreement to continue in service after prior to starting the training. The period of service will equal at least three times the length of the training.

(c) *Failure to fulfill agreements.* With a signed agreement, the agency has a right to recover training costs, except pay or other compensation, if the employee voluntarily separates from Government service. The agency shall provide procedures to enable the employee to obtain a reconsideration of the recovery amount or to appeal for a waiver of the agency's right to recover.

§ 410.310 Computing time in training.

For the purpose of computing time in training for continued service agreements under section 4108 of title 5, United States Code:

(a) An employee on an 8-hour day work schedule assigned to training is counted as being in training for the same number of hours he or she is in pay status during the training assignment. If the employee is not in pay status during the training, the employee is counted as being in training for the number of hours he or she is granted leave without pay for the purpose of the training.

(b) For an employee on an alternative work schedule, the agency is responsible for determining the number of hours the employee is in pay status during the training assignment. If the employee is not in pay status during the training, the employee is counted as being in training for the number of hours he or she is granted leave without pay for the purpose of the training.

(c) An employee on an 8-hour or an alternative work schedule assigned to training on less than a full-time basis is counted as being in training for the number of hours he or she spends in class, in formal computer-based training, in satellite training, in formal self-study programs, or with the training instructor, unless a different method is determined by the agency.

§ 410.311 Records.

Agencies shall retain, in such form and manner as the agency head considers appropriate, a record of training events authorized under this subpart for a reasonable period of time.

Subpart D—Paying for Training Expenses

§ 410.401 Determining necessary training expenses.

(a) The head of an agency determines which expenses constitute necessary training expenses under section 4109 of title 5, United States Code.

(b) An agency may pay, or reimburse an employee, for necessary expenses incurred in connection with approved training as provided in section 4109(a)(2) of title 5, United States Code. Necessary training expenses do not include an employee's pay or other compensation.

§ 410.402 Paying premium pay.

(a) *Prohibitions.* Except as provided by paragraph (b) of this section, an agency may not use its funds,

appropriated or otherwise available, to pay premium pay to an employee engaged in training by, in, or through Government or non-government facilities.

(b) *Exceptions.* The following are excepted form the provision in paragraph (a) of this section prohibiting the payment of premium pay:

(1) *Continuation of premium pay.* An employee given training during a period of duty for which he or she is already receiving premium pay for overtime, night, holiday, or Sunday work shall continue to receive that premium pay. This exception does not apply to an employee assigned to full-time training at institutions of higher learning.

(2) *Training at night.* An employee given training at night because situations that he or she must learn to handle occur only at night shall be paid by the applicable premium pay.

(3) *Cost savings.* An employee given training on overtime, on a holiday, or on a Sunday because the costs of the training, premium pay included, are less than the costs of the same training confined to regular work hours shall be paid the applicable premium pay.

(4) *Availability pay.* An agency shall continue to pay availability pay during agency-sanctioned training to a criminal investigator who is eligible for it under 5 U.S.C. 5545a and implementing regulations. Agencies may, at their discretion, provide availability pay to investigators during periods of initial, basic training. (See 5 CFR 550.185 (b) and (c).)

(5) *Standby and administratively uncontrollable duty.* An agency may continue to pay annual premium pay for regularly scheduled standby duty or administratively uncontrollable overtime work, during periods of temporary assignment for training as provided by 5 CFR 550.162(c).

(6) *Agency exemption.* An employee given training during a period not otherwise covered by a provision of this paragraph may be paid premium pay when the employing agency has been granted an exception to paragraph (a) of this section by the U.S. Office of Personnel Management.

(c) An employee who is excepted under paragraph (b) of this section is eligible to receive premium pay in accordance with the applicable pay authorities.

(d) *Overtime pay under the Fair Labor Standards Act (FLSA).* (1) Time spent in training or preparing for training outside regular working hours shall be considered hours of work for the purpose of computing FLSA overtime if an agency requires the training to bring performance up to a fully successful, or equivalent level or to provide knowledge or skills to perform new duties and responsibilities in the employee's current position. (See also 5 CFR 551.423 and 29 CFR 785.27 through 785.32.)

(2) Time spent in training or preparing for training outside the employee's regular working hours for the following purposes is not hours of work:

(i) Training to improve a nonexempt employee's performance in his or her current position above a fully successful, or equivalent level, provided such training is undertaken with the knowledge that the employee's performance or continued retention in his or her current position will not be adversely affected by nonenrollment in the training program; or

(ii) Training to provide a nonexempt employee with additional knowledge or skills for reassignment to another position or advancement to a higher grade in another position, even if such training is directed by the agency. (See also 29 CFR 785.27 through 785.32).

(e) Compensation for time spent traveling to and from training. (1) Compensation provisions are contained in 5 CFR 550.112(g) for time spent traveling for employees subject to title 5 of the United States Code.

(2) Compensation provisions are contained in 5 CFR 551.422 for time spent traveling for employees covered by the Fair Labor Standards Act. (See also 29 CFR 785.33 through § 785.41.)

§ 410.403 Payments for temporary duty training assignments.

Section 4109(a)(2) of title 5, United States Code, provides that an agency may pay, or reimburse an employee for, all or a part of the necessary expenses of training, including the necessary costs of travel; per diem expenses; or limited relocation expenses including transportation of the immediate family, household goods and personal effects:

(a) If an agency chooses to pay per diem, or in unusual circumstances the actual subsistence, expenses for an employee on a temporary duty training assignment, payment must be in accordance with 41 CFR part 301–7 or 41 CFR part 301–8 (or, for commissioned officers of the National Oceanic and Atmospheric Administration, in accordance with sections 404 and 405 of title 37, United States Code, and the Joint Federal travel Regulations for the Uniformed Services).

(b) An agency may pay a reduces per diem rate, such as a standardized payment less than the maximum per diem rate for a geographical area. If a reduced or standardized per diem rate was not authorized in advance of the travel and the fees paid to a training institution include lodging or meal costs, an appropriate deduction shall be made from the total per diem rate payable on the travel voucher (see 41 CFR 301–7.12).

(c) An agency may pay limited relocation expenses for the transportation of the employee's immediate family, household goods and personal effects, including packing, crating, temporarily storing, draying, and unpacking the household goods in accordance with section 5724 of title 5, United States Code (or, for commissioned officers of the National Oceanic and Atmospheric Administration, in accordance with sections 406 and 409 of title 37, United States Code, and the Joint federal travel Regulations for the uniformed Services). Limited relocation expenses are payable only when the estimated costs of transportation and related services are less than the estimated aggregate per diem or actual subsistence expense payments for the period of training. An employee selected for temporary duty training may receive travel and per diem (or actual subsistence expenses) for the period of the assignment or payment of limited relocation expenses, but not both.

§ 410.404 Determining if a conference is a training activity.

Agencies may sponsor an employee's attendance at a conference as a developmental assignment under section 4110 of title 5, United States Code, when—

(a) The announced purpose of the conference is educational or instructional;

(b) More than half of the time is scheduled for a planned, organized exchange of information between presenters and audience which meets the definition of training in section 4101 of title 5, United States Code;

(c) The content of the conference is germane to improving individual and/or organizational performance, and

(d) Development benefits will be derived through the employee's attendance.

§ 410.405 Protection of Government interest.

The head of an agency shall establish such procedures as he or she considers necessary to protect the Government's interest when employees fail to complete, or to successfully complete, training for which the agency pays the expenses.

§ 410.406 Records of training expenses.

Agencies shall retain, in such form and manner as the agency head considers appropriate, a record of payments made for travel, tuition, fees and other necessary training expenses for a reasonable period of time.

Subpart E—Accepting Contributions, Awards, and Payments From Non-Government Organizations

§ 410.501 Scope.

(a) Section 4111 of title 5, United States Code, describes conditions for employee acceptance of contributions, awards, and payments made in connection with non-Government sponsored training or meetings which an employee attends while on duty when the agency pays the training or meeting attendance expenses, in whole or in part.

(b) This subpart does not limit the authority of an agency head to establish procedures on the acceptance of contributions, awards, and payments in connection with any training and meetings that are outside the scope of this subpart in accordance with laws and regulations governing Government ethics and governing acceptance of travel reimbursements from non-Federal sources.

§ 410.502 Authority of the head of an agency.

(a) In writing, the head of an agency may authorize an agency employee to accept a contribution or award (in cash or in kind) incident to training or to accept payment (in cash or in kind) of travel, subsistence, and other expenses incident to attendance at meetings if

(1) The conditions specified in section 4111 of title 5, United States Code, are met; and

(2) In the judgment of the agency head, the following two conditions are met:

(i) The contribution, award, or payment is not a reward for services to the organization prior to the training or meeting; and

(ii) Acceptance of the contribution, award, or payment:

(A) Would not reflect unfavorably on the employee's ability to carry out official duties in a fair and objective manner;

(B) Would not compromise the honesty and integrity of Government programs or of Government employees and their official actions or decisions;

(C) Would be compatible with the Ethics in Government Act of 1978, as amended; and

(D) Would otherwise be proper and ethical for the employee concerned given the circumstances of the particular case.

(b) Delegation of authority. An agency head may delegate authority to authorize the acceptance of contributions, awards, and payments under this section. The designated official must ensure that—

(1) The policies of the agency head are reflected in each decision; and

(2) The circumstances of each case are fully evaluated under conditions set forth in § 410.502(a).

(c) Acceptance of contributions, awards, and payments. An employee may accept a contribution, award, or payment (whether made in cash or in kind) that falls within the scope of this section only when he or she has specific written authorization.

(d) When more than one non-Government organization participates in making a single contribution, award, or payment, the ''organization'' referred to in this subsection is the one that:

(1) Selects the recipient; and

(2) Administers the funds from which the contribution, award, or payment is made.

§ 410.503 Records.

An agency shall maintain, in such form and manner as the agency head considers appropriate, the following records in connection with each contribution, awards, or payment made and accepted under authority of this section: The recipient's name; the organization's name; the amount and nature of the contribution, award, or payment and the purpose for which it is to be used; and a copy of the written authorization required by § 410.502(a).

Subpart F—Evaluating Training

§ 410.601 Responsibility of the head of an agency.

Under provisions of chapter 41 of title 5, United States Code, and Executive Order 11348, the agency head shall evaluate training to determine how well it meets short and long-range program needs by occupations, organizations, or other appropriate groups. The agency head may conduct the evaluation in the manner and frequency he or she considers appropriate.

§ 410.602 Records.

An agency head shall retain records of these evaluations in such form and manner as he or she considers appropriate.

Subpart G—Reports

§ 410.701 Reports.

Each agency shall maintain records of its training plans, expenditures and activities as required in § 410.302(d), § 410.312, § 410.406, § 410.503, and § 410.602 and report its plans, expenditures and activities to the Office of Personnel Management at such times and in such form as the Office prescribes.

[FR Doc. 96–31975 Filed 12–16–96; 8:45 am]

BILLING CODE 6325–01–M

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 94–022F–2]

RIN 0583–AC24

Use of the Term ''Fresh'' on the Labeling of Raw Poultry Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the poultry product inspection regulations to prohibit the use of the term ''fresh'' on the labeling of raw poultry products whose internal temperature has ever been below 26°F. Raw poultry products whose internal temperature has ever been below 26°F, but is above 0°F, are not required to bear any specific, descriptive labeling terms, including ''hard chilled'' or ''previously hard chilled.'' These products may contain optional, descriptive labeling, provided the optional, descriptive labeling does not cause the raw poultry products to be misbranded. Products whose internal temperature has ever been at or below 0°F will continue to be labeled with the term ''frozen.'' The rule also establishes a temperature tolerance below the 26°F standard for labeling product as ''fresh.''

FSIS is taking this action in response to legislation enacted by the United States Congress directing FSIS to issue a revised final rule about the labeling of raw poultry products.

EFFECTIVE DATE: Effective upon December 17, 1996 9 CFR 381.129(b)(6) is stayed through December 16, 1997. The amendatory changes in this rule will be effective December 17, 1997.

FOR FURTHER INFORMATION CONTACT: Charles R. Edwards, Director, Facilities, Equipment, Labeling & Compounds Review Division; (202) 418–8900.

SUPPLEMENTARY INFORMATION:

Background

On January 17, 1995, FSIS published a proposed rule in the Federal Register

(60 FR 3454) to amend the poultry products inspection regulations to prohibit the use of the term ''fresh'' on the labels of raw poultry products whose internal temperature has ever been below 26°F. The proposal would have required that poultry products whose internal temperature had ever been below 26°F, but above 0°F, be labeled with the descriptive term ''previously frozen.'' Raw poultry products whose internal temperature had ever been at or below 0°F would have had to be labeled with the descriptive term ''frozen'' or ''previously frozen,'' except when such labeling would have duplicated or conflicted with the products'' special handling instructions.

FSIS sought comments on a variety of issues raised in the proposal, including alternative descriptive terms and the use of the term ''fresh'' in brand names, company names, sensory modifiers, etc., on the labels of raw poultry products. FSIS received more than 26,000 comments in response to the proposal. The comments expressed widely diverse opinions about a variety of issues, such as the meaning of the term ''fresh'' as applied to poultry, safety issues, including a temperature threshold, descriptive labeling and alternate terms, and the relabeling of product and relabeling options. FSIS modified the proposed rule in response to the comments and, on August 25, 1995, published a final rule in the Federal Register (60 FR 44396).

As proposed, the final rule amended the poultry products inspection regulations to prohibit the use of the term ''fresh'' on raw poultry product labels if the internal temperature of the poultry product had ever been below 26°F. However, rather than requiring that poultry products whose internal temperature has ever been below 26°F, but above 0°F, be labeled with the descriptive term ''previously frozen,'' the final rule required that those products be labeled with the descriptive term ''hard chilled'' or ''previously hard chilled.'' The final rule also added requirements for the handling and relabeling of misbranded raw poultry products. The final rule's intent was to require clear, descriptive labeling on raw poultry products so that consumers would know if raw poultry products have ever been held at temperatures where the flesh becomes hard-to-the-touch, i.e., an internal temperature below 26°F.

The final rule was to become effective on August 26, 1996. However, on October 21, 1995, Congress passed the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1996, Public Law 104–37, 109 Stat. 299 (1995). Section 726 of that Act prevented FSIS's ''Use of the Term ''Fresh'' on the Labeling of Raw Poultry Products'' final rule from taking effect and prohibited FSIS from using any funds appropriated or otherwise made available by the Act to develop compliance guidelines, implement, or enforce the final rule.

On August 8, 1996, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1997, Public Law 104–80, 110 Stat. 1569 (1996) (1996 Appropriations Act) was signed. Section 732(b) of this Act, entitled ''Labeling of Raw Poultry Products,'' instructed the Secretary of Agriculture to issue, within 90 days, a revised final rule related to the labeling of raw poultry products which would replace certain, specified provisions of FSIS's original August 25, 1995, ''Use of the Term ''Fresh'' on the Labeling of Raw Poultry Products'' final rule with provisions stipulated by Congress.

The law specifies that the revised final rule (1) maintain the requirement promulgated in FSIS's original final rule that the term ''fresh'' may only be used to describe raw poultry products whose internal core temperature has never fallen below 26° F and (2) delete the requirement in the original final rule that poultry products whose internal core temperature has ever been less than 26° F, but more than 0° F, be labeled ''hard chilled'' or ''previously hard chilled.'' The law also declares that poultry products whose internal core temperature has ever been between 0° F and 26° F may not be required to bear any specific alternative labeling. The law does not alter the requirement that poultry products whose internal core temperature has ever been at or below 0° F be labeled ''frozen'' or ''previously frozen.''

To be in compliance with the law and this revised final rule, those raw poultry products that are labeled ''fresh'' but are found to have an internal temperature below 26° F will have to be correctly relabeled by having the ''fresh'' designation deleted from the package. The ''fresh'' designation may be deleted from packages of raw poultry products by any method consistent with the poultry products inspection regulations, including the use of pressure-sensitive stickers. Under 9 CFR 381.133(b)(9)(xxiv), the deletion of any claim, non-mandatory features, or non-mandatory information which was previously approved by FSIS is generically approved. FSIS Policy Memo 115, which currently requires the temporary approval of pressure sensitive stickers before they may be used to cover any information on an approved label, is being amended to permit the generic approval of pressure sensitive stickers. Official establishments will be permitted to cover labels of packages of raw poultry products incorrectly labeled ''fresh'' with pressure sensitive stickers. The stickers must be the type which destroy the underlying label or package if removed or be self-destructive.

The 1997 Appropriations Act establishes a temperature tolerance from the 26° F labeling standard for ''fresh.'' A temperature tolerance of 1° F is established for poultry products within an official processing establishment and 2° F for poultry products in commerce. FSIS has interpreted the temperature tolerance to mean that the temperature of individual packages of raw poultry products labeled ''fresh'' can vary as much as 1° below 26° F (i.e., 25° F) while such product is within an official establishment or 2° below 26° F (i.e., 24° F) after such product leaves an official establishment. The law exempts ''wings, tenders, hearts, livers, gizzards, necks, and products that undergo special processing, such as sliced poultry products,'' from temperature testing.

Further, the law requires FSIS to issue a compliance directive for the enforcement of the labeling standards established by the revised final rule. The law requires the compliance directive to include provisions for measuring temperature at the center of the deepest muscle being tested and a sampling plan designed to ''ensure that the average of individual temperatures within poultry product lots of each specific product type (such as whole birds, whole muscle leg products, and whole muscle breast products) meet the standards.''

The compliance directive will include a sampling plan that ensures that the average temperature of poultry product lots of each specific product type (such as whole birds, whole muscle leg products, and whole muscle breast products) meet the 26° F standard for ''fresh.'' The compliance directive will be used by FSIS to monitor establishment, processor, and retailer compliance with the labeling requirements in the revised final rule. Poultry products not in compliance with the requirements for ''fresh'' shall be handled and relabeled in accordance with the provisions of the August 25, 1995 final rule, as amended by this action. FSIS will publish the compliance directive no later than 60 days after publication of this revised final rule, as directed by Congress.

Implementation Date

Based on its review of the comments submitted in response to the proposed rule, FSIS recognized that some poultry processors might need to make operational changes so they could continue to supply ''fresh'' poultry under the provisions of the original final rule. FSIS therefore decided to allot processors and handlers sufficient time to make any of these operational changes, which might have included establishing new policies and procedures needed to market ''fresh'' poultry, formulating methods for compliance with the rule, and exhausting label inventories to the extent possible. Recognizing that product safety was not a concern, FSIS established an implementation date for the original final rule of 12 months from the date of its promulgation. As noted above, however, Congress prevented that rule from taking effect.

The 1997 Appropriations Act states that ''the Secretary of Agriculture shall issue a revised final rule related to the labeling of raw poultry products that * * * in all other terms and conditions (including the period of time permitted for implementation) is substantively identical'' to the final rule promulgated by FSIS on August 25, 1995. The law also stipulates that the revised final rule cannot be effective during fiscal year 1997.

Therefore, FSIS is establishing an implementation date for all provisions of this revised final rule, as well as the provisions of the August 25, 1995 final rule which are not being amended by this revised final rule, of 12 months from the date of promulgation. This is the same period of time provided for implementation in the original final rule and the corresponding effective date will not fall during fiscal year 1997.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. (1) All state and local laws and regulations that are inconsistent with this rule are preempted; (2) this rule has no retroactive effect; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been determined to be significant and was reviewed by OMB under Executive Order 12866.

In the preambles to the proposed (60 FR 3454) and final (60 FR 44396) rules, FSIS examined possible sources of costs to consumers and the poultry industry if it adopted the proposed rule as a final rule. Except for the costs associated with relabeling raw poultry products that had originally been labeled ''fresh'' but must be relabeled to remove that designation (because the product's internal temperature has fallen below 26°F), all other costs and the assumptions upon which they were based remain the same in this revised final rule as they were in the original final rule. FSIS believes that the relabeling costs to the poultry industry will either remain the same or decrease from those estimated in the original final rule.

Under this revised final rule, those raw poultry products that are labeled ''fresh'' but are ever found to have had an internal temperature below 26°F will have to be correctly relabeled by having the ''fresh'' designation deleted from the package. However, they will not have to be relabeled with any specific alternative descriptive term (unless their temperature should fall to or below 0°F, at which point they will have to be relabeled with the descriptive term ''frozen''). Raw poultry products with an internal temperature below 26°F that were never labeled ''fresh'' will not have to be relabeled.

FSIS believes that relabeling costs can be minimized considerably by the use of pressure sensitive stickers, rather than brand new labels containing optional, descriptive terms. The stickers may be used as needed and are generically approved. Stickers may also be used in those circumstances where label inventory stocks exceed a 1-year supply. This feature will be of interest to processors and retailers when relabeling of product becomes necessary, i.e., when the temperature of product labeled ''fresh'' falls below the permissible temperature tolerance. Though that product will no longer have to be relabeled ''hard chilled,'' the ''fresh'' label will have to be covered or removed from the package under this revised final rule.

In the original final rule, FSIS stated that the new labeling strategy offers consumers a true purchasing option that accurately reflects their expressed expectations. FSIS believes that consumers will continue to benefit from improved consumer knowledge about poultry products under the provisions of this revised final rule. However, there may be some decrease in consumer benefits because the revised final rule will not require specific labeling on poultry products with temperatures between 0°F and 26°F.

The Administrator has determined that this revised final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). The small entities that might be affected by this revised final rule would be small processors of raw poultry (small establishments operating single-inspector processing lines). However, the economic impact of the revised final rule on these poultry processors should be minimal because they currently ship poultry in ice pack or dry ice pack containers. The internal temperature of products refrigerated by these methods does not generally fall below 26°F, and products handled in this manner which remain at or above 26°F may be labeled as ''fresh'' according to the regulations.

Paperwork Requirements

This revised final rule specifies the regulations permitting the use of the term ''fresh'' on the labeling of raw poultry products. Paperwork requirements contained in this revised final rule have not changed significantly and are approved by the Office of Management and Budget under control number 0583–0102.

List of Subjects in 9 CFR Part 381

Food Labeling, Poultry and poultry products.

For the reasons set forth in the preamble, 9 CFR part 381 is amended as follows:

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450, 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

2. Effective December 17, 1996 § 381.129(b)(6) is stayed effective stayed through December 16, 1997.

3. Effective December 17, 1997 § 381.129 is amended by revising paragraphs (b)(6)(i) and (ii), and by redesignating (b)(6)(iii) as (b)(6)(iv) and adding a new paragraph (b)(6)(iii) to read as follows:

§ 381.129 False or misleading labeling or containers.

* * * * *

(b) * * *

(6) (i) Raw poultry product whose internal temperature has ever been below 26°F may not bear a label declaration of ''fresh.'' Raw poultry product bearing a label declaration of ''fresh'' but whose internal temperature has never been below 26°F is mislabeled. The ''fresh'' designation may be deleted from such product in accordance with § 381.133(b)(9)(xxiv).

The temperature of individual packages of raw poultry product within an official establishment may deviate below the 26°F standard by 1° (i.e., have a temperature of 25°F) and still be labeled ''fresh.'' The temperature of individual packages of raw poultry product outside an official establishment may deviate below the 26°F standard by 2° (i.e., have a temperature of 24°F) and still be labeled ''fresh.'' The average temperature of poultry product lots of each specific product type must be 26°F. Product described in this paragraph is not subject to the freezing procedures required in § 381.66(f)(2) of this subchapter.

(ii) Raw poultry product whose internal temperature has ever been at or below 0°F must be labeled with the descriptive term ''frozen,'' except when such labeling duplicates or conflicts with the labeling requirements in § 381.125 of this subchapter. The word ''previously'' may be placed next to the term ''frozen'' on an optional basis. The descriptive term must be prominently displayed on the principal display panel of the label. If additional labeling containing the descriptive term is affixed to the label, it must be prominently affixed to the label. The additional labeling must be so conspicuous (as compared with other words, statements, designs, or devices in the labeling) that it is likely to be read and understood by the ordinary individual under customary conditions of purchase and use. Product described in this paragraph is subject to the freezing procedures required in § 381.66(f)(2) of this subchapter.

(iii) Raw poultry product whose internal temperature has ever been below 26°F, but is above 0°F, is not required to bear any specific descriptive term. Raw poultry product whose internal temperature has ever been below 26°F, but is above 0°F, may bear labeling with an optional, descriptive term, provided the optional, descriptive term does not cause the raw poultry product to become misbranded. If used, an optional, descriptive term must be prominently displayed on the principal display panel of the label. If additional labeling containing the optional, descriptive term is affixed to the label, it must be prominently affixed on the label. The additional labeling must be so conspicuous (as compared with other words, statements, designs, or devices in the labeling) that it is likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(iv) * * *

* * * * *

4. Effective December 17, 1997 § 381.133 is amended by revising paragraph (b)(9)(xxvi) and by adding a new paragraph (b)(9)(xxvii) to read as follows:

§ 381.133 Generically approved labeling.

* * * * *

(b) * * *

(9) * * *

(xxvi) The use of the descriptive term ''fresh'' in accordance with § 381.129(b)(6)(i) of this subchapter.

(xxvii) The use of the descriptive term ''frozen'' as required by § 381.129(b)(6)(ii) of this subchapter.

Done at Washington, DC, on December 11, 1996.

Thomas J. Billy,

Administrator.

[FR Doc. 96–31971 Filed 12–16–96; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–NM–249–AD; Amendment 39–9842; AD 96–25–01]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 747 series airplanes. This action requires inspections to detect broken sealant common to the lower horizontal clevis of the inboard and outboard strut midspar fittings and of the fasteners, and various follow-on actions. This action also requires inspections to detect cracking, corrosion, and fracturing of the lower horizontal clevis, and replacement of discrepant parts with new or serviceable parts, or repair, if necessary. This action also provides for optional terminating action for the inspections. This amendment is prompted by reports of fatigue cracking, stress corrosion cracking, and fracturing of the horizontal clevis of the inboard midspar fitting of the number three strut. The actions specified in this AD are intended to detect and correct such cracking and fracturing, which could result in drooping of the strut at the strut-to-wing interface, and consequent separation of the engine and strut from the airplane.

DATES: Effective January 22, 1997.

The incorporation by reference of certain publications, as listed in the regulations, is approved by the Director of the Federal Register as of January 22, 1997.

The incorporation by reference of certain other publications listed in the regulations was approved previously by the Director of the Federal Register as follows:

Referenced publication and date	Approval date and **Federal Register** citation
Boeing Alert Service Bulletin 747–54A2157, January 12, 1995	July 28, 1995 (60 FR 33333, June 28, 1995).
Boeing Alert Service Bulletin 747–54A2158, November 30, 1994	July 28, 1995 (60 FR 33336, July 28, 1995).
Boeing Alert Service Bulletin 747–54A2159, November 3, 1994	June 21, 1995 (60 FR 27008, May 22, 1995).

Comments for inclusion in the Rules Docket must be received on or before February 18, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–249–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

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

FOR FURTHER INFORMATION CONTACT: Tamara Dow, Aerospace Engineer,

Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98056–4056; telephone (206) 227–2771; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: The FAA has received a report indicating that a complete fracture of the lower horizontal clevis of the inboard midspar fitting across the second row of fasteners from the aft end of the fitting on the number 3 strut had occurred on a Boeing Model 747–200 series airplane equipped with Pratt & Whitney JT9D–7 series engines. Metallurgical analysis revealed that the fracture consisted of three separate cracks that were caused by fatigue from multiple origins on the corroded bore surface of the fitting holes. The final fracture of the fitting was the result of ductile separation.

The terminating action specified in AD 87–04–13 R1, amendment 39–5836 (53 FR 2005, January 26, 1988) had been accomplished on this airplane in accordance with Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989. That terminating action consisted of an eddy current inspection of all the hole locations and oversizing only the aft two holes of the horizontal clevis for both midspar fittings. When the fracture was detected, the airplane had accumulated 7,070 flight hours and 1,966 flight cycles (77,823 total flight hours and 18,858 total flight cycles) since the accomplishment of the terminating action.

Additionally, the FAA has received a report indicating that fatigue and stress corrosion cracking in the lower horizontal clevis common to the second row of fasteners from the aft end of the inboard midspar fitting of the number 3 strut had occurred on a Boeing Model 747–300 series airplane equipped with Pratt & Whitney JT9D–7R4G2 series engines. The length of the crack was 0.67 inch; this crack was found during an inspection of the aft row common to the horizontal clevis in accordance with Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989. When the crack was detected, the airplane had accumulated 46,118 total flight hours and 5,485 total flight cycles.

Cracking and fracturing in the midspar fitting clevis, if not detected and corrected in a timely manner, could result in a fractured fitting and drooping of the strut at the strut-to-wing interface, and consequent separation of the engine and strut from the airplane.

Additionally, the FAA has received a report indicating that broken sealant of the fasteners has been detected. The existing sealant was removed in order to visually inspect the fittings. Investigation revealed loose fasteners, corrosion of the fastener holes, and surface corrosion of the fitting.

Other Relevant Rulemaking

The FAA has previously issued several other AD's that address cracking in the midspar fitting clevis on Boeing 747 series airplanes:

1. AD 87–04–13 R1, amendment 39–5836: Requires an ultrasonic inspection to detect cracking of the aft-most two fastener holes of the upper and lower horizontal clevis legs in accordance with Boeing Service Bulletin 747–54–2118, dated July 25, 1986. In addition, that AD also provided for rework or replacement of the pylon midspar fitting, which would eliminate the need for the repetitive ultrasonic inspections. Since the issuance of that AD, Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; and Revision 4, dated May 11, 1989; have been approved as alternative methods of compliance with that AD.

2. AD 90–06–06, amendment 39–6490 (55 FR 8374, March 7, 1990): Requires structural modification, among various other actions, in accordance with Boeing Document No. D6–35999, dated March 31, 1989. The FAA has approved an alternative method of compliance that extends the compliance time threshold to a maximum of three years after the airplane reaches 20,000 total flight cycles, or until the mandated strut/wing modification is accomplished, whichever occurs first. Additionally, ultrasonic inspections to detect cracking of the fastener holes are required at intervals not to exceed 1,000 flight cycles in accordance with the service bulletin. If cracking or corrosion is detected during those inspections, rework or replacement of the midspar fitting with a new or serviceable part is required, in accordance with Boeing Service Bulletin 747–54–2118, dated July 26, 1986.

3. AD 95–10–16, amendment 39–9233 (60 FR 27008, May 5, 1995): For airplanes equipped with Pratt & Whitney Model JT9D engines (excluding Model JT9D–70 engines), that AD requires modification of the nacelle strut and wing structure, and inspections of the adjacent structure that has not been replaced by the modification, in accordance with Boeing Alert Service Bulletin 747–54A2159, dated November 3, 1994. As a condition to extend the compliance time from 32 to 56 months, AD 95–10–16 also requires repetitive ultrasonic inspection to detect cracking of the aft-most two fastener holes in both strut midspar fittings on the inboard and outboard nacelle struts, or modification of the aft-most two fastener holes as described in Boeing Service Bulletin 747–54–2118. Since the issuance of that AD, Boeing Alert Service Bulletin, Revision 1, dated June 1, 1995; and Revision 2, dated March 14, 1996; have been approved as an alternative method of compliance with that AD.

4. AD 95–13–05, amendment 39–9285 (60 FR 33333, June 28, 1995): For airplanes equipped with Rolls Royce Model RB211 series engines, that AD requires modification of the strut/wing in accordance with Boeing Alert Service Bulletin 747–54A2157, dated January 12, 1995. Since the issuance of that AD, Boeing Alert Service Bulletin 747–54A2157, Revision 1, dated August 3, 1995; and Revision 2, dated November 14, 1996; have been approved as alternative methods of compliance with the AD.

5. AD 95–13–07, amendment 39–9287 (60 FR 33336, July 28, 1995): For airplanes equipped with General Electric Model CF6–45 or –50 series engines, that AD requires modification of the strut/wing in accordance with Boeing Alert Service Bulletin 747–54A2158, dated November 30, 1994. Since issuance of that AD, Boeing Alert Service Bulletin 747–54A2158 Revision 1, dated August 17, 1995; and Revision 2, dated August 15, 1996; have been approved as alternative methods of compliance with that AD.

Explanation of New Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 747–54A2179, dated June 27, 1996, which describes procedures for repetitive ultrasonic inspections to detect cracking, corrosion, and fracturing of the upper horizontal clevis of both midspar fittings on the inboard and outboard struts, and repetitive detailed visual (borescope) inspections to detect cracking, corrosion, and fracturing of the lower horizontal clevis. The alert service bulletin also describes replacement of discrepant parts with new or serviceable parts, if necessary, or rework of parts where no discrepancies are detected. The alert service bulletin specifies that, for certain airplanes, these inspections need only be accomplished on the inboard strut.

For airplanes on which any cracking, corrosion, or fracturing is detected, the replacement referenced in the alert service bulletin involves modification of the strut/wing in accordance with the following Boeing service bulletins, as applicable:

1. Boeing Alert Service Bulletin 747–54A2157, dated January 12, 1995; Revision 1, dated August 3, 1995; or Revision 2, dated November 14, 1996 (for airplanes equipped with Rolls Royce RB211 engines);

2. Boeing Alert Service Bulletin 747–54–A2158, dated November 30, 1994; Revision 1, dated August 17, 1995; or Revision 2, dated August 15, 1996 (for airplanes equipped with General Electric CFC–45/–50 or Pratt & Whitney JT9D–70 engines); and

3. Boeing Service Bulletin 747–54A2159, dated November 3, 1994; Revision 1, dated June 1, 1995, or Revision 2, dated March 14, 1996 (for airplanes equipped with Pratt & Whitney engines).

As an alternative to accomplishing the strut/wing modification, the alert service bulletin references Boeing Service Bulletin 747–54–2118, dated July 25, 1986; Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989; as additional sources of service information for replacement of the midspar fittings with new parts.

Accomplishment of either the strut/wing modification or replacement of the midspar fittings eliminates the need for the repetitive inspections.

For airplanes on which no discrepancies are detected, Boeing Alert Service Bulletin 747–54A2179 describes procedures for rework of the upper and the lower horizontal clevis of the midspar fittings of the inboard and outboard struts, which, if accomplished on all the fastener holes, eliminates the need for the repetitive inspections. The alert service bulletin recommends that, for certain airplanes, only rework of the inboard strut need be accomplished. The rework consists of performing an eddy current inspection in accordance with the 747 Non-Destructive Testing (NDT) Manual D6–7170 (Part 6, Subject 51–00–00, Figure 19) to detect cracking of all 10 to 14 fastener hole locations (depending on fitting design), and repair, if necessary; oversizing all fastener holes and applying one coat of BMS 10–11 Type 1 primer; allowing the primer to dry; applying BMS 5–95 sealant in the holes and on the shank of the oversized fasteners; and installing the oversized fasteners wet. The alert service bulletin references Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989, as an additional source of service information for the accomplishment of this rework. In addition, Boeing Service Bulletin 747–54–2118, dated July 25, 1986; Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; and Revision 4, dated May 11, 1989; specify certain rework limitations of the midspar fittings.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Boeing Model 747 series airplanes of the same type design, this AD is being issued to detect and correct fatigue cracking, stress corrosion cracking, and fracturing of the inboard or outboard fittings of the midspar fitting clevis, which could result in drooping of the strut at the strut-to-wing interface, and consequent separation of the engine and strut from the airplane.

This AD requires visual inspections to detect broken sealant of the fasteners and various follow-on actions (visual inspection to detect corrosion and loose fasteners, and repair, if necessary); removal of the existing sealant; and, after the accomplishment of certain inspections required by this AD, application of specific sealant or corrosion inhibitive compound to all areas where the sealant was disturbed or removed.

This AD also requires repetitive visual inspections to detect cracking, corrosion, and fracturing of the lower horizontal clevis of the inboard and outboard strut midspar fittings, and replacement of discrepant parts with new parts, if necessary, or rework, as applicable. For certain airplanes, this AD requires that these inspections be accomplished only on the inboard strut. This action also provides for optional terminating action, which, if accomplished, constitutes terminating action for the repetitive inspections.

Certain repairs are required to be accomplished in accordance with a method approved by the FAA. Other actions are required to be accomplished in accordance with the alert service bulletin described previously.

Difference Between This AD and the Alert Service Bulletin

Operators should note that while Boeing Alert Service Bulletin 747–54A2179 describes rework procedures for airplanes on which no corrosion or cracking is detected, this AD specifies that rework may be accomplished on airplanes on which corrosion or cracking is within acceptable limits as specified by Figures 3 through 7 (inclusive) of Boeing Service Bulletin 747–54–2118.

Operators should also note that, unlike the alert service bulletin, this AD requires visual inspections to detect broken sealant of the fasteners and various follow-on actions, if necessary (visual inspection to detect corrosion and loose fasteners, and repair, if necessary); removal of the existing sealant; and, after the accomplishment of certain inspections required by this AD, application of specific sealant or corrosion inhibitive compound to all areas where the sealant was disturbed or removed.

Operators should note that this AD does not require initial or repetitive ultrasonic inspections of airplanes to detect cracking and fracturing of the upper horizontal clevis of both midspar fittings on the inboard and outboard struts, as described in the alert service bulletin.

Interim Action

The FAA finds that, while repetitive ultrasonic inspections to detect cracking and fracturing of the upper horizontal clevis will positively address the unsafe condition addressed by this AD, the planned compliance time for the initial inspection is sufficiently long so that notice and public comment will be practicable. The FAA is, therefore, currently considering additional rulemaking to propose accomplishment of these ultrasonic inspections.

Additionally, the manufacturer has advised that it is currently developing Revision 1 of Boeing Service Bulletin 747–54A2179, which will describe rework procedures if cracking or corrosion is detected, and an alternative ultrasonic/detailed visual inspection of the lower horizontal leg. Based on the results of a final review and approval of Revision 1 of the service bulletin, the FAA may also consider approving Revision 1 of the service bulletin as an alternative method of compliance for the requirements of this AD.

Determination of Rule's Effective Date

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

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified

under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 96–NM–249–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

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

96–25–01 Boeing: Amendment 39–9842. Docket 96–NM–249–AD.

Applicability: Model 747 series airplanes having line positions 1 through 886; equipped with Pratt & Whitney JT9D–3, –7, and –70 series engines, General Electric CF6–45/–50 series engines, or Rolls Royce RB211 series engines; certificated in any category.

Note 1: Except as described in Note 2 of this AD, 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 (h) 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.

Note 2: This AD does not apply to any airplane on which the strut midspar fittings have been modified in accordance with Boeing Service Bulletin 747–54–2118, which was originally released on July 25, 1986. In addition, this AD does not apply to any airplane on which the strut/wing modification has been accomplished in accordance with the following Boeing service bulletins:

1. Boeing Alert Service Bulletin 747–54A2157, dated January 12, 1995; Revision 1, dated August 3, 1995; or Revision 2, dated November 14, 1996;

2. Boeing Alert Service Bulletin 747–54A2158, dated November 30, 1994; Revision 1, dated August 17, 1995; or Revision 2, dated August 15, 1996; or

3. Boeing Alert Service Bulletin 747–54A2159, dated November 3, 1994; Revision 1, dated June 1, 1995; or Revision 2, dated March 14, 1996.

Compliance: Required as indicated, unless accomplished previously.

To prevent drooping of the strut at the strut-to-wing interface, and consequent separation of the engine and strut from the airplane due to cracking or fracturing of the midspar fitting clevis, accomplish the following:

(a) For all airplanes: Prior to the accomplishment of each inspection required by paragraphs (b), (c), (d), and (e) of this AD, perform a visual inspection to detect any broken sealant common to the lower horizontal clevis of the inboard (for all airplanes) and the outboard (for Group 1 airplanes identified in Boeing Alert Service Bulletin 747–54A2179, dated June 27, 1996) midspar fittings, and of the fasteners, in accordance with normal maintenance practices.

(1) If no broken sealant is detected, prior to further flight, remove the existing sealant in accordance with normal maintenance practices, and perform the inspections required by paragraph, (b), (c), (d), and/or (e) of this AD, as applicable, at the times specified in the applicable paragraph. Thereafter, prior to further flight following completion of each inspection required by paragraph (b), (c), (d), and/or (e) of this AD; reapply sealant to any area where the existing sealant was removed or disturbed, in accordance with Boeing 747 Maintenance Manual 51–31–01, or apply corrosion inhibitive compound BMS 3–23 in accordance with Boeing 747 BSOP 20–41–05.

(2) If any broken sealant is detected, prior to further flight, remove the existing sealant and perform a visual inspection of the fitting to detect corrosion of the fitting and check for loose fasteners by attempting to rotate them or move them upward with finger pressure.

(i) If no corrosion or loose fastener is detected, perform the inspections required by paragraph (b), (c), (d), and/or (e) of this AD, as applicable, at the times specified in the applicable paragraph. Thereafter, prior to further flight following completion of each inspection required by paragraph (b), (c), (d), and/or (e) of this AD: Reapply sealant to any area where the existing sealant was removed or disturbed, in accordance with Boeing 747 Maintenance Manual 51–31–01, or apply corrosion inhibitive compound BMS 3–23 in accordance with Boeing 747 BSOP 20–41–05.

(ii) If any corrosion or loose fastener is detected, prior to further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

(b) For all airplanes: Perform a detailed visual borescope inspection to detect cracking, corrosion, and fracturing of the lower horizontal clevis of both midspar fittings of the inboard struts, in accordance with Boeing Alert Service Bulletin 747–54A2179, dated June 27, 1996, at the time specified in paragraph (b)(1), (b)(2), or (b)(3), as applicable.

(1) For Groups 1 and 6 airplanes, as identified in the alert service bulletin: Perform the inspection at the time specified in paragraph (b)(1)(i) or (b)(1)(ii), as applicable.

(i) Within 150 flight cycles or 60 days after the effective date of this AD, whichever occurs first. Or

(ii) If terminating action has been accomplished in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989; within the last 500 flight cycles prior to the effective date of this AD: Perform the inspection required by this paragraph within 500 flight cycles or 12 months after the effective date of this AD, whichever occur first.

(2) For Group 2, 3, and 4 airplanes, as identified in the alert service bulletin: Perform the inspection at the time specified in paragraph (b)(2)(i) or (b)(2)(ii), as applicable.

(i) Within 150 flight cycles or 60 days after the effective date of this AD, whichever occurs first. Or

(ii) If terminating action has been accomplished in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989; within the last 1000 flight cycles prior to the effective date of this AD: Perform the inspection within 1000 flight cycles or 12 months after the effective date of this AD, whichever occurs first.

(3) For Group 5 airplanes, as identified in the alert service bulletin: Perform the inspection at the time specified in paragraph (b)(3)(i) or (b)(3)(ii), as applicable.

(i) Within 150 flight cycles or 60 days after the effective date of this AD, whichever occurs first. Or

(ii) If terminating action has been accomplished in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989; within the last 800 flight cycles prior to the effective date of this AD: Perform the inspection within 800 flight cycles or 12 months after the effective date of this AD, whichever occurs first.

(c) For Group 1 airplanes, as identified in Boeing Alert Service Bulletin 747–54A2179: Perform a detailed visual borescope inspection to detect cracking, corrosion, and fracturing of the lower horizontal clevis of both midspar fittings of the outboard struts, in accordance with Boeing Alert Service Bulletin 747–54A2179, dated June 27, 1996, at the time specified in paragraph (c)(1) or (c)(2) of this AD, as applicable.

(1) Within 200 flight cycles or 60 days after the effective date of this AD, whichever occurs first. Or

(2) If terminating action has been accomplished in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989; within the last 1,000 flight cycles prior to the effective date of this AD: Perform the inspection within 1,000 flight cycles or 12 months after the effective date of this AD, whichever occurs first.

(d) For all airplanes: Repeat the inspections of the inboard struts, as specified in paragraph (b) of this AD, at the time specified in paragraph (d)(1) or (d)(2), as applicable, until the terminating action specified in paragraph (f) or (g) of this AD, as applicable, has been accomplished.

(1) For Groups 1 and 6 airplanes: Repeat the inspections at the time specified in either paragraph (d)(1)(i) or (d)(1)(ii) of this AD, as applicable.

(i) Inspect thereafter at intervals not to exceed 150 flight cycles or 3 months, whichever occurs first. Or

(ii) If the aft two fastener holes have been oversized, an eddy current inspection of the remaining holes has been performed, and fasteners have been installed wet with BMS 5–95 in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989: Inspect thereafter at intervals not to exceed 150 flight cycles.

(2) For Groups 2, 3, 4, and 5 airplanes: Repeat the inspections at the time specified in either paragraph (d)(2)(i) or (d)(2)(ii) of this AD, as applicable.

(i) Inspect thereafter at intervals not to exceed 300 flight cycles or 6 months, whichever occurs first. Or

(ii) If the aft two fastener holes have been oversized, an eddy current inspection of the remaining holes has been performed, and fasteners have been installed wet with BMS 5–95 in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989: Inspect thereafter at intervals not to exceed 300 flight cycles.

(e) For Group 1 airplanes: Repeat the inspection of the outboard struts, as required by paragraph (c) of this AD, at the times specified in either paragraph (e)(1) or (e)(2) of this AD, as applicable.

(1) Inspect thereafter at intervals not to exceed 300 flight cycles or 6 months, whichever occurs first. Or

(2) If the aft two fastener holes have been oversized, an eddy current inspection of the remaining holes has been performed, and fasteners have been installed wet with BMS 5–95 in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989: Inspect thereafter at intervals not to exceed 300 flight cycles.

(f) For all airplanes: If any cracking, corrosion, or fracturing is detected during any inspection required by this AD, and it is outside the limits specified in Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989: Prior to further flight, accomplish the requirements of either paragraph (f)(1) or (f)(2) of this AD. Following accomplishment of those actions, no further action is required by this AD.

(1) Accomplish the strut/wing modification specified in paragraph (f)(1)(i), (f)(1)(ii), or (f)(1)(iii) of this AD, as applicable.

(i) For airplanes equipped with Rolls Royce Model RB211 series engines: Accomplish the strut/wing modification in accordance with Boeing Alert Service Bulletin 747–54A2157, Revision 2, dated November 14, 1996. Accomplishment of this paragraph also terminates the requirements of AD 95–13–05, amendment 39–9285.

(ii) For airplanes equipped with General Electric Model CF6–45 or –50 series engines or Pratt & Whitney Model JT9D–70 series engines: Accomplish the strut/wing modification in accordance with Boeing Alert Service Bulletin 747–54A2158, Revision 2, dated August 15, 1996. Accomplishment of this paragraph also terminates the requirements of AD 95–13–07, amendment 39–9287.

(iii) For airplanes equipped with Pratt & Whitney Model JT9D series engines (excluding Model JT9D–70 engines): Accomplish the strut/wing modification, in accordance with Boeing Alert Service Bulletin 747–54A2159, Revision 2, dated March 14, 1996. Accomplishment of this paragraph also terminates the requirements of AD 95–10–16, amendment 39–9233.

(2) Replace the midspar fittings of the strut with new or serviceable fittings in accordance with Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989.

(g) For all airplanes: If any cracking or corrosion is detected during any inspection required by this AD that is within the limits specified in Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989: Prior to further flight, accomplish the requirements of either paragraph (g)(1), (g)(2), or (g)(3) of this AD.

(1) For Group 2, 3, 4, and 5 airplanes: Rework both the upper and lower horizontal clevis of the midspar fittings of each inboard strut, and for Group 1 airplanes, rework both the upper and lower horizontal clevis of the midspar fittings of each inboard and outboard strut, in accordance with Boeing Service Bulletin 747–54–2118, Revision 1, dated May 21, 1987; Revision 2, dated April 21, 1988; Revision 3, dated September 29, 1988; or Revision 4, dated May 11, 1989. Accomplishment of the requirements of this paragraph constitute terminating action for the requirements of this AD provided that the actions specified in paragraphs (g)(1)(i), (g)(1)(ii), (g)(1)(iii), and (g)(1)(iv) are also accomplished.

(i) The rework shall be accomplished on all holes of the horizontal flanges;

(ii) The rework shall include an eddy current inspection of all holes at the horizontal flanges, in accordance with Boeing Non-Destructive Testing (NDT) Manual D6–7170 Part 6, Subject 51–00–00, Figure 19.

(iii) All holes of the horizontal flanges shall be oversized and insurance cut an additional 0.0312 inch, in accordance with Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989. And

(iv) One coat of BMS 10–11 Type 1 primer shall be applied to the fastener holes, and the oversized fasteners shall be installed wet with BMS 5–95 sealant, in accordance with Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989.

(2) For Group 2, 3, 4, and 5 airplanes: Rework both the upper and lower horizontal clevis of the midspar fittings of each inboard strut, and for Group 1 airplanes, rework both the upper and lower horizontal clevis of the

midspar fittings of each inboard and outboard strut, in accordance with Boeing Service Bulletin 747–54–2118, dated July 25, 1986. Accomplishment of the requirements of this paragraph constitute terminating action for the requirements of this AD.

(3) Accomplish the rework (removal of cracking and corrosion) specified in Boeing Service Bulletin 747–54–2118, Revision 4, dated May 11, 1989, with the exception that eddy current inspections specified in that service bulletin must be accomplished in accordance with Boeing Non-Destructive Testing (NDT) Manual D6–7170 Part 6, Subject 51–00–00, Figure 19. Thereafter, repeat the inspections specified in paragraph (d) or (e) of this AD, as applicable, at the time required by the applicable paragraph.

(h) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. 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 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(i) 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.

(j) Certain actions shall be done in accordance with the Boeing Alert Service Bulletins listed in the following table. The incorporation by reference of those documents was approved previously by the Director of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, as of the dates specified in the table below:

Referenced service bulletin and date	Approval date and Federal Register citation
747–54A2157, January 12, 1995	July 28, 1995 (60 FR 33333, June 28, 1995).
747–54A2158, November 30, 1994	July 28, 1995 (60 FR 33336, July 28, 1995).
747–54A2159, November 3, 1994	June 21, 1995 (60 FR 27008, May 22, 1995).

Certain other actions shall be done in accordance with the following Boeing service bulletins, which contain the specified effective pages:

Service bulletin referenced and date	Page No.	Revision level shown on page	Date shown on page
Alert 747–54A2179, June 27, 1996	1–34	(1)	June 27, 1996.
747–54A2157, Revision 1, August 3, 1995	1–901	1	August 3, 1995.
747–54A2157, Revision 2, November 14, 1996	1–961	2	November 14, 1996.
747–54A2158, Revision 1, August 17, 1995	1–1,052	1	August 17, 1995.
747–54A2158, Revision 2, August 15, 1996	1–1,080D2	August 15, 1996.	
747–54A2159, Revision 1, June 1, 1995	1–1,240	1	June 1, 1995.
747–54A2159, Revision 2, March 14, 1996	1–1,298	2	March 14, 1996.
747–54–2118, July 25, 1986	1–172	(1)	July 25, 1986.
Notice of Status Change, 747–54–2118 NSC 1, October 5, 1986	1	(1)	October 5, 1986.
747–54–2118, Revision 1, May 21, 1987	1–175	1	May 21, 1987.
747–54–2118, Revision 2, April 21, 1988	1–5, 7–13, 17–21, 24, 30, 31, 38, 39, 48–51, 58, 59, 61, 69–72, 84, 101, 117, 134, 151, 170.	2	April 21, 1988.
	6, 14–16, 22, 23, 26–29, 32–37, 40–47, 52–57, 60, 62–68, 73–83, 85–100, 102–116, 118–133, 135–150, 152–169, 171–175.	1	May 21, 1987.
	25	(1)	July 25, 1986.
747–54–2118, Revision 3, September 29, 1988	1–6, 9, 10, 12, 21, 22	3	September 29, 1988.
	7, 8, 13–20, 23, 24, 26–175.	1	May 21, 1987.
	11	2	April 21, 1988.
	25	(1)	July 25, 1986.
747–54–2118, Revision 4, May 11, 1989	1–12, 16, 17, 21–170, 173, 174.	4	May 11, 1989.
	13, 18–20	2	April 21, 1988.
	14, 15	1	May 21, 1987.
	171, 172, 175, 176	1	July 25, 1986.

[1] Original.

The incorporation by reference of those documents was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(k) This amendment becomes effective on January 2, 1997.

Issued in Renton, Washington, on November 25, 1996.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC–22389; File No. S7–15–94]

RIN 3235–AF97

Custody of Investment Company Assets With Futures Commission Merchants and Commodity Clearing Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Final Rule.

SUMMARY: The Commission is adopting a new rule under the Investment Company Act of 1940 to permit registered investment companies to maintain their assets with futures commission merchants and certain other entities in connection with futures contracts and commodity options traded on U.S. and foreign exchanges. Currently, investment companies generally must maintain assets relating to these transactions in special accounts with a custodian bank. The new rule will enable investment companies to effect their commodity trades in the same manner as other market participants under conditions designed to provide custodial protections for investment company assets.

EFFECTIVE DATE: The rule will become effective January 16, 1997.

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SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') today is adopting rule 17f-6 [17 CFR 270.17f-6] under the Investment Company Act of 1940 [15 U.S.C. 80a] (the ''Investment Company Act''). The new rule governs the custody of investment company assets by futures commission merchants and other entities used for settling commodity transactions. The rule does not affect the extent to which investment companies may engage in commodity trading.

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Executive Summary

The Commission is adopting rule 17f–6 under the Investment Company Act. Rule 17f–6 permits registered management investment companies, unit investment trusts (''UITs''), and face-amount certificate companies (collectively, ''funds'') to maintain assets (*i.e.*, margin) with futures commission merchants (''FCMs'') in connection with commodity transactions effected on both domestic and foreign exchanges. Currently, funds generally must maintain such assets in special accounts with a custodian bank. The new rule is designed to eliminate unnecessary regulatory burdens, and to enable funds to effect their commodity trades in the same manner as other market participants.

Rule 17f–6 permits funds to maintain their assets with FCMs that are registered under the Commodity Exchange Act (''CEA'') and that are not affiliated with the fund. Rule 17f–6 requires a written contract between the fund and the FCM to contain certain provisions. Among other things, the FCM must agree that any other FCMs used to clear the fund's trades meet the rule's requirements (other than the requirement of a contract with the fund). To protect fund assets from loss in the event of an FCM's bankruptcy, any gains on fund transactions may be maintained with an FCM only in *de minimis* amounts.

Unlike the rule as originally proposed, rule 17f–6 does not require a fund's board of directors to select and monitor the fund's FCM arrangements, nor does the rule require an FCM that holds fund assets to meet capital standards in excess of those imposed under the CEA.

Rule 17f–6 does not require that assets related to commodities transactions be maintained with an FCM. Funds may continue to maintain such assets in a special account with a custodian bank.

I. Background

A. Commodities Trading and Investment Company Act Custody

The Commission proposed rule 17f–6 under the Investment Company Act to permit management investment companies to effect their commodity trades by placing assets relating to such transactions directly with FCMs.[1] Over the last several years, fund participation in commodity markets has increased. A fund, for example, may engage in commodity trades to hedge its portfolio against declines in securities prices, changes in interest rates, or foreign currency fluctuations.[2] A fund also may enter into commodity transactions to adjust the percentage of its portfolio held in cash, debt, and stocks without having to buy or sell the actual assets.[3]

To enter into a futures contract or write a commodity option, a customer typically deposits with an FCM, as security for performance of its obligations, a specified amount of assets or cash as ''initial margin.'' [4] In the case

[1] Rule 17f–6 was proposed for public comment on May 24, 1994. Custody of Investment Company Assets with Futures Commission Merchants and Commodity Clearing Organizations, Investment Company Act Release No. 20313 (May 24, 1994) [59 FR 28286 (June 1, 1994)] [hereinafter the Proposing Release].

[2] Commodity transactions include futures contracts and options on futures contracts and physical commodities. A futures contract generally is a bilateral agreement providing for the purchase or sale of a specified commodity at a stated time in the future for a fixed price. Robert E. Fink & Robert B. Feduniak, Futures Trading 10 (1988) [hereinafter Fink & Feduniak]. A commodity option gives its holder the right, for a specified period of time, to either buy (in the case of a call option) or sell (in the case of a put option) the subject of the option at a predetermined price. The writer (seller) of an option is obligated to sell or buy the specified commodity at the election of the option holder. 1 Philip M. Johnson & Thomas L. Hazen, Commodities Regulation section 1.07 (2d ed. Supp. 1991) [hereinafter Johnson & Hazen].

[3] Taking a position in a futures contract with respect to stocks that comprise the Standard & Poor's 500 Index, for example, may be more efficient than buying and selling all of the stocks that comprise that index due to lower brokerage and transaction costs.

[4] Unlike the parties to a futures contract, only the writer (seller) of an option is subject to margin requirements; the option holder (purchaser) pays the writer a one-time premium as compensation in full for its right to compel the writer's performance. *See* Proposing Release, *supra* note, at n.44 and accompanying text.

of a fund, placing initial margin with an FCM could be viewed as placing fund assets in the custody of the FCM.[5] The FCM then clears the transaction by posting margin either directly with a clearing organization or with one or more other FCMs that will effect the transaction through the clearing organization.[6]

Section 17(f) generally permits a fund to maintain its assets only in the custody of a bank, a member of a national securities exchange, the fund itself, or a national securities depository.[7] Under no-action positions of the Division of Investment Management, a fund may, consistent with the requirements of section 17(f), place assets relating to commodity transactions in a special account with a third party custodian bank (''third party accounts'').[8] As a consequence, an FCM must use its own assets to effect fund commodity trades.

The Commission proposed rule 17f–6 to respond to certain criticisms associated with third party accounts.[9] Commenters have indicated that third party accounts create systemic liquidity risks by diverting FCM capital, which would otherwise be available for use in the marketplace, to effect fund transactions.[10] Commenters also have stated that third party arrangements are unnecessary because they are unlikely to provide any special protection to fund assets in FCM bankruptcy proceedings. The U.S. Bankruptcy Code and rules of the Commodity Futures Trading Commission (''CFTC'') provide that customer assets relating to commodity transactions generally have priority over other creditors' claims, and are subject to distribution based on each customer's *pro rata* share of the available customer property.[11] Although the issue has not been judicially determined, the CFTC staff has stated that assets in a third party account will be subject to the same *pro rata* treatment as all other assets in the FCM's custody.[12] Finally, third party accounts may be redundant in view of the safeguards for customer assets afforded by the CEA and CFTC rules.

B. Custodial Protections for Customer Assets Under the Commodity Exchange Act

The CEA and CFTC rules contain provisions designed to safeguard customer assets held by an FCM.[13] For transactions traded on domestic exchanges, extensive regulations, known as the ''segregation requirements,'' are designed to protect customer funds in an FCM's possession.[14] Under these requirements, an FCM may maintain customer assets in a single commingled bank account established for those assets. The FCM must segregate customer funds from the FCM's own assets, and may not use one customer's assets to carry another customer's trades.[15] Special provisions, which parallel the segregation requirements for domestic transactions, govern the safekeeping of margin relating to foreign exchange-traded transactions.[16] CFTC rules require an FCM engaging in foreign commodity transactions to maintain a ''secured amount,'' which generally represents the assets required to margin the foreign commodity trades of its U.S. customers.[17]

As proposed, rule 17f–6 would have permitted funds to post commodity margin with FCMs registered under the CEA, subject to certain conditions. Nineteen commenters commented on proposed rule 17f–6. Commenters generally supported the rule's adoption, while recommending certain changes to the proposed rule.

II. Rule 17f–6

The Commission is adopting rule 17f–6 with a number of changes based on commenters' suggestions. Rule 17f–6, as adopted, extends to registered investment companies.[18] The adopted

[5] Initial margin is not considered part of the contract or option price, and is returned upon termination of the position, unless used to cover a loss. Initial margin in commodity transactions thus differs from securities margin, which represents a partial payment for securities purchased by a broker on its customer's behalf. Initial margin can also be contrasted with variation margin, which is credited or assessed at least daily to reflect any gains or losses in the contract's value. In contrast to initial margin, variation margin represents the system of marking to market the contract's value. Through this system, losses on one side of a contract position are matched with and paid as profits to the other side of the transaction. *See* Proposing Release, *supra* note at nn.34–38 and accompanying text, and *infra* note.

[6] The clearing organization matches the trade on behalf of the exchange, and acts as guarantor of the opposite side of the transaction. An FCM executing trades on an exchange must be a member of that exchange; nonmembers trade by entering orders through an exchange member. To clear transactions with a clearing organization, an FCM must be both an exchange member and a member of the clearing organization. Non-clearing member FCMs must execute their transactions through a clearing member. A commodity transaction, therefore, may be effected through several FCMs.

[7] 15 U.S.C. 80a–17(f). *See also* Investment Company Act rules 17f–1 [17 CFR 270.17f–1] (custody with members of national securities exchanges); 17f–2 [17 CFR 270.17f–2] (custody by funds themselves); 17f–4 [17 CFR 270.17f–4] (custody with securities depositories); 17f–5 [17 CFR 270.17f–5] (custody of fund securities outside the United States).

[8] *See, e.g.*, Prudential Bache IncomeVertible Plus Fund, Inc. (pub. avail. Nov. 20, 1985). The third party account may be maintained in the name of the FCM, but the FCM's ability to withdraw these funds is limited. *See* Proposing Release, *supra* note, at n.55 and accompanying text.

[9] *See* Proposing Release, *supra* note, at nn.61–70 and accompanying text.

[10] According to a 1988 report, third party accounts may have been a source of liquidity stress in the clearing and credit systems during the October 1987 market break. Report of the Presidential Task Force on Market Mechanisms (1988) VI–73 to –74 (discussing statements of members of the Chicago Mercantile Exchange).

[11] 11 U.S.C. 766; CFTC rule 190.08 [17 CFR 190.08].

[12] CFTC Financial and Segregation Interpretation No. 10, *Treatment of Funds Deposited in Safekeeping Accounts*, 1 Comm. Fut. L. Rep. (CCH) § 7120 at 7130 (CFTC Division of Trading and Markets, May 23, 1984) [hereinafter Interpretation No. 10]. *See also* CFTC Advisory No. 37–96, *Responsibilities of Futures Commission Merchants and Relevant Depositories with Respect to Third Party Custodial Accounts* (July 25, 1996) (discussing Interpretation No. 10 and requesting that FCMs review their custody arrangements with depository institutions to assure that they fully accord with the requirements of the CEA and CFTC regulations).

[13] Maintaining assets in an FCM's custody is not without risk. An FCM is financially responsible for the trade obligations of its customers. Johnson & Hazen, *supra* note 2, at section 1.10. If an FCM becomes insolvent and cannot cover the obligations of a defaulting customer, the FCM's non-defaulting customers may be affected. The clearing organization has the right to use customer assets held at the clearing organization level to satisfy a commodity loss on behalf of the FCM's customers. The resulting shortfall in the customer assets may be borne by the FCM's non-defaulting customers. *See supra* note 11 and *infra* note 17, and accompanying text (regarding FCM bankruptcy provisions). To date, however, losses of customer funds have been rare. *See* Andrea M. Corcoran & Susan C. Ervin, *Maintenance of Market Strategies in Futures Broker Insolvencies: Futures Position Transfers From Troubled Firms*, 44 Wash. & Lee L. Rev. 849, 863–64 (1987) (''customer losses have been forestalled * * *, in significant measure, by the voluntary contributions of futures exchanges'').

[14] CEA section 4d(2) [7 U.S.C. 6d(2)]; CFTC rules 1.20 to .30 [17 CFR 1.20 to .30].

[15] Customer funds also may be maintained in a commingled bank account established by the clearing organization for the FCM's customers.

[16] CFTC rule 30.7 [17 CFR 30.7].

[17] *Id.* In the event of an FCM's bankruptcy, CFTC rules provide for the allocation of property among different types of customer accounts, which include customer assets underlying U.S. and foreign trades that are subject to the segregation and secured amount requirements, respectively. While customer assets relating to U.S. and foreign-based trades are subject to the same *pro rata* treatment in FCM bankruptcy proceedings (*see supra* note 11 and accompanying text), customers of U.S. and foreign trades may receive different proportional amounts based on the assets attributed to the respective account classes. For example, a shortfall in the secured amount (*e.g.*, due to a customer default or currency fluctuations during bankruptcy proceedings) will result in customers of foreign trades receiving a smaller percentage of their margin deposits than customers of the segregated account class underlying U.S. trades. Although the maintenance of separate customer accounts for U.S. and foreign-based trading may result in different *pro rata* distributions in FCM bankruptcy proceedings, these differences generally are attributable to the *investment* risks associated with U.S. and foreign-based commodity transactions rather than differences in custodial protections.

[18] *See* rule 17f–6(b)(3) [17 CFR 270.17f–6(b)(3)] (defining ''Fund''). The Commission notes that trading in futures contracts and commodity options ordinarily requires a significant degree of management. Since unit investment trust (''UIT'')

rule incorporates the safeguards that are provided for fund assets under the CEA and CFTC rules and, in so doing, generally permits funds to effect domestic and foreign commodity transactions in the same manner as other market participants.

A. Role of Fund Board of Directors

Proposed rule 17f–6 would have required a fund's board of directors (or the board's delegate) to find that maintaining the fund's assets with an FCM is consistent with the best interests of the fund and its shareholders. The proposed rule also would have required the board or its delegate to establish a monitoring system to ensure compliance with the requirements of the rule. Several commenters opposed this approach, stating that the level of board involvement was burdensome and unnecessary in light of the regulatory safeguards under the CEA and CFTC rules.

Upon further consideration of the issue, the Commission believes that the rule's objective standards (in particular, the requirement of FCM registration and the related CFTC segregation and secured amount requirements) make specific provisions concerning board oversight unnecessary.[19] As adopted, rule 17f–6 does not require a fund's board to select or monitor the FCMs with which the fund places margin. Like other aspects of fund operations, however, FCM arrangements will remain subject to the board's general oversight.[20] In this regard, fund boards have a particular responsibility to ask questions concerning why and how the fund uses futures and other derivative instruments, the risks of using such instruments, and the effectiveness of internal controls designed to monitor risk and assure compliance with investment guidelines regarding the use of such instruments.

B. Eligible FCM Custodians

1. FCM Registration and CFTC Net Capital Requirements

Like the proposed rule, rule 17f–6 permits a fund to place and maintain assets with an FCM that is registered under the CEA.[21] Registered FCMs are subject to the requirements of the CEA and CFTC rules thereunder, which, among other things, address the safekeeping of assets in FCM custody.[22] Rule 17f–6 does not require that the FCM be a member of a commodity exchange or clearing organization. Such a requirement would not appear necessary for the protection of fund assets and would unnecessarily limit the number of FCMs that could be used as fund custodians.[23] A registered FCM, regardless of its membership status, is subject to the CEA and CFTC safekeeping requirements.

Under CFTC rules, a registered FCM must maintain adjusted net capital equal to or exceeding the greatest of (i) $250,000, (ii) 4% of customer funds maintained in safekeeping, or (iii) for an FCM that also is a registered securities broker-dealer, the net capital required by rule 15c3–1(a) under the Securities Exchange Act of 1934.[24] An FCM generally must notify the CFTC of potential capital impairment if the ratio of its total adjusted net capital to CFTC required minimums falls below 150%.[25] Rule 17f–6, as proposed, would have required an FCM holding fund assets to have at least $20 million in adjusted net capital in *excess* of the CFTC's net capital requirements. In addition, the FCM's adjusted net capital would have had to equal or exceed 250% of the CFTC's required minimum.[26]

Commenters were divided on the proposed approach. Commenters opposing the additional capital requirements suggested that, because the CFTC net capital requirements serve to protect assets in an FCM's custody from loss due to misappropriation or the FCM's insolvency, additional capital standards are not necessary. The Commission agrees that the CFTC net capital requirements are designed to safeguard fund assets in an FCM's custody.[27] Therefore, rule 17f–6, as adopted, does not require FCM custodians to meet additional capital standards.

2. Affiliated FCM Arrangements

As proposed, rule 17f–6 would have broadly prohibited a fund from placing assets with any FCM that is an affiliated person of the fund or an affiliated person of such person.[28] This provision is being adopted substantially as proposed.[29] While some commenters viewed the scope of this provision as too restrictive, custody by fund affiliates raises additional investor protection concerns.[30]

C. Domestic and Foreign Commodity Transactions

As proposed, rule 17f–6 would have permitted a fund to place assets with an FCM only in connection with domestic commodity transactions. The proposed rule would not have permitted a fund to place assets with an FCM in connection

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portfolios are generally unmanaged, it is unclear at present to the Commission how an investment company that engages is commodity trading could meet the requirements imposed on a UIT by the Investment Company Act, including section 4(2) thereof [15 U.S.C. 80a–4(2)].

Rule 17f–6 also is available to face-amount certificate companies that are governed by section 28 of the Investment Company Act [15 U.S.C. 80a–28]. *See* IDS Certificate Company, Investment Company Act Release Nos. 21098 (May 26, 1995) [60 FR 28818 (June 2, 1995)] (Notice of Application) and 21155 (June 21, 1995) [59 SEC Docket 1918] (Order) (regarding, among other things, a face-amount certificate company's participation in commodity markets and the use of third party accounts).

[19] Eliminating the requirement in rule 17f–6 for the board or its delegate to select and monitor FCM arrangements differs from the approach under rule 17f–5, which governs the custody of fund assets outside the United States. Custody arrangements for assets maintained outside the United States and related safeguards vary widely from one country to another. As such, it appears to be appropriate for such rule to require case-by-case evaluations. *See* Custody of Investment Company Assets Outside the United States, Investment Company Act Release No. 21259 (July 27, 1995) [60 FR 39592 (Aug. 2, 1995)]. In contrast, domestic and foreign FCM arrangements are subject to a regulatory framework under the CEA designed to provide consistent safeguards.

[20] The Investment Company Act and state law impose oversight responsibilities on a fund's board of directors to protect the interests of fund shareholders. *See, e.g.,* Burks v. Lasker, 441 U.S. 471, 484 (1979).

[21] *See* rule 17f–6(b)(4) [17 CFR 270.17f–6(b)(4)] (defining ''Futures Commission Merchant''). The FCM may, in turn, place the initial margin with certain other market participants, such as a clearing organization, to effect the fund's transactions. *See* rule 17f–6(a)(1)(ii) [17 CFR 270.17f–6(a)(1)(ii)].

[22] *See supra* notes 13–17 and *infra* note 33, and accompanying text.

[23] *See supra* note 6 and accompanying text.

[24] CFTC rule 1.17 [17 CFR 1.17]; 17 CFR 240.15c3–1(a).

[25] CFTC rule 1.12 [17 CFR 1.12]. The CFTC recently amended rule 1.12 to strengthen its provisions concerning early warning to the CFTC in the event of FCM capital impairment. Early Warning Reporting Requirements, Minimum Financial Requirements, Prepayment of Subordinated Debt, Gross Collection of Exchange-Set Margin for Omnibus Accounts and Capital Charge on Receivables from Foreign Brokers (Apr. 25, 1996) [61 FR 19177 (May 1, 1996)] [hereinafter the CFTC Early Warning Release].

[26] *See* Proposing Release, *supra* note, at nn.97–98 and accompanying text.

[27] *See, e.g.,* CFTC Early Warning Release, *supra* note 25.

[28] *See* Proposing Release, *supra* note, at nn.104–106 and accompanying text; Investment Company Act section 2(a)(3) [15 U.S.C. 80a–2(a)(3)] (defining affiliated person).

[29] Rule 17f–6(b)(4) [17 CFR 270.17f–6(b)(4)]. The prohibition has been incorporated into the definition of ''Futures Commission Merchant.''

[30] For example, to guard against potential abuses resulting from control over fund assets by related persons in other contexts, rule 17f–2, the Commission's rule governing self-custody arrangements, has been read to require fund affiliates to comply with its provisions or establish other appropriate safeguards. *See, e.g.,* Pegasus Income and Capital Fund, Inc. (pub. avail. Dec. 31, 1977) (custody by adviser-bank). One commenter acknowledged the risks that could be presented by affiliated custody and suggested that safeguards similar to those in rule 17f–2 could be required for affiliated FCM arrangements.

with commodity transactions traded on a foreign exchange. Commenters strongly urged the Commission to expand rule 17f–6 to permit FCM custody in connection with foreign exchange-traded transactions. In support of this approach, commenters cited the custodial protections under the CEA applicable to these transactions and noted the importance of international commodity trading in achieving fund management and hedging objectives.

Upon further consideration of the issue, the Commission has decided to permit a fund to place assets with a registered FCM in connection with commodity trades effected on both domestic and foreign exchanges.[31] As in the case of domestic transactions, an FCM holding the assets of U.S. customers in connection with foreign commodity transactions is subject to CFTC regulations designed to protect those assets.[32] These regulations require the FCM to be registered under the CEA, and thus subject to, among other things, the secured amount and CFTC net capital requirements.[33] Consistent with commodity trading practices, the rule permits FCMs to place fund assets with a clearing organization and certain other market participants as appropriate to effect foreign commodity transactions.[34]

D. Assets Held in FCM Custody

1. Initial Margin

As proposed, rule 17f–6 would have permitted a fund to place and maintain assets with an FCM in amounts necessary to effect its commodity trades. Consistent with commodity settlement practices, the proposed rule would have allowed a fund to maintain assets with an FCM to meet exchange-imposed minimum margin requirements, as well as any additional requirements imposed by the FCM. Three commenters supported the proposed approach. One commenter recommended that the rule limit FCM custody of fund margin to the minimum requirements established by an exchange.

The Commission is adopting this provision of the rule as proposed. Rule 17f–6 permits funds to meet FCM margin requirements that exceed those of an exchange.[35] Limiting FCM custody of initial fund margin to exchange requirements is not necessary to safeguard fund assets. Such a limitation also would be inconsistent with commodity settlement practices, since FCMs typically impose higher margin requirements than the margin requirements established by exchanges.[36]

2. Gains on Commodity Transactions

Once a customer establishes a position with an FCM, it is marked to market at least daily to reflect gains and losses in the position's value. Gains on commodity transactions are available for collection by commodity customers on the next business day following the crediting of the gain by the clearing organization.[37] In the event of an FCM's bankruptcy, if there are insufficient assets to cover all customer claims, commodity gains in the FCM's possession may be distributed on a *pro rata* basis to all of the FCM's customers. Allowing unlimited amounts of commodity gains to be maintained in an FCM's custody would subject fund assets to unnecessary risks.[38]

As proposed, rule 17f–6 would have permitted a fund to maintain with the

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[31] *See* rule 17f–6(b)(2)(i) and (ii) [17 CFR 270.17f–6(b)(2)(i) and (ii)] (defining ''Exchange-Traded Futures Contracts and Commodity Options'' for purposes of domestic and foreign transactions, respectively). Certain foreign-related commodity transactions trade on U.S. exchanges. These transactions, which may involve placing fund margin outside the United States, include futures contracts and commodity options involving foreign currencies and those effected through electronic links between U.S. and foreign exchanges. Consistent with CFTC rules and commodity settlement practices, a fund engaging in foreign currency transactions on domestic exchanges or placing margin overseas in connection with domestic trades may enter into subordination agreements. In these agreements, commodity customers agree that, if their FCM becomes insolvent and there is a margin shortfall, claims to margin securing their trades will be subordinated to the claims of customers whose accounts are denominated in U.S. dollars or held in the United States. *See* CFTC Financial and Segregation Interpretation No. 12 [53 FR 46911 (Nov. 21, 1988)] (the subordination requirement seeks to tie the risks of a particular jurisdiction or currency to customers engaging in commodity transactions relative to that jurisdiction or currency). *See also* Proposing Release, *supra* note , at nn.148–152 and accompanying text. In the case of commodity transactions effected on foreign exchanges, a subordination agreement is not required. In FCM bankruptcy proceedings, when a fund's assets relating to foreign exchange-traded transactions are held in one or more foreign currencies, the fund may be subject to the risks of foreign currency fluctuations of assets held on behalf of other customers in other foreign currencies.

[32] CFTC rules 30.1 to .11 [17 CFR 30.1 to .11]; *see supra* notes—and accompanying text. In early 1995, Barings PLC, a British investment bank, failed after suffering losses of approximately $1 billion from commodity transactions effected on the Singapore Monetary Exchange. Following Barings' collapse, commodity regulators from sixteen countries agreed in the ''Windsor Declaration'' on principles aimed at improving communications among commodity regulators and enhancing surveillance of risks taken by commodity market participants. Among the issues addressed was the protection of customer assets. *See* Suzanne McGee, *Futures Regulators Agree to Cooperate Globally*, Wall St. J. C18 (May 18, 1995); Brett D. Fromson, *Regulators Adopt Crisis Measures*, Wash. Post D15 (May 18, 1995). Earlier this year, commodity exchanges and regulators from various countries agreed on specific information-sharing measures. Suzanne McGee, *Two Information-Sharing Pacts Signed By 50 Exchanges and 13 Regulators*, Wall St. J. A7B (Mar. 18, 1996).

[33] CEA section 4d(1) [7 U.S.C. 6d(1)]; CFTC rules 3.10, 30.4 [17 CFR 3.10, 30.4]. The CFTC grants to certain foreign commodity brokers exemptions from requirements under the CFTC's rules relating to transactions effected on foreign exchanges, including FCM registration. CFTC rule 30.10 [17 CFR 30.10]. The CFTC grants the exemption based on a determination that the foreign broker is subject to comparable regulation in its home country. Because of uncertainties arising from differing regulatory schemes among various jurisdictions, especially those involving the bankruptcies of commodities brokers, rule 17f–6 permits funds to use only registered FCMs.

[34] *See infra* note and accompanying text (discussing provisions of rule 17f–6 that permit an FCM to transfer fund margin to another registered FCM, a clearing organization, a member of a foreign board of trade, or a U.S. or foreign bank).

[35] Rule 17f–6(a) [17 CFR 270.17f–6(a)]. Currently, only the writer of a commodity option is required to post margin with an FCM. Rule 17f–6, therefore, does not apply to funds that purchase commodity options through payment of an option premium. *See supra* note and accompanying text.

[36] Fink & Feduniak, *supra* note, at 137. An FCM, for example, may impose higher initial margin requirements based on market volatility or to retain a cushion in the event an exchange subsequently raises its margin requirements. *Id*. at 137–138.

Exchange rules or the procedures of the FCM also may restrict the types of assets that may be used to satisfy margin requirements. A fund may borrow assets from an FCM to meet margin requirements so long as the arrangement is consistent with section 18 of the Investment Company Act [15 U.S.C. 80a–18]. Section 18 restricts the circumstances under which funds may borrow from other persons. Borrowing assets from an FCM will not be deemed to violate section 18, in the case of an open-end fund, or be subject to that section's asset coverage requirements, in the case of a closed-end fund, if the fund sets aside or provides the FCM with liquid assets that collateralize 100% of the market value of the loan. *See, e.g.*, Merrill Lynch Asset Management, L.P. (pub. avail. July 2, 1996). *See also* 1 Thomas P. Lemke *et al.*, Regulation of Investment Companies, section 8.06[1][a][ii] (1996) (by setting aside fund assets or otherwise covering its exposure, a fund avoids the restrictions of section 18(f)); 1 Thomas A. Russo, Regulation of the Commodities Futures and Options Markets section 1.20 (1983 & Supp. 1993) (FCM asset lending arrangements typically are fully collateralized).

[37] A party to a futures contract suffering a loss on its position makes a payment (variation margin) in the amount of the loss, which is available for collection by the other party to the contract on the next business day. *See supra* note 5. While an option writer suffering a loss on its position similarly makes a payment covering the loss, the payment is held by the clearing organization on behalf of the option holder until the option is exercised; in the event of subsequent gains in the writer's position, the writer would be entitled to collect the gains from its previous payments held by the clearing organization.

[38] *See* Interpretation No. 10, *supra* note 12, at 7133 n.15 (indicating that gains on commodity transactions should be collected daily). *See also supra* note 11 and accompanying text. For funds that use third party accounts, gains on commodity positions are paid directly by an FCM to the fund without flowing through or being held in the third party account. Goldman Sachs & Co. (pub. avail. May 2, 1986). Consequently, the rule's *de minimis* limitation on the amount of gains in an FCM's custody effectively is required for third party arrangements.

FCM *de minimis* amounts of gains on fund commodity transactions; gains exceeding the *de minimis* threshold could be held by an FCM only until the next business day. One commenter supported the proposed approach. Four other commenters indicated that the amount of commodity gains held by an FCM should be determined by the FCM and the fund on an individual basis.

Rule 17f–6, as adopted, retains the proposed requirement governing commodity gains in FCM custody.[39] This approach gives funds the flexibility of not having to withdraw *de minimis* amounts of gains from FCM custody, while limiting the potential for fund assets to be used to satisfy the claims of other customers in the event of the FCM's bankruptcy.

E. Contract Requirements and Custodians Used To Effect Commodity Transactions

As proposed, rule 17f–6 would have required a fund to enter into a written contract with an FCM custodian, in which the FCM would agree to adhere to the CEA and CFTC segregation requirements and to furnish the Commission with information concerning the FCM's custody of fund margin. The proposed rule also would have required certain contract provisions relating to the transfer of fund assets for clearing purposes.[40]

The adopted rule retains these requirements, modified to reflect the use of FCM custodians in connection with foreign exchange-traded transactions.[41] Thus, in addition to requiring compliance with the segregation requirements for domestic trades, the contract must require the FCM to comply with the secured amount requirements in connection with any foreign transactions.[42] The FCM also must agree that any other FCM used to effect transactions will be registered with the CFTC, comply with the CFTC segregation or secured amount requirements, and not be affiliated with the fund. Consistent with commodity settlement practices, rule 17f–6 permits an FCM to place fund margin with a clearing organization, a member of a foreign board of trade, or a U.S. or foreign bank. The FCM must agree to obtain from each entity used for clearing purposes, including any other FCM, an acknowledgment that the fund's assets are held on behalf of the FCM's customers in accordance with provisions under the CEA.[43]

F. Withdrawal of Assets From FCM Custody

As proposed, rule 17f–6 would have required a fund to withdraw its assets from an FCM *promptly* in the event the fund's FCM arrangements no longer complied with the requirements of the rule. The Proposing Release suggested that asset withdrawals would be expected to be made within five days of the event triggering the withdrawal.[44] Rule 17f–6, as adopted, requires asset withdrawals to be made *as soon as reasonably practicable*.[45] Although a five-day standard appears to be a generally appropriate length of time,[46] any asset withdrawals under the rule would be subject to circumstances (such as the size or number of a fund's positions) that indicate a longer period of time would be reasonable.

III. Cost/Benefit Analysis

Rule 17f–6 should not impose any burdens on funds. Rather, the rule should benefit funds by permitting, but not requiring, fund margin to be maintained directly with FCMs instead of in third party accounts. The requirements of rule 17f–6 are consistent with those of the CEA and CFTC rules. The rule gives funds the option of placing with FCMs margin in the same manner as other participants in the commodity markets.

IV. Summary of Regulatory Flexibility Analysis

A summary of the Initial Regulatory Flexibility Analysis, which was prepared in accordance with 5 U.S.C. 603, was published in Investment Company Act Release No. 20313. No comments were received on this analysis. The Commission has prepared a Final Regulatory Flexibility Analysis in accordance with 5 U.S.C. 604. The Analysis states that the new rule will permit funds to maintain their assets with FCMs and other entities used for settlement purposes in connection with futures contracts and commodity options traded on a U.S. or foreign exchange. The Analysis explains that the rule provides flexibility and custodial protections in a way that should minimize any impact on, or cost to, small business. Cost-benefit information reflected in the ''Cost/Benefit Analysis'' section of this Release also is reflected in the Analysis. A copy of the Final Regulatory Flexibility Analysis may be obtained by contacting Nadya B. Roytblat, Mail Stop 10–2, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

V. Statutory Authority

The Commission is adopting rule 17f–6 under sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), –37(a)].

List of Subjects in 17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Adopted Rule

For the reasons set out in the preamble, Title 17, Chapter II of the

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[39] Rule 17f–6(a)(2) [17 CFR 270.17f–6(a)(2)]. Losses paid to an FCM due to declines in a fund's commodity positions represent discharged liabilities and not fund assets under section 17(f). Montgomery Street Income Securities, Inc. (pub. avail. Apr. 11, 1983). Losses paid to an FCM, therefore, are not subject to rule 17f–6.

[40] The proposal would have required the FCM to agree that any transfer of fund assets for clearing purposes would be to another FCM that met the requirements of the rule (other than the requirement of a contract with the fund). The FCM also would have been permitted to place fund margin with a clearing organization or a bank.

[41] Rule 17f–6(a)(1)(i) to (iii) [17 CFR 270.17f–6(a)(1)(i) to (iii)].

[42] Last year, the CFTC adopted rules creating a new market for eligible professional investors. Section 4(c) Contract Market Transactions; Swap Agreements, 60 FR 51323 (Oct. 2, 1995); CFTC rules 36.1 *et seq.* [17 CFR 36.1 *et seq.*] Transactions in the new market by eligible investors, which include funds with total assets exceeding $5 million, are exempt from many of the requirements under the CEA and related CFTC rules. The CFTC rules applicable to the new professional trading market, however, do not affect requirements relating to, among other things, segregation and FCM net capital. Consequently, funds may participate in the new professional trading market and use FCM custodians under rule 17f–6.

[43] Rule 17f–6(a)(1)(ii) [17 CFR 270.17f–6(a)(1)(ii)]. *See* CFTC rules 1.20, 30.7(c) [17 CFR 1.20, 30.7(c)] (requiring this acknowledgment). *See also* rule 17f–6(b)(1) [17 CFR 270.17f–6(b)(1)] (defining ''Clearing Organization''); rule 17f–6(b)(5) [17 CFR 270.17f–6(b)(5)] (defining ''U.S. or Foreign Bank''). Proposed rule 17f–6 would have required that any bank used to hold fund assets have a minimum capitalization of $500,000. The adopted rule does not impose this requirement because the CFTC addresses the creditworthiness of these depositories. *See, e.g.*, CFTC Advisory 87–5 (Dec. 17, 1987). The Proposing Release requested comment on requiring a number of other contract provisions. In particular, the Proposing Release requested comment whether fund contracts should require FCMs: (i) to provide information at the request of the fund's accountants, (ii) to maintain specific records or furnish funds with specific reports concerning their margin accounts, and (iii) to indemnify funds or insure fund assets against non-trading margin losses. While one commenter favored these additional requirements, most commenters indicated that they are unnecessary. Rule 17f–6 does not include these requirements, since either CFTC regulations address these issues (such as recordkeeping) or these matters (such as accountants' access and indemnification) can be negotiated between the fund and the FCM.

[44] Proposing Release, *supra* note 1, at n. 129 and accompanying text.

[45] Rule 17f–6(a)(3) [17 CFR 270.17f–6(a)(3)]. *See* Custody of Investment Company Assets Outside the United States, *supra* note 19 (proposing a similar approach for custody arrangements involving foreign securities).

[46] *Cf.* CFTC rule 190.02(e) [17 CFR 190.02(e)] (giving a trustee in FCM bankruptcy proceedings four days to transfer open commodity positions).

Code of Federal Regulations is amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39 unless otherwise noted;

* * * * *

2. By adding § 270.17f–6 to read as follows:

§ 270.17f–6 Custody of investment company assets with Futures Commission Merchants and Commodity Clearing Organizations.

(a) A Fund may place and maintain cash, securities, and similar investments with a Futures Commission Merchant in amounts necessary to effect the Fund's transactions in Exchange-Traded Futures Contracts and Commodity Options, *Provided that:*

(1) The manner in which the Futures Commission Merchant maintains the Fund's assets shall be governed by a written contract, which provides that:

(i) The Futures Commission Merchant shall comply with the segregation requirements of section 4d(2) of the Commodity Exchange Act (7 U.S.C. 6d(2)) and the rules thereunder (17 CFR Chapter I) or, if applicable, the secured amount requirements of rule 30.7 under the Commodity Exchange Act (17 CFR 30.7);

(ii) The Futures Commission Merchant, as appropriate to the Fund's transactions and in accordance with the Commodity Exchange Act (7 U.S.C. 1 through 25) and the rules and regulations thereunder (including 17 CFR part 30), may place and maintain the Fund's assets to effect the Fund's transactions with another Futures Commission Merchant, a Clearing Organization, a U.S. or Foreign Bank, or a member of a foreign board of trade, and shall obtain an acknowledgment, as required under rules 1.20(a) or 30.7(c) under the Commodity Exchange Act [17 CFR 1.20(a) or 30.7(c)], as applicable, that such assets are held on behalf of the Futures Commission Merchant's customers in accordance with the provisions of the Commodity Exchange Act; and

(iii) The Futures Commission Merchant shall promptly furnish copies of or extracts from the Futures Commission Merchant's records or such other information pertaining to the Fund's assets as the Commission through its employees or agents may request.

(2) Any gains on the Fund's transactions, other than de minimis amounts, may be maintained with the Futures Commission Merchant only until the next business day following receipt.

(3) If the custodial arrangement no longer meets the requirements of this section, the Fund shall withdraw its assets from the Futures Commission Merchant as soon as reasonably practicable.

(b) For purposes of this section:

(1) *Clearing Organization* means a clearing organization as defined in rule 1.3(d) under the Commodity Exchange Act (17 CFR 1.3(d)) and includes a clearing organization for a foreign board of trade.

(2) *Exchange-Traded Futures Contracts and Commodity Options* means commodity futures contracts, options on commodity futures contracts, and options on physical commodities traded on or subject to the rules of:

(i) Any contract market designated for trading such transactions under the Commodity Exchange Act and the rules thereunder; or

(ii) Any board of trade or exchange outside the United States, as contemplated in Part 30 under the Commodity Exchange Act.

(3) *Fund* means an investment company registered under the Act (15 U.S.C. 80a–1 *et seq.*).

(4) *Futures Commission Merchant* means any person that is registered as a futures commission merchant under the Commodity Exchange Act and that is not an affiliated person of the Fund or an affiliated person of such person.

(5) *U.S. or Foreign Bank* means a bank, as defined in section 2(a)(5) of the Act (15 U.S.C. 80a–2(a)(5)), or a banking institution or trust company that is incorporated or organized under the laws of a country other than the United States and that is regulated as such by the country's government or an agency thereof.

Dated: December 11, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–31891 Filed 12–16–96; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8692]

RIN 1545–AR57

Reissuance of Mortgage Credit Certificates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations relating to the reissuance of mortgage credit certificates. Changes to the applicable law were made by the Tax Reform Act of 1984. The regulations provide guidance to issuers and holders of mortgage credit certificates.

EFFECTIVE DATE: These regulations are effective December 17, 1996.

FOR FURTHER INFORMATION CONTACT: L. Michael Wachtel, (202) 622–3980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document adds final regulations to the Income Tax Regulations (26 CFR part 1) to provide guidance under section 25(e)(4) of the Internal Revenue Code (Code) with respect to the reissuance of mortgage credit certificates. Section 25(e)(4) was added to the Code by section 612 of the Tax Reform Act of 1984, 98 Stat. 494, 905.

On December 22, 1993, temporary regulations (TD 8502) relating to refinancing under section 25(e)(4) were published in the Federal Register (58 FR 67689). A notice of proposed rulemaking (REG–209574–92, previously FI–47–92) cross-referencing the temporary regulations was published in the Federal Register for the same day (58 FR 67744).

Written comments responding to these notices were received. There were no requests to appear in response to publication of a notice of a hearing in the Federal Register (61 FR 15204). Therefore, no public hearing was held. After consideration of all the comments, the proposed regulations under section 25(e)(4) are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed. The comments and revisions are discussed below.

Explanation of Provisions and Summary of Comments

The temporary regulations permit the reissuance of a mortgage credit

certificate on or after December 22, 1992, but no later than 1 year after the date of the refinancing. Commentators thought this unnecessarily limited eligibility for the reissuance of a certificate and limited the flexibility of State and local governments. The final regulations, reflecting the goal of giving State and local governments maximum flexibility to administer mortgage credit certificate programs, remove these limits. A State or local government may reissue a certificate to any person who refinanced a mortgage for which a mortgage credit certificate was issued and who meets the other requirements for a reissued certificate. The credit for prior years is available to the extent that the certificate holder may file a claim for refund.

The temporary regulations provide that the certified mortgage indebtedness amount on the reissued certificate cannot exceed the remaining balance of the certified mortgage indebtedness amount on the existing certificate. Commentators suggested that the final regulations permit the indebtedness amount on the reissued certificate to include costs such as closing costs of the refinancing loan. This recommendation was not implemented in the final regulations because section 25(e)(4) of the Code limits the amount of the reissued certificate to the outstanding balance of the existing certificate.

The temporary regulations provide that the reissued certificate may not result in an increase in the credit that would otherwise have been allowable to the holder under the existing certificate for any taxable year. In the case of a series of refinancings, the amount allowable on the refinanced loan would be the amount allowable on the original loan, rather than the immediately preceding refinanced loan.

A holder of a mortgage credit certificate who refinances a fixed rate loan can determine the amount of interest that would have been paid for any taxable year on the refinanced loan from an amortization schedule that projects interest and principal payments over the life of the loan. By applying the mortgage credit rate to the amount of interest, the holder can calculate the amount of tax credit that would have been allowable for the taxable year.

The amount of tax credit that would have been allowable for a taxable year is not as easily calculated by a holder of a mortgage credit certificate who refinances a variable rate loan because the holder cannot project an amortization schedule for the refinanced loan. Instead, each year the holder must calculate the amount of interest that would have been paid on the refinanced loan under the interest rate in effect for that year and then calculate the tax credit that would have been allowable. This procedure was described as burdensome by various commentators.

The final regulations continue to reflect the statutory requirement that the reissued certificate not result in an increase in the credit that would otherwise have been allowable to the certificate holder under the existing certificate for any taxable year. The final regulations, however, permit a certificate holder who refinances a variable rate loan with either a variable rate loan or a fixed rate loan to determine the xamount of credit that would have been allowable by using an alternative method instead of calculating the amount based on the actual interest that would have been paid on the refinanced loan. Under the alternative method, the credit that would have been allowable is computed using an amortization schedule of a hypothetical self-amortizing loan with level payments projected to the final maturity date of the refinanced loan. The interest rate of the hypothetical loan is the annual percentage rate (APR) of the refinancing loan determined for purposes of the Federal Truth in Lending Act. The principal of the hypothetical loan is the remaining outstanding balance of the certified mortgage indebtedness specified on the existing certificate.

A certificate holder who refinances a variable rate loan may use the alternative method or may compute the actual amount of credit that would have been allowable. However, the method chosen must be consistently applied by the holder beginning with the first taxable year for which the tax credit based upon the reissued certificate is claimed.

The temporary regulations do not address whether a refinancing loan is a financing that is subject to the recapture provisions of section 143(m) if the refinanced loan was not subject to recapture. The final regulations provide that the refinancing loan underlying a reissued mortgage credit certificate that replaces a mortgage credit certificate issued on or before December 31, 1990, is not a federally subsidized indebtedness that is subject to the recapture provisions of section 143(m) of the Code.

Commentators asked for clarification of whether additional volume cap was required in order to reissue a mortgage credit certificate and whether additional reporting was required by the issuer of a reissued mortgage certificate. Reissuance of a mortgage credit certificate relates to refinancing by a mortgage credit certificate holder of a mortgage loan on the holder's principal residence. Volume cap was required to be obtained in connection with the program under which the original certificate had been issued. Because the reissued certificate is replacing the existing certificate, it is treated as issued in connection with the original program, and additional volume cap is unnecessary for the reissuance. For similar reasons, no additional reporting is required by an issuer of a reissued mortgage credit certificate.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. It also has been determined that section 553(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rule making preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is L. Michael Wachtel, Office of the Assistant Chief Counsel (Financial Institutions and Products), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for Sections 1.25–1T—1.25–8T and adding entries in numerical order to read as follows:

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

Section 1.25–1T also issued under 26 U.S.C. 25.

Section 1.25–2T also issued under 26 U.S.C. 25.

Section 1.25–3 also issued under 26 U.S.C. 25.

Section 1.25–3T also issued under 26 U.S.C. 25.
Section 1.25–4T also issued under 26 U.S.C. 25.
Section 1.25–5T also issued under 26 U.S.C. 25.
Section 1.25–6T also issued under 26 U.S.C. 25.
Section 1.25–7T also issued under 26 U.S.C. 25.
Section 1.25–8T also issued under 26 U.S.C. 25. * * *

Par. 2. Section 1.25–3 is added to read as follows:

§ 1.25–3 Qualified mortgage credit certificate.

(a) through (g)(1)(ii) [Reserved] For further guidance, see § 1.25–3T(a) through (g)(1)(ii).

(g)(1)(iii) *Reissued certificate exception.* See paragraph (p) of this section for rules regarding the exception in the case of refinancing existing mortgages.

(g)(2) through (o) [Reserved] For further guidance, see § 1.25–3T(g)(2) through (o).

(p) *Reissued certificates for certain refinancings—(1) In general.* If the issuer of a qualified mortgage credit certificate reissues a certificate in place of an existing mortgage credit certificate to the holder of that existing certificate, the reissued certificate is treated as satisfying the requirements of this section. The period for which the reissued certificate is in effect begins with the date of the refinancing (that is, the date on which interest begins accruing on the refinancing loan).

(2) *Meaning of existing certificate.* For purposes of this paragraph (p), a mortgage credit certificate is an existing certificate only if it satisfies the requirements of this section. An existing certificate may be the original certificate, a certificate issued to a transferee under § 1.25–3T(h)(2)(ii), or a certificate previously reissued under this paragraph (p).

(3) *Limitations on reissued certificate.* An issuer may reissue a mortgage credit certificate only if all of the following requirements are satisfied:

(i) The reissued certificate is issued to the holder of an existing certificate with respect to the same property to which the existing certificate relates.

(ii) The reissued certificate entirely replaces the existing certificate (that is, the holder cannot retain the existing certificate with respect to any portion of the outstanding balance of the certified mortgage indebtedness specified on the existing certificate).

(iii) The certified mortgage indebtedness specified on the reissued certificate does not exceed the remaining outstanding balance of the certified mortgage indebtedness specified on the existing certificate.

(iv) The reissued certificate does not increase the certificate credit rate specified in the existing certificate.

(v) The reissued certificate does not result in an increase in the tax credit that would otherwise have been allowable to the holder under the existing certificate for any taxable year. The holder of a reissued certificate determines the amount of tax credit that would otherwise have been allowable by multiplying the interest that was scheduled to have been paid on the refinanced loan by the certificate rate of the existing certificate. In the case of a series of refinancings, the tax credit that would otherwise have been allowable is determined from the amount of interest that was scheduled to have been paid on the original loan and the certificate rate of the original certificate.

(A) In the case of a refinanced loan that is a fixed interest rate loan, the interest that was scheduled to be paid on the refinanced loan is determined using the scheduled interest method described in paragraph (p)(3)(v)(C) of this section.

(B) In the case of a refinanced loan that is not a fixed interest rate loan, the interest that was scheduled to be paid on the refinanced loan is determined using either the scheduled interest method described in paragraph (p)(3)(v)(C) of this section or the hypothetical interest method described in paragraph (p)(3)(v)(D) of this section.

(C) The scheduled interest method determines the amount of interest for each taxable year that was scheduled to have been paid in the taxable year based on the terms of the refinanced loan including any changes in the interest rate that would have been required by the terms of the refinanced loan and any payments of principal that would have been required by the terms of the refinanced loan (other than repayments required as a result of any refinancing of the loan).

(D) The hypothetical interest method (which is available only for refinanced loans that are not fixed interest rate loans) determines the amount of interest treated as having been scheduled to be paid for a taxable year by constructing an amortization schedule for a hypothetical self-amortizing loan with level payments. The hypothetical loan must have a principal amount equal to the remaining outstanding balance of the certified mortgage indebtedness specified on the existing certificate, a maturity equal to that of the refinanced loan, and interest equal to the annual percentage rate (APR) of the refinancing loan that is required to be calculated for the Federal Truth in Lending Act.

(E) A holder must consistently apply the scheduled interest method or the hypothetical interest method for all taxable years beginning with the first taxable year the tax credit is claimed by the holder based upon the reissued certificate.

(4) *Examples.* The following examples illustrate the application of paragraph (p)(3)(v) of this section:

Example 1. A holder of an existing certificate that meets the requirements of this section seeks to refinance the mortgage on the property to which the existing certificate relates. The final payment on the holder's existing mortgage is due on December 31, 2000; the final payment on the new mortgage would not be due until January 31, 2004. The holder requests that the issuer provide to the holder a reissued mortgage credit certificate in place of the existing certificate. The requested certificate would have the same certificate credit rate as the existing certificate. For each calendar year through the year 2000, the credit that would be allowable to the holder with respect to the new mortgage under the requested certificate would not exceed the credit allowable for that year under the existing certificate. The requested certificate, however, would allow the holder credits for the years 2001 through 2004, years for which, due to the earlier scheduled retirement of the existing mortgage, no credit would be allowable under the existing certificate. Under paragraph (p)(3)(v) of this section, the issuer may not reissue the certificate as requested because, under the existing certificate, no credit would be allowable for the years 2001 through 2004. The issuer may, however, provide a reissued certificate that limits the amount of the credit allowable in each year to the amount allowable under the existing certificate. Because the existing certificate would allow no credit after December 31, 2000, the reissued certificate could expire on December 31, 2000.

Example 2. (a) The facts are the same as *Example 1* except that the existing mortgage loan has a variable rate of interest and the refinancing loan will have a fixed rate of interest. To determine whether the limit under paragraph (p)(3)(v) of this section is met for any taxable year, the holder must calculate the amount of credit that otherwise would have been allowable absent the refinancing. This requires a determination of the amount of interest that would have been payable on the refinanced loan for the taxable year. The holder may determine this amount by—

(1) Applying the terms of the refinanced loan, including the variable interest rate or rates, for the taxable year as though the refinanced loan continued to exist; or

(2) Obtaining the amount of interest, and calculating the amount of credit that would have been available, from the schedule of equal payments that fully amortize a hypothetical loan with the principal amount equal to the remaining outstanding balance of the certified mortgage indebtedness specified

on the existing certificate, the interest equal to the annual percentage rate (APR) of the refinancing loan, and the maturity equal to that of the refinanced loan.

(b) The holder must apply the same method for each taxable year the tax credit is claimed based upon the reissued mortgage credit certificate.

(5) *Coordination with Section 143(m)(3).* A refinancing loan underlying a reissued mortgage credit certificate that replaces a mortgage credit certificate issued on or before December 31, 1990, is not a federally subsidized indebtedness for the purposes of section 143(m)(3) of the Internal Revenue Code.

§ 1.25–3T [Amended]

Par. 3. Section 1.25–3T is amended by removing paragraphs (g)(1)(iii) and (p).

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: November 27, 1996.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31772 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–U

26 CFR Part 48

[TD 8693]

RIN 1545–AU52

Diesel Fuel Excise Tax; Special Rules for Alaska

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the application of the diesel fuel excise tax to fuel used in Alaska. The regulations implement certain changes made by the Small Business Job Protection Act of 1996. They affect certain enterers, refiners, retailers, terminal operators, throughputters, wholesale distributors, and users. The text of these regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the Federal Register.

DATES: These regulations are effective December 17, 1996. For dates of applicability of these regulations, see §§ 48.4082–5T(g) and 48.6715–2T(b).

FOR FURTHER INFORMATION CONTACT: Frank Boland (202) 622–3130 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Section 4081 imposes a tax on certain removals, entries, and sales of diesel fuel. However, under section 4082, tax is not imposed if, among other conditions, the diesel fuel is indelibly dyed in accordance with Treasury regulations. Dyed diesel fuel can be used legally in nontaxable uses such as for heating oil, as fuel in stationary engines, or as fuel in nonhighway vehicles. A substantial penalty under section 6715 applies if dyed diesel fuel is used for a taxable purpose such as in a registered highway vehicle.

A similar dyeing regime for diesel fuel is required by regulations issued under the Clean Air Act. That Act prohibits the use on highways of diesel fuel with a sulfur content exceeding prescribed levels. The Environmental Protection Agency (EPA) requires this ''high sulfur'' diesel fuel to be dyed.

Section 1801 of the Small Business Job Protection Act of 1996 amends section 4082 to create an exception to the IRS dyeing requirement. Under this amendment, which is effective October 1, 1996, the IRS dyeing requirement does not apply to diesel fuel that is removed, entered, or sold in a state for ultimate sale or use in an area of such state during the period such area is exempted from EPA's sulfur content and fuel dyeing requirements if the use of the fuel is certified pursuant to Treasury regulations.

Section 211(i)(4) of the Clean Air Act allows EPA to exempt the states of Alaska and Hawaii from the Clean Air Act's sulfur content requirements. In response to a petition from Alaska, the EPA granted a permanent exemption for remote areas of Alaska (that is, areas that are not served by the Federal Aid Highway System). In addition, a temporary exemption was granted for urban areas. This temporary exemption, which was originally scheduled to expire after September 30, 1996, has been extended by the EPA (61 FR 42812 (August 19, 1996)) for 24 months, or until a decision is made on Alaska's petition for a permanent exemption, whichever period is shorter.

Thus, under current EPA rules, the entire state of Alaska is exempt from the Clean Air Act's sulfur content requirements and, consequently, from the EPA's dyeing requirements. No part of Hawaii or any other state is similarly exempt.

Explanation of Provisions

These temporary regulations generally establish a system for collecting the federal diesel fuel tax at the wholesale level in Alaska. This system is similar to the pre-1994 federal system under section 4091 and the present system used by the state of Alaska for state fuel tax. The person liable for tax under the temporary regulations generally will be a person who is licensed by Alaska as a qualified dealer.

Under the temporary regulations, a qualified dealer may buy undyed diesel fuel tax free at a terminal rack and sell the fuel tax free to another qualified dealer or to a buyer for the buyer's own nontaxable use. However, a qualified dealer is liable for tax when it sells to a buyer for the buyer's taxable use or to a reseller that is not a qualified dealer.

A qualified dealer must keep adequate records to document the exempt nature of its nontaxable sales. Although the temporary regulations do not prescribe any specific documentation, taxpayers may consider using a format similar to the notification certificate in § 48.4081–5 as proof of tax-free sales between qualified dealers. As proof of tax-free sales for nontaxable uses, taxpayers may consider using Alaska's exemption certificate, when appropriate, or an adaptation of the certificate presently used to support tax-free sales of aviation fuel that is found in Notice 88–132, 1988–2 C.B. 552, 555. The IRS will consider whether the final regulations should specify model certificates to be used for documenting nontaxable transactions in the future.

Taxpayers are cautioned that the uses that are exempt from Alaska's state tax are not identical to the uses that are exempt from the federal tax. For example, Alaska exempts sales to all nonprofit organizations described in section 501(c)(3); the comparable federal rule exempts only sales to nonprofit educational organizations.

Taxpayers should also note that diesel fuel that is dyed in accordance with existing IRS regulations will continue to be exempt from the section 4081 tax in Alaska.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this temporary regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Frank Boland, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 48 is amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 is amended by adding an entry in numerical order to read in part as follows:

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

Section 48.4082–5T also issued under 26 U.S.C. 4082. * * *

Par. 2. Section 48.4082–5T is added to read as follows:

§ 48.4082–5T Diesel fuel; Alaska (temporary).

(a) *Application.* This section applies to diesel fuel removed, entered, or sold in Alaska for ultimate sale or use in an exempt area of Alaska.

(b) *Definitions.*

Exempt area of Alaska means the area of Alaska in which the sulfur content requirements for diesel fuel (see section 211(i) of the Clear Air Act (42 U.S.C. 7545(i))) do not apply because the Administrator of the Environmental Protection Agency has granted an exemption under section 211(i)(4) of that Act.

Nontaxable use means a use described in section 4082(b).

Qualified dealer means any person that holds a qualified dealer license from the state of Alaska.

(c) *Tax-free removals and entries.* Notwithstanding § 48.4082–1, tax is not imposed by section 4081 on the removal or entry of any diesel fuel in an exempt area of Alaska if—

(1) The person that would be liable for tax under § 48.4081–2 or 48.4081–3 is a taxable fuel registrant and satisfies the requirements of paragraph (e) of this section;

(2) In the case of a removal from a terminal, the terminal is an approved terminal; and

(3) The owner of the diesel fuel immediately after the removal or entry holds the fuel for its own use in a nontaxable use or is a qualified dealer.

(d) *Sales after removals and entries*—(1) *In general.* Paragraph (c) of this section does not apply with respect to diesel fuel that is subsequently sold by a qualified dealer unless—

(i) The fuel is sold in an exempt area of Alaska;

(ii) The buyer purchases the fuel for its own use in a nontaxable use or is a qualified dealer; and

(iii) The seller satisfies the requirements of paragraph (e) of this section.

(2) *Tax imposed at time of sale; liability for tax.* Notwithstanding §§ 48.4081–2 and 48.4081–3, in any case in which paragraph (c) of this section does not apply with respect to diesel fuel because of a subsequent sale by a qualified dealer, the tax with respect to that fuel is imposed at the time of the subsequent sale and the qualified dealer is liable for the tax.

(3) *Rate of tax.* For the rate of tax, see section 4081.

(e) *Evidence of tax-free transactions.* The requirements of section 4082(c)(2) (relating to certification) and this paragraph (e) are satisfied if the person otherwise liable for tax is able to show the district director satisfactory evidence of the exempt nature of the transaction and has no reason to believe that the evidence is false. Satisfactory evidence may include copies of qualified dealer licenses or exemption certificates obtained for state tax purposes.

(f) *Cross reference.* For the tax on previously untaxed diesel fuel that is used for a taxable purpose, see § 48.4082–4.

(g) *Effective date.* This section is applicable with respect to diesel fuel removed or entered after December 31, 1996.

Par. 3. Section 48.6715–2T is added to read as follows:

§ 48.6715–2T Application of section 6715(a)(3) to Alaska (temporary).

(a) *In general.* The penalty provided by section 6715(a)(3) for willful alteration of dyed fuel will not be assessed if the alteration occurs in an exempt area of Alaska.

(b) *Effective date.* This section is applicable as of October 1, 1996.

Approved: November 27, 1996.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31857 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–U

26 CFR Part 301

[TD 8691]

RIN 1545–AU13

Sale of Seized Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the sale of seized property. The final regulations reflect changes concerning the setting of a minimum price for seized property by the Tax Reform Act of 1986. The regulations affect all sales of seized property.

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Kevin B. Connelly, (202) 622–3640 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR part 301) relating to the sale of seized property under section 6335 of the Internal Revenue Code (Code). The Tax Reform Act of 1986 amended section 6335(e), relating to the manner and conditions of sale, to require the Secretary to determine whether it would be in the best interest of the United States to buy seized property at the minimum price set by the Secretary. On June 13, 1996, a notice of proposed rulemaking reflecting this change was published in the Federal Register (61 FR 30012). No comments responding to the notice of proposed rulemaking were received, and no public hearing was requested or held. The final regulations are adopted as proposed.

Explanation of Provisions

Section 1570 of the Tax Reform Act of 1986 amended section 6335(e) of the Code to require the Secretary to determine before the sale of seized property whether it would be in the best interest of the United States to purchase such property at the minimum price set by the Secretary. The best interest determination is to be based on criteria prescribed by the Secretary. If, at the sale, one or more persons offer at least the minimum price, the property shall be sold to the highest bidder. If no one offers at least the minimum price and the Secretary has determined that it would be in the best interest of the United States to purchase the property for the minimum price, the property

will be declared sold to the United States for the minimum price. If no one offers the minimum price and the Secretary has not determined that it would be in the best interest of the United States to purchase the property for the minimum price, the property shall be released to the owner of the property and the expense of the levy and sale shall be added to the amount of tax for the collection of which the United States made the levy. Any property released shall remain subject to any lien imposed by subchapter C of chapter 64 of subtitle F of the Code.

The regulations reflect the changes made by the Tax Reform Act of 1986. The regulations authorize district directors to make the required determination whether it would be in the best interest of the United States to purchase seized property for the minimum price. In addition, the regulations set forth factors the district director may consider when determining the best interest of the United States. The district director may consider all relevant facts and circumstances including for example: (1) marketability of the property; (2) cost of maintaining the property; (3) cost of repairing or restoring the property; (4) cost of transporting the property; (5) cost of safeguarding the property; (6) cost of potential toxic waste cleanup; and (7) other factors pertinent to the type of property.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Kevin B. Connelly, Office of Assistant Chief Counsel (General Litigation) CC:EL:GL, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

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

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Par. 2. Section 301.6335–1 is amended as follows:

1. Paragraph (c)(3) is revised.
2. Paragraphs (c)(4) through (c)(9) are redesignated as paragraphs (c)(5) through (c)(10), respectively.
3. New paragraph (c)(4) is added.

The addition and revision read as follows:

§ 301.6335–1 Sale of seized property.

* * * * *

(c) * * *

(3) *Determinations relating to minimum price*—(i) *Minimum price.* Before the sale of property seized by levy, the district director shall determine a minimum price, taking into account the expenses of levy and sale, for which the property shall be sold. The internal revenue officer conducting the sale may either announce the minimum price before the sale begins, or defer announcement of the minimum price until after the receipt of the highest bid, in which case, if the highest bid is greater than the minimum price, no announcement of the minimum price shall be made.

(ii) *Purchase by the United States.* Before the sale of property seized by levy, the district director shall determine whether the purchase of property by the United States at the minimum price would be in the best interest of the United States. In determining whether the purchase of property would be in the best interest of the United States, the district director may consider all relevant facts and circumstances including for example—

(*a*) Marketability of the property;

(*b*) Cost of maintaining the property;

(*c*) Cost of repairing or restoring the property;

(*d*) Cost of transporting the property;

(*e*) Cost of safeguarding the property;

(*f*) Cost of potential toxic waste cleanup; and

(*g*) Other factors pertinent to the type of property.

(iii) *Effective date.* This paragraph (c)(3) applies to determinations relating to minimum price made on or after December 17, 1996.

(4) *Disposition of property at sale*—(i) *Sale to highest bidder at or above minimum price.* If one or more persons offer to buy the property for at least the amount of the minimum price, the property shall be sold to the highest bidder.

(ii) *Property deemed sold to United States at minimum price.* If no one offers at least the amount of the minimum price for the property and the Secretary has determined that it would be in the best interest of the United States to purchase the property for the minimum price, the property shall be declared to be sold to the United States for the minimum price.

(iii) *Release to owner.* If the property is not declared to be sold under paragraph (c)(4)(i) or (ii) of this section, the property shall be released to the owner of the property and the expense of the levy and sale shall be added to the amount of tax for the collection of which the United States made the levy. Any property released under this paragraph (c)(4)(iii) shall remain subject to any lien imposed by subchapter C of chapter 64 of subtitle F of the Internal Revenue Code.

(iv) *Effective date.* This paragraph (c)(4) applies to dispositions of property at sale made on or after December 17, 1996.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: November 19, 1996.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31770 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–U

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26 CFR Part 301

[TD 8695]

RIN 1545–AT48

Disclosure of Returns and Return Information To Procure Property or Services for Tax Administration Purposes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the disclosure of returns and return information in connection with the procurement of property and services for tax administration purposes. The regulations authorize the Department of

Justice, including offices of United States Attorneys, to make such disclosures. Prior to these amendments, disclosure authority within the Department of Justice rested only with the Tax Division. The amendments also reflect a change to the law made by the Omnibus Budget Reconciliation Act of 1990 regarding the type of services about which disclosures may be made.

EFFECTIVE DATE: These regulations are effective on December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Donald Squires, 202–622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 15, 1995, a notice of proposed rulemaking (DL–40–95) relating to the disclosure of returns and return information in connection with the procurement of property and services for tax administration purposes was published in the Federal Register (60 FR 64402). No public hearing was requested or held nor were any comments submitted by the public in response to this notice.

The regulations proposed by DL–40–95 are adopted by this Treasury decision without revision and are discussed below.

Explanation of Provisions

As previously written, 26 CFR 301.6103(n)–1 authorized the Tax Division of the Department of Justice, among other entities and individuals, to disclose returns and return information pursuant to section 6103(n) of the Internal Revenue Code. This authority allowed the Tax Division to disclose tax information incident to its contracts to private parties for, among other purposes, automated litigation support services.

The Department of Justice indicated its intention to establish an expanded automated tracking system for all monetary judgments in favor of the United States, which will be operated by a private company under contract with the Department. Although the majority of tax cases are handled by the Tax Division, there are several United States Attorneys' offices that also have litigation responsibility in the civil tax area. In addition, the Tax Division refers some judgments in tax cases to the United States Attorneys for collection. The previously existing regulations arguably would not have permitted these offices, which are technically not part of the Tax Division, to disclose tax information incident to their inclusion of tax judgments in the automated tracking system.

The amendments adopted by this Treasury decision authorize the Department of Justice, including offices of United States Attorneys, to make disclosures to procure property and services for tax administration purposes. Any such disclosures will be made under the same conditions and restrictions already set forth in the previously existing regulations. By definition, any office within the Department of Justice without tax administration duties will not have occasion or authority pursuant to these regulations to make such disclosures.

The amendments also authorize disclosures in connection with ''the providing of other services,'' i.e., services not related to the strict mechanical processing or manipulation of tax returns or return information. This conforms the regulations to the language of the statute, as amended by the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508, 104 Stat. 1388–353).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Donald Squires, Office of the Assistant Chief Counsel (Disclosure Litigation), IRS. However, other personnel from the IRS, Department of Justice and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

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

Adopted Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

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

Paragraph 2. Section 301.6103(n)–1 is amended as follows:

1. The first sentence of paragraph (a) introductory text is amended by removing the language ''Tax Division,''.

2. Paragraph (a)(2) is amended by removing the language ''or to''.

3. Paragraph (a)(2) is further amended by adding the language ''or the providing of other services,'' immediately following the text ''other property,''.

4. The concluding text of paragraph (a) is amended by removing the language ''Tax Division,''.

5. The second sentence of paragraph (d) introductory text is amended by removing the language ''Tax Division,''.

6. Paragraph (d)(2) is amended by removing the language ''Tax Division,''.

7. Paragraph (e)(1) is amended by removing the language '', and'' at the end of the paragraph and adding a semicolon in its place.

8. Paragraph (e)(2) is amended by removing the period at the end of the paragraph and adding ''; and'' in its place.

9. Paragraph (e)(3) is added.

10. The authority citation immediately following § 301.6103(n)–1 is removed.

The addition reads as follows:

§ 301.6103(n)–1 Disclosure of returns and return information in connection with procurement of property and services for tax administration purposes.

* * * * *

(e) * * *

(3) The term *Department of Justice* includes offices of the United States Attorneys.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: June 26, 1996.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31769 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–U

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26 CFR Part 301

[TD 8694]

RIN 1545–AS52

Disclosure of Return Information to the U.S. Customs Service

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: These amendments to the regulations under 26 CFR part 301 implement section 6103(l)(14) of the Internal Revenue Code, which authorizes the disclosure of certain return information to the U.S. Customs Service. The regulations specify the procedure by which return information may be disclosed and describe the conditions and restrictions on the use of the information by the U.S. Customs Service.

EFFECTIVE DATE: These regulations are effective December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Donald Squires, 202–622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The North American Free Trade Agreement Implementation Act (Act), Public Law 103–182, 107 Stat. 2057, was signed into law on December 8, 1993. Section 522 of the Act added section 6103(l)(14) to the Internal Revenue Code (Code), authorizing the IRS to disclose certain tax data to the U.S. Customs Service. The Act directed the Treasury Department to adopt temporary regulations to implement the new section.

On March 11, 1994, temporary regulations were published in the Federal Register (59 FR 11547) specifying the procedure by which return information may be disclosed to officers and employees of the United States Customs Service, and describing the conditions and restrictions on the use and redisclosure of that information. A notice of proposed rulemaking (DL–21–94) cross-referencing the temporary regulations was published in the Federal Register for the same day (59 FR 11566).

The IRS received two comments on the proposed regulations but did not hold a public hearing. After consideration of the comments, this Treasury decision adopts the proposed regulations without revision. The comments are discussed below.

Explanation of Provisions

The regulations authorize disclosure of return information only to the extent necessary to the purposes authorized by the statute, i.e., ascertaining the correctness of entries in audits under the Tariff Act of 1930 and other actions to recover any loss of revenue or collect amounts determined to be due and owing as a result of these audits. The regulations permit redisclosure to the Department of Justice for civil enforcement actions related to these collection efforts. Consistent with the statute's legislative history, the regulations prohibit disclosure of information (i) relating to Advance Pricing Agreements (as described in Rev. Proc. 91–22 (1991–1 C.B. 526)), or (ii) covered by tax treaties and executive agreements with respect to which the United States is a party. The regulations also specifically prohibit any use or redisclosure of the information by the Customs Service in a manner inconsistent with section 6103 and the regulations.

Notice to Taxpayers/Importers

One commentator suggested that the regulations should provide taxpayers with advance notice of a Customs Service request for tax data and an opportunity to comment upon or object to the request. The legislation authorizing these disclosures did not, however, make any provision for such advance notice and pre-disclosure challenges to Customs Service requests for disclosure of tax data. Such procedures would, moreover, run counter to the existing statutory scheme of section 6103. Disclosures under section 6103 are governed by the requirements of that statute and applicable regulations, none of which offers a procedural opportunity for a taxpayer to challenge, in advance, a proposed disclosure of tax information by the IRS.

The same commentator suggested that, in the alternative, a taxpayer should be notified in the event of a disclosure so the taxpayer can prepare its response to inquiries from the Customs Service that might be based on such tax data. Otherwise, the commentator argued, the taxpayer would be forced to defend itself against an ''unexpressed suspicion'' based on information the taxpayer does not know the Customs Service has obtained and possibly has misinterpreted.

Nothing in the statute's legislative history suggests that Congress intended the Service to notify taxpayers upon disclosure of their tax data to the Customs Service. As noted above, such a requirement would be at odds with general practice under section 6103. Moreover, the IRS understands that the usual practice of the Customs Service is not to request information from the IRS unless the data has been first directly requested from, but not provided by, importers. When importers receive such a request, therefore, they will effectively be on notice, whether or not they choose to comply with the request, that the Customs Service is likely to consider tax information in the course of its audit.

Misinterpretation of Tax Data by Customs

Both commentators expressed a concern that due to the different reporting requirements of the IRS and the Customs Service, tax data is susceptible to misinterpretation by Customs Service auditors. For example, it was noted that the cost of goods reported for tax purposes includes certain amounts (e.g. duty, transportation, insurance, storage, design costs) not relevant to, or included in, the value of goods for customs purposes.

Congress was aware when it enacted the legislation, however, that IRS tax information may not correlate exactly with the information required to be reported to the Customs Service. Congress nonetheless concluded that the value of the tax information to the Customs Service would outweigh the possible difficulties caused by the necessity of adjusting the IRS data for use in Customs Service audits. Moreover, the Customs Service has informed the IRS that the Customs Service is committed to a policy of full disclosure and communication with importers during audits. In light of that policy, any apparent discrepancies between tax data and Customs Service reporting will be brought to the attention of the importer when discovered in order to allow the importer to explain or reconcile the data. The Customs Service also notes that importers have an additional opportunity to review and comment upon the findings of an auditor before the preparation of the auditor's final report.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Donald Squires, Office of the Assistant Chief Counsel (Disclosure Litigation), IRS. However, other personnel from the IRS, Customs Service and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

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

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by removing the entry for Section 301.6103(l)(14)–1T and adding an entry in numerical order to read as follows:

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

Section 301.6103(l)(14)–1 also issued under 26 U.S.C. 6103(l)(14). * * *

§ 301.6103(l)(14)–1T [Redesignated as § 301.6103(l)(14)–1]

Par. 2. Section 301.6103(l)(14)–1T is redesignated as § 301.6103(l)(14)–1 and the section heading is amended by removing the language ''(temporary)''.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: November 13, 1996.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 96–31771 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF JUSTICE

28 CFR Part 14

Administrative Claims Under the Federal Tort Claims Act; Delegation of Authority

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Directive delegates authority to the Postmaster General to settle administrative claims presented pursuant to the Federal Tort Claims Act where the amount of the settlement does not exceed $200,000. The Directive implements the Administrative Dispute Resolution Act. This Directive will alert the general public to the new authority and is being published in the CFR to provide a permanent record of this delegation.

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 616–4400.

SUPPLEMENTARY INFORMATION: This Directive has been issued to delegate settlement authority and is a matter solely related to division of responsibility between the Department of Justice and the Postal Service. It does not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). It is not a significant regulation action within the meaning of Executive Order No. 12866.

List of Subjects in 28 CFR Part 14

Authority delegations (Government agencies), Claims.

By virtue of the authority vested in me by part 0 of Title 28 of the Code of Federal Regulations, including §§ 0.45, 0.160, 0.162, 0.164, and 0.168, 28 CFR part 14 is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

1. The authority citation for Part 14 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 2672; 38 U.S.C. 224(a).

2. The Appendix to Part 14 is amended by revising the heading and text for the ''Delegation of Authority to the Postmaster General'' to read as follows:

Appendix to Part 14—Delegations of Settlement Authority

* * * * *

Delegation of Authority to the Postmaster General

Section 1. Authority to compromise tort claims.

(a) The Postmaster General shall have the authority to adjust, determine, compromise and settle a claim involving the Postal Service under Section 2672 of Title 28, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed $200,000. When the Postmaster General believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Postmaster General may redelegate in writing the settlement authority delegated to him under this section.

Section 2. Memorandum.

Whenever the Postmaster General settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of $100,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent to the Director, FTCA Staff, Torts Branch of the Civil Division.

* * * * *

Frank W. Hunger,

Assistant Attorney General, Civil Division.

[FR Doc. 96–31923 Filed 12–16–96; 8:45 am]

BILLING CODE 4410–12–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–208–FOR]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving a proposed amendment to the Kentucky regulatory program (hereinafter referred to as the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Kentucky proposed revisions to its regulations pertaining to civil penalties, performance bond and liability insurance, contemporaneous reclamation, and revegetation. The amendment is intended to revise the Kentucky program to be consistent with the corresponding Federal regulations and SMCRA.

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: William J. Kovacic, Director, OSM, Lexington Field Office, 2675 Regency Road, Lexington, Kentucky 40503. Telephone: (606) 233–2894.

SUPPLEMENTARY INFORMATION:

I. Background on the Kentucky Program

On May 18, 1982, the Secretary of the Interior conditionally approved the Kentucky program. Background information on the Kentucky program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the May 18, 1982, Federal Register (47

FR 21404). Subsequent actions concerning conditions of approval and program amendments can be found at 30 CFR 917.11, 917.15, 917.16, and 917.17.

II. Submission of the Proposed Amendment

By letter dated July 19, 1994 (Administrative Record No. KY–1304), Kentucky submitted a proposed amendment to its program pursuant to SMCRA at its own initiative.

OSM announced receipt of the proposed amendment in the August 9, 1994 Federal Register (59 FR 40503), and in the same document opened the public comment period and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on September 8, 1994.

By letter dated January 11, 1995 (Administrative Record No. KY–1331), Kentucky resubmitted a proposed amendment that completed its regulation promulgation process. The resubmission included changes to 405 KAR 10:010—Requirements for Bond and Liability Insurance, 405 KAR 16:010—General Provisions, 16:020 Contemporaneous Reclamation, 405 KAR 18:010—General Provisions, and a Statement of Consideration.

Based on the revised information, OSM reopened the public comment period in the February 17, 1995 Federal Register (60 FR 9314), and provided the opportunity for a public hearing on the adequacy of the revised amendment. The public comment period closed on March 20, 1995.

During its review of the proposed amendment, OSM identified certain concerns relating to the revegetation provisions at 405 KAR 16:200 and 18:200. OSM notified Kentucky of these concerns by letter dated May 10, 1996 (Administrative Record No. KY–1367). By letter dated June 13, 1996 (Administrative Record No. KY–1369), Kentucky responded to OSM's concerns by submitting additional explanatory information to its proposed program amendment. Because the additional information merely clarified certain provisions of Kentucky's proposed revisions, OSM did not reopen the public comment period.

By letter dated March 2, 1995 (Administrative Record No. KY–1347), Kentucky submitted additional revisions to the proposed amendment pertaining to civil penalty assessment and revegetation. Based on the revised information. OSM reopened the comment period in the April 17, 1995, Federal Register (60 FR 19193). During its review of the proposed revisions, OSM noted that Kentucky did not submit the January 6, 1995, ''Procedures for Assessment of Civil Penalties'' incorporated by reference in the March 2, 1995, amendment. It was subsequently submitted on September 26, 1996. OSM reopened the comment period in the October 25, 1996, Federal Register (61 FR 55247).

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment.

Revisions not specifically discussed below concern nonsubstantive wording changes, or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

1. 405 KAR 7:015—Documents Incorporated by Reference

In section 3, Kentucky proposes to delete the incorporation by reference to the Penalty Assessment Manual. This document is superseded by the addition of procedures for the assessment of civil penalties at 405 KAR 7:095, section 7. The Director finds that the proposed deletion at 405 KAR 7:015(3) will not render the State program less effective than the Federal regulations.

2. 405 KAR 7:095—Assessment of Civil Penalties

At section 5(2), Kentucky proposes to clarify that the provisions of subsection (2) are in addition to the civil penalty provided for in subsection (1). At section 7, Kentucky proposes to incorporate by reference ''Procedures for Assessment of Civil Penalties,'' (January 6, 1995). The document establishes procedures for determining how and when penalties will be assessed, assessing continuing violations, and waiving the point system for calculating penalties. The Federal regulations at 30 CFR part 845 provide procedures for the assessment of civil penalties. The Director finds that the proposed regulations at 405 KAR 7:095 (2) and (7) contain procedural requirements which are the same or similar to those contained in section 518 of SMCRA, and which are consistent with the Federal regulations at 30 CFR part 845.

3. 405 KAR 10:010—General Requirements for Performance Bond and Liability Insurance

At section 2(4), Kentucky proposes to require that a rider to the applicable performance bond confirming coverage of a revision be submitted by the applicant if the acreage of the permit area is unchanged but if the revision: (a) Adds a coal washer, a crush and load facility, a refuse pile, or a coal mine waste impoundment to the existing permit or (b) alters the boundary of a permit area or increment. The Federal regulations at 30 CFR 800.15(d) require that bonds be adjusted to conform to the permit as revised. Kentucky also proposes to add a new section 5 which incorporates by reference the following documents: Performance Bond, SME–42, February, 1991; Irrevocable Standby Letter of Credit; Confirmation of Irrevocable Standby Letter of Credit; Certificate of Liability Insurance; Notice of Change of Liability Insurance; and Escrow Agreement. While there are no direct Federal counterparts, the Director finds that the proposed revisions at 405 KAR 10:010(2)(4) is not inconsistent with the Federal regulations at 30 CFR 800.15(d), which requires a regulatory authority to review the adequacy of a bond for a permit which has been revised. Also, the Director finds that the incorporation by reference of the above-listed forms in 405 KAR 10:010(5) will not render the Kentucky program less effective than the Federal regulations at 30 CFR 800.11, 800.21(b) and 800.60.

4. 405 KAR 16:020—Contemporaneous Reclamation

At section 2, Kentucky proposes to revise its backfilling and grading plan requirements to allow more than one pit per permit if the permittee makes certain demonstrations. If alternative distance limits are approved or additional pits allowed, the applicant is required to provide supplemental assurance in accordance with section 6 of the regulations. Kentucky also proposes to revise the backfilling and grading provisions of sections 2(1)–(6). At section 2(1)—Area Mining, only one pit per permit area is allowed. At section 2(2)—Auger Mining, the deadline for completion of coal removal is proposed to be 60 calendar days after the initial excavation for the purpose of removal of topsoil or overburden, instead of 60 calendar days after the initial surface disturbance. Only one auger mining operation per permit operation is allowed. At section 2(3)—Contour Mining, the phrase ''surface disturbance'' is replaced by ''excavation for the purpose of removal of topsoil or overburden,'' in the same manner as described above for section 2(2). Only one pit per permit area is allowed. At section 2(4)—Multiple-seam Contour Mining, only one multiple seam operation per permit is allowed. At section 2(5)—Combined Contour and Auger Mining, only one contour mining pit and one auger mining operation per

permit area are allowed. At section 2(6)—Mountaintop Removal, if the mountaintop removal operation begins by mining a contour cut around all or part of the mountaintop, the time and distance limits for contour mining shall apply to that cut unless alternative limits are approved. There are no backfilling time and distance limitation, or limits on the number of pits allowed per permit area in the current Federal regulations. States must, however, impose time and distance limitations which ensure that reclamation occurs as contemporaneously as practicable with mining operations, in accordance with 30 CFR 816.100 and 817.100. The Director finds that the proposed revisions at 405 KAR 16:020 section 2, which now more clearly define the deadline for completion of coal removal for area and auger mining operations, are not inconsistent with the general Federal provisions pertaining to contemporaneous reclamation at 30 CFR 816.100.

Kentucky proposes to add new section 6—Supplemental Assurance. If alternative distance limits or additional pits are approved, the applicant is required to submit supplemental assurance in the amounts specified for the purpose of assuring the reclamation of the additional unreclaimed disturbed area. This supplemental assurance is in addition to the performance bond required under 405 KAR Chapter 10. While the bonding requirements of 405 KAR 10:030, 10:035, and 10:050 shall apply to supplemental assurance, the bond release requirements of 405 KAR 10:040 shall not apply. Supplemental assurance amounts are specified for contour, mountaintop removal, and area mining. Supplemental assurance will be returned upon application and after inspection and documentation of the completion of backfilling, grading, or highwall removal, as appropriate. While there are no direct Federal counterparts, the Director finds that the proposed provisions at 405 KAR 16:020 section 6 are consistent with the Federal regulations pertaining to adjustment of bond amounts at 30 CFR 800.15(a). However, the Director notes that additional bond is still required for any proposal to add acreage to the permit area.

Kentucky proposes to add new section 7—Documents Incorporated by Reference. Supplemental assurance and escrow agreement forms are incorporated by reference. Office addresses where the documents may be reviewed are listed. There are no Federal counterparts to these provisions. However, the Director finds that the proposed provisions at 405 KAR 16:020 section 7 are not inconsistent with the requirements of SMCRA and the Federal regulations.

5. 405 KAR 16:200—Revegetation/ Surface Mining Activities

405 KAR 18:200—Revegetation/ Underground Mining Activities

At section 1(4), Kentucky proposes to clarify for cropland or pastureland postmining land use, compliance with sections 16:180 3(2) and 18:180 3(2) for cropland is required. The Director finds that the proposed revisions at 405 KAR 16:200 1(4) and 18:200 1(4) are no less effective than the Federal regulations at 30 CFR 816:97(h) and 817.97(h) and satisfy a portion of the required amendment at 30 CFR 917.16(i), pertaining to Finding number 1 of the June 9, 1993, Federal Register Notice (58 FR 32283, 32284).

At section 1(5)(b), Kentucky is proposing to delete the reference to Technical Reclamation Memorandum (TRM) #20 and incorporate by reference TRM #21 ''Plant Species, Distribution Patterns, Seeding Rates, and Planting Arrangements for Revegetation of Mined Lands,'' (January 6, 1995). In its review dated April 18, 1996, OSM found TRM #21 to be technically sound with certain exceptions relating to stocking standards and soil degradation. Kentucky responded to OSM's concerns pertaining to stocking standards in its letter dated June 13, 1996 (Administrative Record No. KY–1369). Kentucky's regulations at 405 KAR 16:050 and 18:050—Topsoil—provide for the removal, storage, and redistribution of topsoil to sustain the appropriate vegetation. The specific provisions at section 4(1) require that the land be scarified or otherwise treated to promote root penetration. The Director finds that the proposed revisions at 405 KAR 16:200 1(5)(b) and 18:200 1(5)(b) are consistent with the Federal provisions pertaining to revegetation at 30 CFR 816.111 and 817.111, as well as 30 CFR 816.116 and 817.116. The revisions also satisfy a portion of the required amendment at 30 CFR 917.16(i), pertaining to Finding number 1 of the June 9, 1993, Federal Register Notice (58 FR 32284).

At section 5(2) (a)2,3 and (b)(2), Kentucky is proposing to reference the ''Kentucky Agricultural Statistics'' publication as the source of ground cover success standards. The Federal regulation at 30 CFR 816.116(a)(1) and 817.116(a)(1) allow the regulatory authority to select standards for success and valid sampling techniques. The Director finds that the proposed revisions at 405 KAR 16:200 5(2) (a)2,3 and (b)(2) and 18:200 5(2) (a)2,3 and (b)(2) are no less effective than the corresponding Federal regulations, and satisfy two portions of the required amendment at 30 CFR 917.16(i), pertaining to Finding number 5 of the June 9, 1993, Federal Register Notice (58 FR 32287).

At section 6(1), Kentucky is proposing to require a minimum stocking density of 300 trees or trees and shrubs, with tree species comprising at least 75% of the total stock on at least 70% of the area stocked if forest land is the approved postmining landuse. At section 6(2)(b)1, Kentucky is proposing to require that the minimum stocking density be 300 woody plants per acre, including volunteers. At least four species of trees or shrubs listed in Appendix A of TRM #21, including at least one hard mast species, one conifer species, and two soft mast or shrub species, shall be present and the stocking densities of these species shall be at least 90 hard mast plants per acre, 30 conifer plants per acre, and 30 plants per acre for each of the two soft mast or shrub species. Stocking densities shall be determined with a statistical confidence of 90%. Section 6(2)(b)(2) provides that, in place of the requirements of section 6(2)(b)(1), the cabinet may, if requested by the applicant, approve stocking densities and woody plant species that are recommended by the Kentucky Department of Fish and Wildlife Resources for the permit area based upon site-specific considerations.

However, the stocking density of recommended species must still be at least 150 woody plants per acre, including volunteers, with stocking densities determined with a statistical confidence of 90%. Section 6(2)(b)4 provides that this amendment to this paragraph shall apply to original applications for permits and applications for permit amendments submitted after the effective date of this amendment. Permits issued or applications submitted prior to the effective date of this amendment may be revised to comply fully with this paragraph. At section 6(2)(c), Kentucky is proposing to require that the stocking density for woody plants be 300 plants per acre for recreation areas, greenbelts, fence rows, woodlots, or shelter belts for wildlife, or where the planting of trees and shrubs will otherwise facilitate the postmining land use. At section 6(3)(f), Kentucky is proposing to permit the counting of volunteer plants that meet all applicable requirements to determine tree or shrub stocking success. The Federal regulations at 30 CFR 816.116(b)(3)(I) and 817.116(b)(3)(I)

allow the regulatory authority to specify minimum stocking and planting arrangements. By cover letter to OSM dated May 3, 1995, Kentucky submitted letters of approval from the Kentucky Department of Fish and Wildlife Services and the Department for Natural Resources, Division of Forestry, for 405 KAR 16:200 and 18:200, sections 6(1) and 6(2), and for TRM 3521 (Administrative Record No. KY–1353). OSM notified Kentucky, by letter dated May 10, 1996, that it must also provide rationale to support its proposed reduction, at 405 KAR 16:200 and 18:200, section 6(1), in standards for acceptable tree stocking on forestry postmining land use (Administrative Record No. KY–1367). By letter dated June 13, 1996, Kentucky responded to OSM's concern by including an October 20, 1993, memorandum from the Division of Forestry (Administrative Record No. KY–1369). This memorandum specifically recommends the stocking standards for the forestry postmining land use which Kentucky adopted in section 6(1), and which were approved by both the Division of Forestry and the Department of Fish and Wildlife Services. Therefore, based upon the supporting documentation provided by Kentucky, the Director finds that the proposed revisions at 405 KAR 16:200 6(1), 6(2)(b)1 and 2, 6(2)(c), and 6(3)(f) and 18:200 6(1), 6(2)(b)1 and 2, 6(2)(c), and 6(3)(f) are no less effective than the corresponding Federal regulations. In addition, these approved changes satisfy a portion of the required amendments at 30 CFR 917.16(i), pertaining to Finding number 6 of the June 9, 1993, Federal Register Notice (58 FR 32288).

At 405 KAR 16:200 and 18:200, sections 9(3)(c) and 9(6), Kentucky is proposing to delete the productivity test area option as a measurement of vegetation success for cropland where hay is grown that is not prime farmland and for pastureland. Productivity must be measured by either the techniques established by TRM #19 or by determining total yield. The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) allow the regulatory authority to select standards for success and valid sampling techniques. As noted above, Kentucky retains two other options for measuring productivity at sections 9(2)(a) and 9(2)(b). The Director find that the deletion of the provisions at 405 KAR 16:200 and 18:200, sections 9(3)(c) and 9(6) does not render the State program less effective than the Federal regulations. In addition, the deletion satisfies a portion of the required amendment at 30 CFR 917.16(i), pertaining to Finding number 9 of the June 9, 1993, Federal Register Notice (58 FR 32289).

IV. Summary and Disposition of Comments

Public comments

The Director solicited public comments and provided an opportunity for a public hearing on the proposed amendment. Three separate submissions were received from the same commenter. Because no one requested an opportunity to speak at a public hearing, no hearing was held.

The commenter generally supported the revisions to 405 KAR 10:010 which requires a rider to confirm coverage of permit revisions which alter permit areas or boundaries. The commenter also supported the concept of providing a supplemental assurance mechanism in addition to the base bond as provided in 405 KAR 16:020 but stated that Kentucky should clarify that the mechanism is not to be released in a partial manner. The Director notes that section 6(6) provides for return of supplemental assurance funds only upon verification that the area for which it was submitted has been backfilled and graded. Therefore, even if partial release is permitted, only that amount of the supplemental assurance no longer needed to ensure backfilling and grading of a portion of the disturbed area could be returned. Several of the commenter's initial concerns were satisfied by Kentucky's subsequent revisions to its original submission. At 405 KAR 7:095 3(3), the commenter felt that Kentucky should provide further clarification as to whether it would attribute all acts of persons working on the mine site or only attribute violations, in terms of calculating civil penalty points to be assigned for negligence. The Director notes that the section of the regulations to which the commenter refers is not being revised at this time and is, therefore, outside the scope of this rulemaking. With regard to the document, ''Procedures for Assessment of Civil Penalties,'' the commenter stated that it should be stressed to the civil penalty assessor that penalties are imposed to achieve a deterrent effect and to penalize violations of the law and the regulations. While the Director agrees with the commenter that civil penalties are intended to serve as deterrents as well as punishment, he notes that neither SMCRA nor the Federal regulations explicitly state the goals of civil penalty assessment. Therefore, he cannot require Kentucky to make the suggested change. The commenter also believed that the threshold for seriousness points should be lowered to reflect the goal of environmental damage prevention. OSM cannot require that states impose a uniform civil penalty point system [*See In Re Permanent Surface Mining Regulation Litigation,* 14 Env't. Rep. Case 1083, 1089 (D.D.C. February 26, 1980)]. Therefore, the Director cannot require that Kentucky make the suggested change. At 405 KAR 16:200 and 18:200, the commenter opposes the use of undifferentiated average county yields for measurement of productivity of lands with a postmining use of hayland or pastureland. The Director notes that OSM considered this issue in an earlier Kentucky amendment and found Kentucky's productivity standards acceptable and no less effective than the Federal regulations (see 58 FR 32290, June 9, 1993). In addition, the United States District Court for the Eastern District of Kentucky affirmed OSM's decision to approve the use of undifferentiated average county yields, in *KRC* v. *Babbitt*, No. 93–78 (E.D. Ky., March 30, 1995).

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(I), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Kentucky program. The following agencies concurred without comment: the Department of Agriculture, Natural Resources Conservation Service; the Department of Labor, Mine Safety and Health Administration; and the Department of the Interior, Fish and Wildlife Service and Bureau of Mines.

The Department of Agriculture, Soil Conservation Service, noted that the Soil Survey Manual—Handbook #18 referenced at 405 KAR 7:015 3(4) has been revised and it provided the updated information. The director notes that the section of the regulations referenced is not being revised at this time and is, therefore, outside the scope of this rulemaking. However, Kentucky is aware of the revision and will make the appropriate changes at a later date.

The Department of the Interior, Bureau of Land Management, noted a possible discrepancy in 405 KAR 7:095 3(4) regarding the assessment of good faith points in that Kentucky's point system appears to be less stringent than the Federal regulations. The Director notes that the section of the regulations referenced is not being revised at this time and is, therefore, outside the scope of this rulemaking. The Director also notes that the provisions of OSM Directive REG–5 dated August 31, 1991,

provide that if a State program requires consideration of the four mandatory statutory criteria (history of previous violations, seriousness of violations, negligence of operator, and good faith) in determining whether to assess a penalty and determining the amount, the program meets the requirements of section 518 of SMCRA. The penalty amounts need not be equivalent to those specified at 30 CFR part 845. *See also, In Re Permanent Surface Mining Regulation Litigation,* 14 Env't. Rep. Cas 1083, 1089 (D.D.C., February 26, 1980).

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*)

On August 3, 1994, OSM solicited EPA's concurrence with the proposed amendment. On August 26, 1994, EPA have its written concurrence (Administrative Record No. KY–1311).

V. Director's Decision

Based on the above findings, the Director approves the proposed amendment as submitted by Kentucky on July 19, 1994, and as revised on January 11, 1995.

The Director's approval herein of the proposed amendments has satisfied a portion of the required amendment codified at 30 CFR 917.16. Therefore, the Director is amending 30 CFR 917.16(i) to refer specifically to those portions of the required amendment which remain unsatisfied.

The Federal regulations at 30 CFR Part 917, codifying decisions concerning the Kentucky program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this 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.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions of the corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 19, 1996.

Michael K. Robinson,

Acting Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 917—KENTUCKY

1. The authority citation for Part 917 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 917.15 is amended by adding paragraph (aaa) to read as follows:

§ 917.15 Approval of regulatory program amendments.

* * * * *

(aaa) The following rules, as submitted to OSM on July 19, 1994, and as revised on January 11, 1995, and March 2, 1995, are approved effective December 17, 1996.

405 KAR 7:015 section 3
Documents Incorporated by Reference
405 KAR 7:095 sections 5(2),7
Assessment of Civil Penalties
405 KAR 10:010 section 2(4)
General Requirements for Performance
Bond and Liability Insurance
405 KAR 16:020 sections 2, 6 (new), and 7 (new)
Contemporaneous Reclamation
405 KAR 16:200
Revegetation—Surface Mining
405 KAR 18:200 sections 1(4), 1(5)(b), 5(2)(a)2, 3 and (b)(2), 6(1), 6(2)(b) 1, 2, 6(2)(c), 6(3)(f), 9(2)(c), 9(5).
Revegetation—Underground Mining

3. Section 917.16 is amended by revising (i) to read as follows:

§ 917.161 Required regulatory program amendments.

* * * * *

(i) By December 17, 1996, Kentucky shall submit to the Director either a proposed written amendment or a description of an amendment to be proposed which revises 405 KAR 16:200 and 405 KAR 18:200, sections 1(7)(a) 1 through 5, 1(7)(b) and 1(7)(d), in accordance with the Director's findings published in the June 9, 1993, Federal Register (58 FR 32283), and a timetable for enactment which is consistent with

established administrative and legislative procedures in the State.

* * * * *

[FR Doc. 96–31750 Filed 12–16–96; 8:45 am]
BILLING CODE 4310–05–M

DEPARTMENT OF EDUCATION

34 CFR Part 86

RIN 1810–AA83

Drug and Alcohol Abuse Prevention

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations on Drug-Free Schools and Campuses to incorporate changes made by the Improving America's Schools Act of 1994. As a result of that legislation, these regulations no longer apply to State educational agencies (SEAs) and local educational agencies (LEAs). The Secretary amends the regulations to conform them to these revised statutory provisions.

EFFECTIVE DATE: These regulations take effect January 16, 1997.

FOR FURTHER INFORMATION CONTACT: William Wooten, U.S. Department of Education, Office of Elementary and Secondary Education, Room 4000, Portals Bldg., 600 Independence Avenue, SW, Washington, DC 20202–6123. Telephone: (202) 260–1922. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Provisions in 20 U.S.C. 3224a relating to certification of drug and alcohol abuse prevention programs by State and local educational agencies were eliminated by amendments to the Elementary and Secondary Education Act of 1965 contained in the Improving America's Schools Act of 1994, Pub. L. 103–382, enacted October 20, 1994. As a result of this statutory amendment, which became effective July 1, 1995, State and local educational agencies are no longer subject to the certification requirements contained in 34 CFR part 86.

The regulations in part 86 implemented the Drug-Free Schools and Communities Act requirement for a one-time certification by all SEAs and LEAs that they had adopted and implemented drug prevention policies and programs for their students and employees. Virtually all SEAs and LEAs had submitted the required certification by the time the statute was reauthorized, and the certification requirement was no longer needed. Furthermore, by the time the statute was reauthorized as the Safe and Drug-Free Schools and Communities Act, LEAs were developing comprehensive, community-wide prevention strategies in addition to school-based programs, and were beginning to integrate drug prevention with activities designed to prevent other significant problems such as youth violence. Consequently, the Safe and Drug-Free Schools and Communities Act has eliminated the one-time certification requirement and replaced it with the requirement that LEAs adopt and carry out comprehensive drug and violence prevention programs designed for all students and employees. In keeping with this legislative change, the regulations in part 86 pertaining to SEAs and LEAs are no longer necessary and are being eliminated.

The regulations are amended in accordance with the President's Regulatory Reinvention Initiative in order to reflect removal of the statutory requirement and relieve a burden imposed on State and local educational agencies. Part 86 is still applicable to institutions of higher education.

Waiver of Proposed Rulemaking

In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, these regulations merely reflect statutory changes and do not establish substantive policy. Therefore, the Secretary has determined, pursuant to 5 U.S.C. 553(b)(B), that public comment is unnecessary and contrary to the public interest.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Educational Impact

Based on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 86

Drug abuse, Elementary and secondary education, Grant programs—education, Postsecondary education.

Dated: December 10, 1996.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance numbers do not apply)

The Secretary amends Title 34 of the Code of Federal Regulations by amending part 86 as follows:

Authority: 20 U.S.C. 1145g, unless otherwise noted.

PART 86—DRUG AND ALCOHOL ABUSE PREVENTION

1. The authority citation for part 86 is revised to read as follows:

2. The heading of part 86 is revised to read as set forth above.

3. Part 86 is amended by removing '', SEA, or LEA'' in the following places:

(a) § 86.2(a) and (b);

(b) § 86.3 heading, (a), and (b);

(c) § 86.5 heading, (a), and (b);

(d) § 86.301 heading, (a) introductory text (twice), (a)(2), (b) introductory text (twice), (b)(1), and (b)(2)(i)(B);

(e) § 86.302(a) and (b);

(f) § 86.303(a) introductory text, (b) (twice), (c), (d), and (e) (twice);

(g) § 86.304(a) introductory text, (a)(1), (a)(2)(i), (a)(3) introductory text (twice), (a)(3)(ii), (b) introductory text, (b)(1), and (b)(2) introductory text;

(h) § 86.400(a);

(i) § 86.401(d)(1) and (2);

(j) § 86.402(a);

(k) § 86.407(a) and (d);

(l) § 86.408(a)(1)(ii);

(m) § 86.409(c) introductory text and (e)(2);

(n) § 86.410(a)(1) introductory text and (d); and

(o) § 86.411(a)(1), (a)(2), and (b).

4. Part 86 is amended by removing '', SEA's, or LEA's '' in the following places:

(a) § 86.301(b)(2)(i)(A); and

(b) § 86.304 heading, (a) introductory text, and (a)(3)(ii).

5. Section 86.1 is revised to read as follows:

§ 86.1 What is the purpose of the Drug and Alcohol Abuse Prevention regulations?

The purpose of the Drug and Alcohol Abuse Prevention regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which added section 1213 to the Higher Education Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g)

6. In § 86.3 paragraphs (a) and (b) are amended by removing ''for IHEs and §§ 86.200 and 86.201 for SEAs and LEAs''.

7. Section 86.4 is amended by removing ''(a) *IHE drug prevention program certification*.'' in paragraph (a) and by removing paragraphs (b) and (c).

8. Section 86.6 is amended by revising the heading; removing '', SEA, or LEA'' both times it appears in paragraph (a), both times it appears in paragraph (b)(1), and in paragraph (b)(2); and revising paragraph (b)(3) to read as follows:

§ 86.6 When must an IHE submit a drug prevention program certification?

* * * * *

(b) * * *

(3) An IHE shall submit a request for an extension to the Secretary.

§ 86.7 [Amended]

9. Section 86.7 is amended by removing paragraph (a); redesignating paragraphs (b) and (c) as paragraphs (a) and (b), respectively; by removing ''Local educational agency'' and ''State educational agency'' from the list of terms in redesignated paragraph (a); and by removing '', SEA, or LEA'' both times it appears in the definition of ''Compliance agreement'' in redesignated paragraph (b).

Subpart C—[Removed and Reserved]

10. Subpart C is removed and reserved.

Subpart D—[Amended]

11. The heading of Subpart D is amended by removing '', SEA, or LEA''.

§ 86.300 [Amended]

12. Section 86.300 is amended by removing '', SEA, or LEA'' in the heading, the undesignated introductory text, and paragraph (b) introductory text; and by removing ''or by an SEA or LEA under §§ 86.200(c) and 86.201(a)'' in paragraph (b)(2).

13. The authority citation following each section of the regulations is revised to read as follows:

(Authority: 20 U.S.C. 1145g)

[FR Doc. 96–31874 Filed 12–16–96; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 63

[AD–FRL–5601–7]

RIN 2060–AE02
RIN 2060–AD98

National Emission Standards for Hazardous Air Pollutants for Source Categories: Aerospace Manufacturing and Rework Facilities and Shipbuilding and Ship Repair (Surface Coating) Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This action corrects the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Aerospace Manufacturing and Rework Facilities and Shipbuilding and Ship Repair (Surface Coating) Operations promulgated in the Federal Register on September 1, 1995 (60 FR 45948) and December 15, 1995 (60 FR 64330), respectively. This action also announces that the Information Collection Requirements (ICR) contained in the NESHAP for Shipbuilding and Ship Repair (Surface Coating) Operations have been approved by the Office of Management and Budget (OMB).

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: For information on the aerospace manufacturing and rework facilities standard contact Mr. James Szykman at (919) 541–2452, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. For information on the shipbuilding and ship repair (surface coating) standard contact Dr. Mohamed Serageldin at (919) 541–2379, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The Administrator is invoking the ''good cause'' exception of the Administrative Procedures Act, 5 U.S.C. 553(b)(3)(B), which allows an agency to promulgate rules without notice or the opportunity for comment when it finds that such procedures would be ''impracticable, unnecessary, or contrary to the public interest.'' Following notice and comment procedures for this rule would be unnecessary because the changes effected here are only minor corrections that do not changes the intended effect of the original rule. The Administrator is also invoking the good cause provision to make this rule immediately effective upon its date of publication.

I. Shipbuilding and Ship Repair (Surface Coating)

The NESHAP for shipbuilding and ship repair (surface coating) operations was promulgated in the Federal Register on December 15, 1995 (60 FR 64330) as subpart II of 40 CFR Part 63.

The final rule contained (1) errors in numbering the incorporations by reference which were added to § 63.14; (2) improper punctuation in § 63.788(b)(3)(ii)(B); (3) a footnote to Table 2 of subpart II which incorrectly identified those coating categories that were not given cold-weather allowances; and (4) inappropriate use of the term ''unaffected'' major sources in § 63.788(b)(1). This action corrects these portions of the final rule. In addition, it amends the table in 40 CFR Part 9 of ICR control numbers issued by OMB for approved collections of information in certain EPA regulations. At the time of publication of the final rule, the EPA did not have an approved ICR control number to add to the table. The OMB subsequently approved the ICR for the final NESHAP, and the approved ICR control number (2060–0330) is being added to 40 CFR Part 9.

II. Aerospace Manufacturing and Rework Facilities

The NESHAP for aerospace manufacturing and rework facilities was promulgated in the Federal Register on September 1, 1995 (60 FR 45948). A document of correction to the final rule was published in the Federal Register on February 9, 1996 (61 FR 4902) which corrected the deadline for existing sources to submit an initial notification to the Administrator.

The amendatory language for this final rule correction inadvertently referenced paragraph (a)(1) instead of referencing paragraph (a)(2) of Section 63.753. The amendatory language should have read, ''Section 63.753 is amended by adding a new sentence to the beginning of paragraph (a)(2) as follows:'' This document includes the applicable language to make this correction.

Administrative Requirements

I. Paperwork Reduction Act

The information collection requirements of the previously promulgated NESHAP were submitted to and approved by the Office of Management and Budget (OMB). A copy of the Information Collection Request (ICR) documents (OMB number 1414.02 and 1687.01, for shipbuilding and

aerospace, respectively) may be obtained from Sandy Farmer, Information Policy Branch (PM–223Y); U.S. Environmental Protection Agency; 401 M Street, SW; Washington, DC 20460 or by calling (202) 260–2740.

Today's changes to the NESHAP should have no impact on the information collection burden estimates made previously.

II. Executive Order 12866 Review

Under Executive Order 12866, the EPA must determine whether the proposed regulatory action is ''not significant'' and therefore, subject to OMB review and the requirements of the executive order. The Order defines ''significant'' regulatory action as one that is likely to lead to 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 in State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.

The Shipbuilding NESHAP promulgated on December 15, 1995 was determined to not be a ''significant regulatory action'' under Executive Order 12866. The Aerospace NESHAP promulgated on September 1, 1995 has been determined to be a ''significant regulatory action'' under Executive Order 12866. The amendments issued today do not add any additional control requirements or costs. Therefore, this regulatory action does not affect the previous decisions and is not considered to be significant.

III. 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, the 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).

IV. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, the 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, the EPA must select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the 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.

Therefore, the requirements of the Unfunded Mandates Reform Act do not apply to this action.

List of Subjects

40 CFR Part 9

Reporting and recordkeeping requirements.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: August 22, 1996.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

For the reasons set out in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended as follows:

PART 9—[AMENDED]

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 et seq., 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 et seq., 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 et seq., 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. Section 9.1 is amended by adding the new entries under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act

* * * * *

40 CFR citation	OMB control No.
* * * * *	
National Emission Standards for Hazardous Air Pollutants for Source Categories[3]	
* * * * *	
63.5(d)	2060–0330
63.787 (a)–(b)	2060–0330
63.788 (a)–(c)	2060–0330
* * * * *	

[3] The ICRs referenced in this section of the Table encompass the applicable general provisions contained in 40 CFR Part 63, subpart A, which are not independent information collection requirements.

PART 63—[AMENDED]

3. The authority citation for Part 63 continues to read as follows:

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

4. Section 63.14 is amended by redesignating paragraphs (b)(4) through (b)(14) added on December 15, 1995 at 60 FR 64336 as paragraphs (b)(8) through (b)(18).

Subpart GG—National Emission Standards for Aerospace Manufacturing and Rework Facilities

5. Section 63.753 is amended by adding a new sentence to the beginning of paragraph (a)(2) to read as follows:

§ 63.753 Reporting requirements.

(a)(1) * * *

(2) The initial notification for existing sources, required in § 63.9(b)(2) shall be submitted no later than September 1, 1997. * * *

* * * * *

Subpart II—National Emission Standards for Shipbuilding and Ship Repair (Surface Coating) Operations

6. Section 63.788 is amended to revise the first sentence of paragraph (b)(1) as follows:

* * * * *

§ 63.788 Recordkeeping and Reporting Requirements.

* * * * *

(b) * * *

(1) Each owner or operator of a major source shipbuilding or ship repair facility having surface coating operations with less than 1000 liters (L) (264 gallons (gal)) annual marine

coating usage shall record the total volume of coating applied at the source to ships. * * *

* * * * *

7. Table 2 to Subpart II of Part 63, footnote (e) is revised as follows:

* * * * *

Table 2 to Subpart II of Part 63.—Volatile Organic HAP (VOHAP) Limits for Marine Coatings

* * * * *

These limits apply during cold-weather time periods, as defined in § 63.782. Cold-weather allowances are not given to coatings in categories that permit less than 40 percent volume solids (nonvolatiles). Such coatings are subject to the same limits regardless of weather conditions.

* * * * *

[FR Doc. 96–31344 Filed 12–16–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 96–121; RM–8806 and RM–8820]

Radio Broadcasting Services; Forestville and Algoma, WI

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Action in this proceeding allots Channel 271A to Forestville, Wisconsin, as that community's first local service in response to a petition filed by Lyle Robert Evans d/b/a The Radio Company. *See* 61 FR 30585, June 17, 1996. The coordinates for Channel 271A at Forestville are 44–45–54 and 87–28–48. There is a site restriction 8.5 kilometers (5.3 miles) north of the community. In response to the counterproposal filed by WTRW, Incorporated, we shall allot Channel 281A to Algoma, Wisconsin, without a site restriction. The coordinates for Channel 281A are 44–36–18 and 87–26–12. Since Algoma and Forestville are both located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for both channels. With this action, this proceeding is terminated.

DATES: Effective January 27, 1997. The window period for filing applications for Channel 2271A at Forestville, Wisconsin, and Channel 281A at Algoma, Wisconsin, will open on January 27, 1997, and close on February 27, 1997.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 96–121, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Wisconsin, is amended by adding Channel 281A at Algoma and by adding Forestville, Channel 271A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31937 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–37; RM–8765]

Radio Broadcasting Services; Sylvan Beach, NY

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Michael S. Celenza, allots Channel 262A to Sylvan Beach, NY, as the community's first local aural service. *See* 61 FR 10977, March 18, 1996. Channel 262A can be allotted to Sylvan Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates 43–11–47 NL; 75–43–51 WL. Canadian concurrence in the allotment has been received since Sylvan Beach is located within 320 kilometers (200 miles) of the U.S.-Canadian border. With this action, this proceeding is terminated.

DATES: Effective January 17, 1997. The window period for filing applications will open on January 17, 1997, and close on February 18, 1997.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 96–37, adopted November 22, 1996, and released November 29, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under New York, is amended by adding Sylvan Beach, Channel 262A.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31936 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 95–175; RM–8707]

Radio Broadcasting Services; Ada, Newcastle and Watonga, Oklahoma

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Tyler Broadcasting Corporation, reallots Channel 227C1

from Ada to Newcastle, Oklahoma, as the community's first local aural broadcast service, and modifies the license of Station KTLS accordingly. To accommodate the allotment at Newcastle, the license of Station KIMY, Watonga, Oklahoma, is modified to specify operation on Channel 230A in lieu of its present Channel 228A. *See* 60 FR 63669, December 12, 1995. Channel 227C1 can be allotted to Newcastle in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.5 kilometers (4.7 miles) south, at coordinates 35–10–44 NL and 97–36–03 WL, to accommodate petitioner's desired transmitter site. Channel 230A can be allotted to Watonga at Station KIMY's presently licensed transmitter site, at coordinates 35–54–17; 98–23–09. With this action, this proceeding is terminated.

EFFECTIVE DATE: January 17, 1997.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 95–175, adopted November 22, 1996, and released November 29, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by removing Channel 227C1 at Ada, adding Newcastle, Channel 227C1, and adding Channel 230A and removing Channel 228A at Watonga.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31931 Filed 12–16 –96; 8:45 am]

BILLING CODE 6712 –01 –p

47 CFR Part 73

[MM Docket No. 96–78; RM–8778]

Radio Broadcasting Services; Hicksville, Ohio

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Lake Cities Broadcasting Corporation, allots Channel 294A to Hicksville, Ohio, as the community's first local aural transmission service. *See* 61 FR 18711, April 29, 1996. Channel 294A can be allotted to Hicksville in compliance with the Commission's mileage separation requirements with a site restriction of 5.4 kilometers (3.4 miles) northeast, at coordinates 41–19–35 North Latitude and 84–43–03 West Longitude, to avoid a short-spacing to Station WMRI, Channel 295B, Marion, Indiana. Canadian concurrence in the allotment has been received since Hicksville is located within 320 kilometers (200 miles) of the U.S.-Canadian border. With this action, this proceeding is terminated.

DATES: Effective January 17, 1997. The window period for filing applications will open on January 17, 1997, and close on February 18, 1997.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 96–78, adopted November 22, 1996, and released November 29, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

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

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by adding Hicksville, Channel 294A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31932 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1002

[STB Ex Parte No. 542]

Regulations Governing Fees For Services Performed in Connection With Licensing and Related Services—1996 Update

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: After consideration of the petition to reopen this proceeding, the Surface Transportation Board (Board) reduces the filing fee for Item (60), Labor arbitration proceedings to $150, and establishes a new effective date for Item (61), Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d). The Board also modifies Item (56), Formal complaints to comply with Congressional directives.

EFFECTIVE DATE: This final rule is effective on January 16, 1997. Section 1002.2 (b)(61) is effective on January 16, 1997.

FOR FURTHER INFORMATION CONTACT: Kathleen M. King, (202) 927–5249 or David T. Groves, (202) 927–6395. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: The Board's regulations in 49 CFR 1002.3 require the Board to update its user fee schedule annually. At 61 FR 42190 (August 14, 1996) the Board issued final rules in this proceeding that established its 1996 user fee schedule.

On September 3, 1996, Joseph C. Szabo, the Illinois Legislative Director for the United Transportation Union (Petitioner or Mr. Szabo) filed a petition to reopen this proceeding. Petitioner

requests that the $1,000 filing fee for Item (56), Formal complaints, and Item (58)(i), Petitions for declaratory orders, which are comparable to complaints, and the $1,400 filing fee for Item (58)(ii), All other petitions for declaratory order, be eliminated for rail employees and their unions.

In addition, he seeks elimination of the new $7,600 filing fee for Item (60), Labor arbitration proceedings, and the new $150 filing fee for Item (61), Appeals to a Surface Transportation Board decision and petitions to revoke an exemption pursuant to 49 U.S.C. 10502(d). Previously, at 61 FR 48639 (September 16, 1996) the effective date for those two fee items was delayed by Chairman Morgan to allow the Board sufficient time to consider the issues raised in this petition to reopen.

We find that there is no basis for granting petitioner's request that the fees for formal complaints and petitions for declaratory order be eliminated for rail employees or their unions. Based on the new evidence submitted by the labor officials who support Mr. Szabo's petition, we conclude that the $7,600 filing fee for Item (60), Labor arbitration proceedings, should be reduced to $150. After reviewing petitioner's arguments we conclude that the $150 filing fee for Item (61), Appeals to Surface Transportation Board decisions and petitions to revoke exemption under 49 U.S.C. 10502(d), is appropriate.

While we had indicated that the filing fee for formal complaints should be increased, the current $1,000 filing fee for Item (56), Formal complaints, was maintained until the on-going legislative debate regarding that filing fee was completed. That legislative debate has now been resolved by enactment of section 1219 of the Federal Aviation Authorization Act of 1996, Pub. L. 104–264, 110 Stat. 3213 (Oct. 9, 1996), which prohibits any increase in the filing fee for complaints filed by small shippers in connection with rail maximum rates complaints until after September 30, 1998. Therefore, we will maintain the filing fee for formal complaints under Item 56(ii) at $1,000 for small shippers. For all other shippers, we will adopt the filing fee of $23,300 for Item (56)(i), Formal complaints filed under the coal rate guidelines, and a filing fee of $2,300 for Item 56(iii), All other formal complaints.

Additional information is contained in the Board's decision. To obtain a copy of the full decision, write, call, or pick up in person from DC News & Data, Inc., Room 2229, 1201 Constitution Ave. N.W., Washington, DC 20423. Telephone: (202) 289–4357/4359. (Assistance for the hearing impaired is available through TDD services (202) 927–5721.)

The Board affirms its previous finding that the fee changes adopted here will not have a significant economic impact on a substantial number of small entities.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information, User fees.

Decided: December 5, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commission Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721(a).

2. The new effective date for 49 CFR 1002.2(f), fee item (61), is January 16, 1997.

3. In section 1002.2 (f) fee items (56) and (60) are revised to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

Type of Proceeding	Fee
* * * * *	
(56) A formal complaint alleging unlawful rates or practices of rail carriers, motor carriers of passengers or motor carriers of household goods:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1) except a complaint filed by a small shipper	$23,300
(ii) A formal complaint involving rail maximum rates filed by a small shipper	1,000
(iii) All other formal complaints	2,300
* * * * *	
(60) Labor arbitration proceedings	150
* * * * *	

[FR Doc. 96–31954 Filed 12–16–96; 8:45 am]

BILLING CODE 4915–00–P

49 CFR Part 1039

[Ex Parte No. 346 (Sub-No. 34)]

Rail General Exemption Authority; Exemption of Hydraulic Cement

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rule.

SUMMARY: The Board is exempting from regulation the transportation by rail of hydraulic cement (STCC No. 32–4) including shipments from the South Dakota State Cement Plant Commission (''Dacotah'') facility at Rapid City, SD (herein, the ''Dacotah Cement Plant''). Those shipments had been excepted when cement was exempted from regulation. The exception for the Dacotah Cement Plant is now removed. Hydraulic cement, without the Dacotah exception, is added to the list of exempt commodities as set forth below. This exemption does not embrace exemptions from the regulation of car hire and car service.

EFFECTIVE DATE: This final rule is effective on January 16, 1997.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: The ICC Termination Act of 1995, Public Law No. 104–88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This notice relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10701 and 10502. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. However, because of the nature of the action in this proceeding—adoption of a class exemption with application to future transportation and related future filings—we have considered both the new and the old law in issuing our decision here. Citations are to the current sections of the statute, unless otherwise indicated.

On July 26, 1995, at 60 FR 38280, the ICC requested comments on whether the Dacotah cement facilities at Rapid City, SD, are rail captive and the effect, if any, of the ICC's decision in *Union Pacific*

Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control—Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133 (ICC served Mar. 7, 1995) on this matter. The comments have been received and analyzed. We are removing the exception in 49 CFR part 1039 for shipments of hydraulic cement from the Dacotah Cement Plant at Rapid City, SD.

For further information, see the Board's printed decision. To obtain a copy of the full decision, write to, call, or pick up in person from DC News & Data, Inc., Room 2229, 1201 Constitution Avenue, N.W., Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services: (202) 927–5721.]

We affirm the ICC's initial finding that the exemption will not significantly affect either the quality of the human environment or the conservation of energy resources. We also affirm the ICC's initial finding that the exemption will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 49 CFR Part 1039

Agricultural commodities, Intermodal transportation, Manufactured commodities, Railroads.

Decided: December 4, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1039 of the Code of Federal Regulations is amended as follows:

PART 1039—EXEMPTIONS

1. The authority citation for part 1039 continues to read as follows:

Authority: 5 U.S.C. 553, and 49 U.S.C. 10502, and 13301.

2. In § 1039.11, the table in paragraph (a) is amended by revising the entry for STCC No. 32–4 to read as follows:

§ 1039.11 Miscellaneous commodities exemptions.

(a) * * *

STCC No.	STCC tariff		Commodity
*	*	*	*
32–4	.....do	.....	Hydraulic cement.
*	*	*	*

* * * * * *

[FR Doc. 96–31955 Filed 12–16–96; 8:45 am]

BILLING CODE 4915–00–P

Proposed Rules

Federal Register
Vol. 61, No. 243
Tuesday, December 17, 1996

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.

OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1305

RIN 0348–AB35

Release of Official Information, and Testimony by OMB Personnel as Witnesses in Litigation

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Proposed rule.

SUMMARY: The Office of Management and Budget (OMB) seeks public comment on a proposed rule that would set forth the procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand of a court or other authority is issued for the production or disclosure of: Any material contained in the files of OMB; any information relating to materials contained in the files of OMB; or any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status. Many agencies have issued regulations of this kind in the past in order to establish procedures to respond to such demands in an orderly and consistent manner.

DATES: Comments must be received no later than February 18, 1997.

ADDRESSES: Comments on the proposed rule should be addressed to: Steven Aitken, Assistant General Counsel, Office of Management and Budget, Room 464, Old Executive Office Building, Washington, D.C. 20503. Comments up to three pages in length may be submitted via facsimile to (202) 395–7294. Electronic mail comments may be submitted via Internet to TOUHYREG@A1.EOP.GOV. Please include the full body of electronic mail comments in the text and not as an attachment. Please include the name, title, organization, postal address, and E-mail address in the text of the message.

Comments regarding collection of information requirements contained in the proposed rule should be addressed to Mr. Aitken at the address above and to: Edward Springer, OMB Desk Officer, Office of Information and Regulatory Affairs, OMB, Room 10236, New Executive Office Building, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Steven Aitken, Assistant General Counsel, Office of Management and Budget, at (202) 395–4728.

SUPPLEMENTARY INFORMATION: As have many agencies over the years, OMB is proposing to issue a ''*Touhy*'' regulation regarding the production or disclosure of OMB materials and information in response to a subpoena, order or other demand of a court or other authority. Such regulations were upheld by the Supreme Court in its decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

The proposed OMB ''*Touhy*'' regulation, which is set forth below, would be placed in a new Part 1305 in OMB's regulations, which are found at 5 CFR Chapter III. OMB invites comments on the proposed regulation.

Paperwork Reduction Act

This proposed rule contains collection of information requirements subject to the Paperwork Reduction Act. The requirement in § 1305.3(a), for a person receiving a demand to notify the OMB General Counsel that the demand has been made, is estimated to take 5 minutes; this can be satisfied by a phone call relating the demand and/or by a facsimile transmission of the demand. The requirement in § 1305.3(b), for the person making the demand to submit an affidavit or statement summarizing the information or material sought and its relevance to the proceeding, is estimated to take 15 minutes; a demand for documents will generally already specify the documents sought, the person making a demand for testimony should already know what information is sought (and therefore needs only to describe that information), and in each case the person making the demand should already know the relevance of the documents or testimony to the proceeding (and therefore needs only to state that relevance). To the extent that any disclosure is required under § 1305.4, it is estimated to take 5 minutes; the only additional disclosure that might result from this provision would be for a person to state, when declining to comply with a demand, that he or she is doing so pursuant to this regulation. Based on previous experience with demands for OMB information and materials, it is estimated that there will generally be not more than 10 respondents/year subject to the above requirements.

Comments are solicited concerning the proposed collection of information requirements to: (1) Evaluate whether the proposed collection of information is necessary for the proper functions of OMB, 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, 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 on those who are to respond, such as using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Comments should be sent to the persons specified above (see **ADDRESSES**).

Regulatory Flexibility Act, Unfunded Mandates Reform Act, and Executive Orders 12866 and 12875

For purposes of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the proposed rule will not, if promulgated, have a significant economic effect on a substantial number of small entities; the proposed rule addresses only the procedures to be followed in the production or disclosure of OMB materials and information in litigation. For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Orders No. 12866 and 12875, the proposed rule would not significantly or uniquely affect small governments, and would not result in increased expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more.

Issued in Washington, D.C., December 9, 1996.

Franklin D. Raines,

Director.

For the reasons set forth in the preamble, OMB proposes to amend 5 CFR Chapter III by adding a new part 1305 to read as follows:

PART 1305—RELEASE OF OFFICIAL INFORMATION, AND TESTIMONY BY OMB PERSONNEL AS WITNESSES, IN LITIGATION

Sec.

Authority: 31 U.S.C. 502.

§ 1305.1 Purpose and scope.

This part contains the regulations of the Office of Management and Budget (OMB) concerning procedures to be followed when, in litigation (including administrative proceedings), a subpoena, order or other demand (hereinafter in this part referred to as a ''demand'') of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of OMB;

(b) Any information relating to materials contained in the files of OMB; or

(c) Any information or material acquired by any person while such person was an employee of OMB as a part of the performance of the person's official duties or because of the person's official status.

§ 1305.2 Production prohibited unless approved.

No employee or former employee of OMB shall, in response to a demand of a court or other authority, produce any material contained in the files of OMB, disclose any information relating to materials contained in the files of OMB, or disclose any information or produce any material acquired as part of the performance of the person's official duties, or because of the person's official status, without the prior approval of the General Counsel.

§ 1305.3 Procedures in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of OMB for the production of material or the disclosure of information described in § 1305.2, he shall immediately notify the General Counsel. If possible, the General Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If information or material is sought by a demand in any case or matter in which OMB is not a party, an affidavit (or, if that is not feasible, a statement by the party seeking the information or material, or by his attorney) setting forth a summary of the information or material sought and its relevance to the proceeding, must be submitted before a decision is made as to whether materials will be produced or permission to testify or otherwise provide information will be granted. Any authorization for testimony by a present or former employee of OMB shall be limited to the scope of the demand as summarized in such statement.

(c) If response to a demand is required before instructions from the General Counsel are received, an attorney designated for that purpose by OMB shall appear, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the General Counsel.

§ 1305.4 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1305.3(c) pending receipt of instructions from the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

§ 1305.5 No private right of action.

This part is intended only to provide guidance for the internal operations of OMB, and is not intended to, and does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

[FR Doc. 96–31794 Filed 12–16–96; 8:45 am]

BILLING CODE 3110–01–P

DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Part 273

[Amendment No. 376]

RIN 0584–AB57

Food Stamp Program; Anticipating Income and Reporting Changes

AGENCY: Food and Consumer Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes revisions in Food Stamp Program procedures for reporting and acting on changes in earned income. The changes are designed to increase State agency flexibility and improve procedures for determining the eligibility and benefits of households whose income fluctuates unpredictably. Under this proposal, State agencies would choose from three different reporting requirements for households with earned income. The reporting requirement a State agency selects would replace the current requirement that households report a change of more than $25 in earned income. In addition to reporting a change in source of income, households would be required to report one of the following: A change in wage rate or salary and a change in part-time or full-time status, provided the household is certified for no more than 3 months; a change in wage rate or salary and a change of more than 5 hours a week that is expected to continue for more than a month; or a change in the amount earned of more than $80 a month.

DATES: Comments must be received on or before February 18, 1997 to be assured of consideration.

ADDRESSES: Comments should be submitted to Margaret Werts Batko Assistant Branch Chief, Certification Policy Branch, Program Development Division, Food and Consumer Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302, (703) 305–2516. Comments may also be datafaxed to the attention of Ms. Batko at (703) 305–2486. The internet address is: Margaret__Batko@FCS.USDA.GOV. All written comments will be open for public inspection at the office of the Food and Consumer Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, Room 720.

FOR FURTHER INFORMATION CONTACT: Questions regarding the proposed rulemaking should be addressed to Ms.

Batko at the above address or by telephone at (703) 305–2516.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

Executive Order 12372

The Food Stamp Program (Program) is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Ellen Haas, Under Secretary for Food, Nutrition, and Consumer Services, has certified that this rule will not have a significant economic impact on a substantial number of small entities. State and local welfare agencies will be the most affected to the extent that they administer the Program.

Paperwork Reduction Act

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The reporting and recordkeeping burden associated with the eligibility, certification, and continued eligibility of food stamp recipients is approved under OMB No. 0584–0064. Current burden estimates for OMB No. 0584–0064 include burden associated with collecting and verifying information reported on the application to determine initial household eligibility and also on a form given to households for reporting changes in their circumstances during the certification period. Some households are required to submit a report every month; other households (change reporting households) are required to report changes within 10 days of the date they become aware of the change. State agencies provide households with a form for reporting these changes (change report form) at every certification and whenever a change is reported. This rule would amend 7 CFR 273.12(a)(1)(i) to provide State agencies with three options for earned income changes households would be required to report. The options are (1) a change in wage rate or salary and a change in part-time or full-time status, provided that the household is certified for no more than 3 months; (2) a change in wage rate and a change of more than 5 hours a week that is expected to continue for more than a month; or (3) a change in the amount earned of more than $80 a month. State agencies would select one of these options to include on the change report form. The provisions in 7 CFR 273.12(a)(1)(i) of this proposed rulemaking do not alter burden estimates already approved under OMB No. 0584–0064 for change reporting households. The methodologies used to determine the burden estimates assume that all change reporting households will submit at least one change report form annually. The number of change reporting households is estimated to be 9,324,000. Although the proposed changes would remove the need for change reporting households to report small changes in the amount of earned income, households would still be required to report other changes, and the assumption of at least one report a year remains valid. The public reporting burden for the change report form is estimated to average .1617 hours per report form for a total burden of 1,507,691 hours annually.

Comments. 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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (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 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. Comments may be sent to Wendy Taylor, OIRM, Room 404–W, Office of Management and Budget, Paperwork Reduction Project (OMB No. 0584–0064), Washington, D.C. 20503 and Department of Agriculture, Clearance Officer, OIRM, AG Box 7630, Washington, DC 20250. Comments and recommendations on the proposed information collection must be received by February 18, 1997.

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **EFFECTIVE DATE** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Regulatory Impact Analysis

Need for Action

This action is needed to respond to requests from State agencies for revision of the requirements for reporting changes in earned income, to clarify procedures for averaging income, and to assist households in meeting their responsibility to comply with Program requirements.

Benefits

State agencies will benefit from this rule because households will better understand which changes in earnings they are required to report. Recipients who work will benefit because they will have to report only significant changes in their employment status rather than frequent and temporary changes in the amount of monthly income.

Costs

The changes in requirements for reporting changes in earnings and acting on reported changes are not expected to have a significant impact on Program costs.

Background

There are two systems in the Food Stamp Program for determining the amount of benefits a household should receive: Prospective budgeting and retrospective budgeting. Section 5(f)(3)(A) of the Food Stamp Act of 1977, as amended (the Act), 7 U.S.C. 2014(f)(3)(A), provides that calculation of household income on a prospective basis should be based on the income the household reasonably anticipates receiving during the period for which eligibility and benefits are being determined. The law requires the calculation to be made in accordance with regulations which provide for taking into account both the income reasonably anticipated to be received by the household during the period for which eligibility or benefits are being determined and the income received by the household during the preceding 30 days. Section 5(f)(3)(B) of the Act, 7 U.S.C. 2014(f)(3)(B), provides that

calculation of household income on a retrospective basis is the calculation of income for the period for which eligibility or benefits are being determined on the basis of income received in a previous period. 7 CFR 273.10(c) of the food stamp regulations provides requirements for prospective budgeting; retrospective budgeting is addressed in 7 CFR 273.21.

Certified households are required to report certain changes in circumstances that occur during the certification period. State agencies have the option under section 6(c)(1)(A) of the Act, 7 U.S.C. 2015(c)(1)(A), to require some categories of households to report on a periodic basis; however, State agencies are prohibited from including certain households in a monthly reporting system or budgeting the households retrospectively as provided at 7 CFR 273.21(b).

Section 6(c)(1)(B) of the Act, 7 U.S.C. 2015(c)(1)(B), provides that households not required to file a periodic report on a monthly basis shall be required to report changes in income or household circumstances as provided in regulations. State agencies are required to determine the benefits of monthly reporting households by retrospective budgeting. However, change reporting households, i.e, those households not subject to monthly reporting, may be budgeted prospectively or retrospectively. Regulations for monthly reporting households are at 7 CFR 273.21; those for change reporters are at 7 CFR 273.12.

In this rule we are proposing to simplify the regulations for reporting changes in earned income when a household is not required to report monthly. The proposed revisions are designed to address problems State agencies have reported in determining the benefits of households with income that fluctuates monthly.

Prospective Budgeting and Change Reporting

Prior to passage of the Hunger Prevention Act of 1988 (HPA) (Pub. L. 100–435, September 19, 1988), monthly reporting and retrospective budgeting (MRRB) were mandatory for households with earnings or a recent work history. The HPA made monthly reporting a State agency option.

Since then, some State agencies have abandoned monthly reporting while others have retained MRRB for all or part of the caseload. There are several advantages to retaining MRRB for households with earnings. Households with earnings report their income each month, and benefits are adjusted accordingly for a subsequent issuance month. Since the actual amount of income earned in the budget month is used to determine the allotment for the issuance month, the allotment corresponds exactly to the reported income rather than to an estimate of anticipated income. The requirement that a household submit a monthly report also helps eligibility workers keep in contact with households on a regular basis without the need for frequent recertification.

However, a monthly reporting system requires the State agency to determine each month whether or not a monthly reporting household has filed a report and to act on any reported changes. When caseloads increase, it is sometimes difficult for eligibility workers to process the reports within the required time frames. A monthly reporting system is also expensive because of the number of reports and notices that have to be printed and mailed out. Monthly reporting is burdensome for participants and less responsive to changes in household circumstances than change reporting because benefits are based on circumstances that existed in a prior month.

Because of the costs associated with monthly reports, many State agencies converted their entire caseload from MRRB to change reporting and prospective budgeting. Prospective budgeting requires State agencies to use information available at initial certification and subsequent recertifications to predict what a household's circumstances will be during the period of eligibility—the certification period. Change reporting provisions at 7 CFR 273.12(a) require households to report certain changes in household circumstances within 10 days of the date the change becomes known to the household. Each time the State agency learns of a change in the household's circumstances during the certification period, the State agency must determine the effect of the change on eligibility and benefits.

One of the difficulties encountered by State agencies using prospective budgeting and change reporting is the problem of determining the eligibility and benefits of households with income that changes unpredictably in amount or frequency from month to month (fluctuating income).

Under prospective budgeting, State agencies must anticipate income that will be received. Regulations at 7 CFR 273.10(c) for anticipating income were published on October 17, 1978, and have not been amended since that time. The regulations include the following requirements:

1. If the amount of income anticipated to be received and the date of receipt are uncertain, the income shall not be counted.

2. Income received during the past 30 days shall be used as an indicator of future income, but past income shall not be used if a change has occurred or is anticipated. If income fluctuates to the extent that income from the past 30 days is not an accurate predictor of future income, the State agency and the household may use a longer period of past time to provide a more accurate figure.

3. If the receipt of income is reasonably certain but the monthly amount may fluctuate, the household may elect to have its income averaged. To average income, the State agency shall use the household's anticipation of income fluctuations over the certification period.

4. Income shall be counted only in the month in which it is expected to be received, unless it is averaged.

5. If income is received on a weekly or biweekly basis (every 2 weeks), the State agency shall convert the income to a monthly amount by multiplying weekly amounts by 4.3 and biweekly amounts by 2.15, use the State agency's public assistance (PA) conversion standard, or use the exact monthly figure if it can be anticipated for each month of the certification period.

If the income fluctuates and there is an income history, the usual practice is to anticipate future fluctuations in income by projecting an average of income received in recent past months. However, regulations at 7 CFR 273.12(a) require households to report changes of more than $25 in gross monthly income. If income is averaged, the figure used to determine the allotment will differ from the income a household actually received in any one month. To address this and other problems, FCS has proposed changes in the $25 reporting requirement on several occasions.

Section 5(f)(3)(A) of the Act, 7 U.S.C. 2014(f)(3)(A), gives the Secretary of Agriculture broad discretion in the area of Food Stamp Program reporting requirements. Regulations published July 15, 1974 (39 FR 25996–26008) required households to report changes of $25 or more in income or deductions. The preamble to a proposed rule issued May 2, 1978 (43 FR 18874–96) discussed problems with the income reporting requirement and solicited comments on the proposed change and two alternatives. The proposed change was to require households to report all changes in income, except changes in the PA grant. The two alternatives were:

1. The household would be required to report all income changes but the State agency would not have to act on monthly changes of $10 or less.

2. The household would be required to report only changes of $20 or more, but the $20 would apply separately to each income source.

The preamble to final rules dated October 17, 1978 (43 FR 47846, 47872–74) indicates that the largest number of commenters preferred the second alternative and the next largest group preferred the current procedures. Based on the comments citing the administrative difficulties of the three reporting procedures offered in the proposed rule and the number of comments supporting the $25 requirement, we chose to continue the then existing and still current policy.

In a rulemaking published January 16, 1981 (46 FR 4642), we proposed to change the income reporting requirement to address problems in handling changes for households with fluctuating income. The proposed change would have required households with fluctuating income to report changes in wage rate, full-time or part-time status, and source of income. The $25 minimum reporting requirement would not have applied to these households. No change was proposed in the reporting requirement for households with stable earnings or unearned income.

Some commenters opposed the proposal, calling it burdensome, an example of overregulation, and too confusing. Other commenters believed that the omission of a requirement to report changes in the number of hours worked would result in lack of action on possibly significant changes. Because of the adverse comments and the imminent implementation of monthly reporting requirements, a final rule was not published on the subject.

As part of a rule proposed September 29, 1987 (52 FR 36546), we again proposed to change requirements for reporting changes in fluctuating income. In addition to problems with the $25 threshold cited in previous rules, the preamble of these regulations indicated that the current requirement makes it difficult to develop quality control (QC) review procedures. The proposal was also designed to be consistent with provisions of the Aid to Families with Dependent Children (AFDC) QC manual which defined a change as any employment status change which results in either increased or decreased income such as a change in part-time or full-time status, the loss of a job, or a change in hourly rate. The proposal retained the $25 threshold for reporting changes but added the requirement to report changes in full-time or part-time status, source, or hourly rate. The proposed requirement applied only to households with fluctuating income, which was defined as income that varies unpredictably from month to month. Under the proposal, households with fluctuating income would report permanent changes in the source of income and ongoing changes in the number of hours worked. The proposal was based on assumptions that the $25 minimum reporting requirement does not lend itself to changes in fluctuating income and that errors in household income are more frequently attributable to changes in employment status, such as converting from unemployed to employed or from part-time to full-time work.

A majority of commenters opposed this proposal. They were concerned that the rule would add another reporting requirement and that it would be difficult to define permanent and non-permanent status changes and fluctuating income. In addition, the proposed changes would not have resulted in complete conformity between the Food Stamp and AFDC Programs. For these reasons, the provision was not adopted as final. The implementation of monthly reporting also reduced the immediate need for a change in change reporting requirements.

In addition to the problems of anticipating income that fluctuates and determining which changes should be reported during the certification period, there is also the difficulty in deciding under what circumstances a reported change in fluctuating income should be reflected in a changed allotment. Introductory paragraph 7 CFR 273.12(c) requires State agencies to take prompt action on all changes to determine if the change affects the household's eligibility or allotment. Even if the allotment is not changed, the State agency must document the reported change in the case file and send the household another change report form. Regulations at 7 CFR 273.12(c)(1) and (2) provide specific requirements for changes that result in an increase or decrease in the allotment.

However, it is not clear how the State agency should react to a temporary change in income reported by a household whose income has been averaged. The regulations do not specifically require the State agency to compute a new average based on a temporary change. One eligibility worker might reaverage the income based on the new information and adjust the household's allotment. Another eligibility worker might document the reported change in accordance with 7 CFR 273.12(c), but make no change in the allotment unless it was anticipated that the change would continue.

In this rule, we are proposing to modify the requirements for averaging income, reporting changes in income, and acting on reported changes. We believe these modifications will assist State agencies in determining the eligibility and benefits of households with fluctuating income over the months of the certification period. When income is averaged, the amount of income received each month does not correspond directly to the issuance for any given month. However, if the average used corresponds closely to the household's average income received during the certification period, the household's benefits over the certification period will correctly reflect the increases and decreases in income that normally occur.

The changes proposed in this rule are designed to simplify the reporting requirements and assist State agencies in managing cases with fluctuating income. We are seeking comments on the following proposed changes and suggestions for alternatives.

a. Averaging Income—7 CFR 273.10(c)(3)(i)

Current regulations at 7 CFR 273.10(c)(3)(i) provide that households (except destitute households and public assistance (PA) households subject to monthly reporting) may elect to have their income averaged over the certification period. Some State agencies have requested that food stamp regulations be revised to allow averaging at the State agency's option. Others have requested that averaging be mandatory for fluctuating income.

We are proposing to retain the provision of 7 CFR 273.10(c)(3)(i) allowing households to choose whether income shall be counted in the month received or averaged. We believe households should continue to have the opportunity to select the method used to determine their benefits when fluctuations in income are anticipated. There may be situations in which the household would prefer to have income counted in the month received rather than having it averaged. However, we would like to solicit comments on this provision. We are proposing to amend 7 CFR 273.10(c)(3) to remove the reference to PA households subject to monthly reporting. This section was written before the use of monthly reporting in the Food Stamp Program. Section 273.21 now provides

requirements for monthly reporting and retrospectively budgeted households; therefore, there is no need to mention these households at 7 CFR 273.10(c)(3).

We have received questions concerning the steps to be followed in averaging and converting weekly or biweekly income amounts. For the purposes of 7 CFR 273.10(c)(3), income (whether earned or unearned) is averaged by adding together income amounts received or expected to be received over two or more months. The total is then divided by the number of months used in the calculation to arrive at an average.

Conversion as authorized in 7 CFR 273.10(c)(2)(i) is the process of taking into account months in the year in which an extra weekly or biweekly payment will be received by using a conversion factor instead of adjusting the allotment for the months in which the extra check is received. The amounts used in anticipating income must be representative of income the household expects to receive. If the household member has just started a job and has no income history, the eligibility worker would anticipate income in accordance with the requirements at 7 CFR 273.10(c)(1). If the same amount of income is received or expected to be received every week, anticipated income from one payment may be converted to a monthly amount by using a conversion factor. However, converting a single weekly amount to a monthly amount does not constitute averaging for the purposes of the provisions in 7 CFR 273.10(c)(3). State agencies that elect not to use a conversion factor would have to anticipate receipt of an extra pay check and adjust the allotment for the month in which it will be received.

We are proposing to revise 7 CFR 273.10(c)(3)(i) to eliminate the reference to PA monthly reporting households and to add a reference to § 273.12(c), which we propose to amend as indicated below. We would also clarify that monthly amounts are used in averaging and eliminate unnecessary language, including the example.

b. Income Reporting Requirements—7 CFR 273.12(a)(1)

The heading of regulations at 7 CFR 273.12 currently reads ''Reporting changes.'' The section includes requirements for reporting and acting on changes for households not required to report monthly. Requirements for monthly reporting households have been added to the regulations at 7 CFR 273.21 since 7 CFR 273.12 was originally written. Therefore, we are proposing to change the title of 7 CFR 273.12 to ''Requirements for change reporting households.'' The introductory sentence of 7 CFR 273.12(a)(1) currently provides that ''Certified households are required to report the following changes in circumstances.'' We are proposing to amend the sentence to specify that households not required to report monthly (change reporting households) are required to report the specified changes. Proposals for changes in the reporting requirements are discussed below.

In this rulemaking, we are proposing to modify 7 CFR 273.12(a)(1)(i) by revising the reporting requirements for earned income. Although the reporting requirement for fluctuating income is of particular concern, we are proposing that the requirement apply to all earned income (as defined in 7 CFR 273.9(b)(1)). Under this proposal, all households would be required to report a change in source of income, such as starting or losing a job, changing employers, or gaining or losing a source of unearned income. All households would also have to report a change of more than $25 in unearned income.

Households with earned income would also be required to report changes affecting the amount of income earned. As a substitute for the current requirement to report a change of more than $25 in income, we propose to offer State agencies three alternative earned income reporting requirements. The three earned income reporting options are:

(1) A change in wage rate or salary and a change in part-time or full-time employment status. Because some households could experience a change in part-time employment that would be less than a change from part-time to full-time but could involve a significant change in income, State agencies would be required to certify these households for no more than 3 months.

(2) A change in wage rate and a change in hours worked of more than 5 hours a week that is expected to continue for more than a month.

(3) A change in the amount earned of more than $80 a month.

Under the first option, households would have to report any change in wage rate and a change in part-time or full-time employment status. We believe a change in part-time or full-time status would signal a significant change in the number of hours a household member would be expected to work. Regulations at 7 CFR 273.7 provide that a person working a minimum of 30 hours a week is exempt from work registration, and we considered using the 30-hour figure as a bench mark for full-time employment. However, because State agencies may have a definition of ''part-time'' that is used for PA, we have decided not to define ''part-time.'' To provide State agency flexibility and facilitate consistency with PA, we are proposing that State agencies may define ''part-time.''

Under the second option, households would be required to report when a change in wage rate occurred and also when there was a change of more than 5 hours a week that is expected to continue for more than a month. Under the third option, households would be required to report when the amount earned changed by more than $80 a month. We believe the use of one of these options would eliminate some of the problems with the current reporting requirement for earned income. Households with earnings would have a clearer idea of exactly what to report and would not have to report fluctuations in income resulting from temporary changes in the number of hours worked. In addition, the proposal would eliminate some of the problems encountered in quality control reviews of cases with fluctuating income. Providing three options would increase the ability of State agencies to conform reporting requirements for various programs.

In this rule we are proposing to continue the current $25 reporting requirement threshold for unearned income with the two changes noted below. However, we are interested in comments on alternative reporting requirements for unearned income, including the use of computer matching information in lieu of household reporting.

Some State agencies may have the capability of making information regarding a household's unearned income available to their eligibility workers very quickly through data exchange systems that have been established for the exchange of information between the providers of various benefits and State agencies. Through these systems, State agencies match household records with information from the income sources and determine the amount of Supplemental Security Income (SSI), Federal Old Age, Survivors, and Disability Insurance (OASDI) benefits, and unemployment compensation (UC) households receive. It would appear that information from these data sources, rather than from the households, could be used to maintain current and accurate information about the benefits households are receiving. However, this would be possible only if the information could be obtained and

used to adjust food stamp benefits in accordance with the timeframes currently in place for acting on changes.

New systems developed by the Social Security Administration (SSA) may provide faster access to accurate information about SSI and OASDI benefits than has previously been the case. SSA has developed the State Verification and Exchange System (SVES), 42 U.S.C. 1320b–7(a), which replaces previously separate exchanges for SSI and OASDI data. Using the new File Transfer Management System (FTMS), State agencies will be able to obtain daily updates of SSI and OASDI information. SSA will respond to SVES inquiries submitted via FTMS within 24 hours. Using these systems, State agencies will be able to obtain current income information and update records at the State level or provide the information to local offices electronically.

We are interested in State agency comments on their ability to access and use these systems to identify and act on changes in SSI and OASDI benefits within the current timeframes in 7 CFR 273.12(c) for acting on reported changes. We are also interested in comments on the ability of State agencies to use the State's UC data systems for acting on changes in households' UC benefits.

c. Action on Changes in Fluctuating Income—7 CFR 273.12(c)

To address the problem of determining when eligibility workers should act on a reported change in fluctuating income, we are proposing to revise the introductory paragraph of 7 CFR 273.12(c) to specify that if a household reports a change in income, the State agency shall use the information to compute a new allotment amount if the change is representative of anticipated future income. Whether it is representative would be determined on the basis of an expectation that the new circumstance will continue for at least one month beyond the month in which the change is reported. The worker would document the case record to indicate the basis for adjusting or not adjusting the average. If the change does not affect the allotment, the worker would document that fact.

Implementation

We are proposing that the changes made by this rule would be effective and implemented no later than the first day of the month 180 days after publication of the final rule.

List of Subjects in 7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Food stamps, Fraud, Grant programs—social programs, Penalties, Records, Reporting and recordkeeping requirements, Social security, Students.

Accordingly, 7 CFR part 273 is proposed to be amended as follows:

1. The authority citation of part 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2032.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

2. In § 273.10, paragraph (c)(3)(i) is revised to read as follows:

§ 273.10 Determining household eligibility and benefit levels.

* * * * *

(c) *Determining income.* * * *

(3) *Income averaging.* (i) Households may elect to have their income averaged. However, the State agency shall not average the income of destitute households (as defined in paragraph (e)(3) of this section). When averaging income, the State agency shall use the household's anticipation of monthly income fluctuations over the certification period. An average must be recalculated at recertification and in response to changes in income, in accordance with § 273.12(c).

* * * * *

5. In § 273.12,

a. The heading of the section, the introductory text of paragraph (a)(1) and paragraph (a)(1)(i) are revised.

b. The introductory text of paragraph (c) is amended by adding two sentences after the first sentence.

The revisions and additions read as follows:

§ 273.12 Requirements for change reporting households.

(a) *Household responsibility to report.* (1) Monthly reporting households are required to report as provided in § 273.21. Certified change reporting households are required to report the following changes in circumstances:

(i) (A) A change greater than $25 in the amount of unearned income, except changes relating to PA or general assistance (GA) in project areas in which GA and food stamp cases are jointly processed. The State agency is responsible for identifying changes during the certification period in the amount of PA or GA in jointly processed cases.

(B) A change in the source of income, including starting or stopping a job or changing jobs.

(C) One of the following, as determined by the State agency:

(*1*) A change in the wage rate of earned income and a change in full-time or part-time employment status (as determined by the employer or as defined in the State's PA Program), provided that the household is certified for no more than 3 months;

(*2*) A change in wage rate and a change in hours worked of more than 5 hours a week that is expected to continue for more than a month; or

(*3*) A change in the amount earned of more than $80 a month.

* * * * *

(c) *State agency action on changes.* * * * If a household reports a change in income, the State agency shall act on the change in accordance with paragraphs (c)(1) and (c)(2) of this section if the new circumstance is expected to continue for at least one month beyond the month in which the change is reported. The time frames in paragraphs (c)(1) and (c)(2) of this section apply to these actions. * * *

* * * * *

Dated: December 10, 1996.

Ellen Haas,

Under Secretary for Food, Nutrition, and Consumer Services.

[FR Doc. 96–31989 Filed 12–16–96; 8:45 am]

BILLING CODE 3410–30–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–CE–44–AD]

RIN 2120–AA64

Airworthiness Directives; Jetstream Aircraft Limited HP137 Mk1, Jetstream Series 200, and Jetstream Models 3101 and 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); Reopening of the comment period.

SUMMARY: This document proposes to revise an earlier proposed airworthiness directive (AD) that would have required the following on Jetstream Aircraft Limited (JAL) HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes: repetitively inspecting the main landing gear (MLG) pintle to cylinder interface for cracks, and replacing any MLG cylinder that has a crack of any length. The proposed AD results from reports of MLG cracks in the area of the pintle to cylinder interface on three of the affected airplanes. Since publication of that proposal, the Federal Aviation Administration (FAA) has determined

that the proposed action is still a valid safety issue, but that more stringent repetitive inspection intervals should be established than what was earlier proposed. This proposed AD revises the previous proposal by incorporating this change. The actions specified by the proposed AD are intended to prevent failure of the MLG caused by cracks in the pintle to cylinder interface area, which could result in loss of control of the airplane during landing operations. Since the comment period for the previous proposal has closed and the change described above goes beyond the scope of what was previously proposed, the FAA is allowing additional time for the public to comment.

DATES: Comments must be received on or before February 28, 1997.

ADDRESSES: Submit comments in triplicate to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 95–CE–44–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Jetstream Aircraft Limited, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone (44–292) 79888; facsimile (44–292) 79703; or Jetstream Aircraft Inc., Librarian, P.O. Box 16029, Dulles International Airport, Washington, D.C. 20041–6029; telephone (703) 406–1161; facsimile (703) 406–1469. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Rodriguez, Program Manager, Brussels Aircraft Certification Division, FAA, Europe, Africa, and Middle East Office, c/o American Embassy, B–1000 Brussels, Belgium; telephone (32 2) 508.2715; facsimile (32 2) 230.6899; or Mr. S.M. Nagarajan, Project Officer, Small Airplane Directorate, Aircraft Certification Service, FAA, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone (816) 426–6932; facsimile (816) 426–2169.

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 should 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 supplemental 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 that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this supplemental notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 95–CE–44–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of Supplemental NPRM

Any person may obtain a copy of this supplemental NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 95–CE–44–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Events Leading to This Action

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain JAL HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes was published in the Federal Register on September 19, 1995 (60 FR 48429). The notice of proposed rulemaking (NPRM) proposed to require repetitively inspecting (using non-destructive testing eddy current methods) the MLG pintle to cylinder interface for cracks, and replacing any MLG cylinder that has a crack exceeding certain limits. Accomplishment of the proposed inspections as specified in the NPRM would be in accordance with Jetstream Alert Service Bulletin 32–A–JA 941245, Revision 2, dated March 28, 1995, and AP Precision Hydraulics Ltd. Service Bulletin 32–56, Revision 3, dated February 1995.

Interested persons were afforded an opportunity to participate in the making of this amendment. One comment was received in favor of the proposed rule and no comments were received regarding the FAA's determination of the cost to the public.

The original NPRM, if followed with a final rule, would have allowed continued flight if cracks were found in the MLG pintle to cylinder interface when the cracks did not exceed certain limits. The FAA has recently established a policy to disallow airplane operation when known cracks exist in primary structure (the MLG pintle to cylinder interface is considered primary structure). For this reason, the FAA issued a supplemental NPRM on March 19, 1996 (61 FR 12051, March 25, 1996) that proposed the same actions as the original proposal, but proposed to require the MLG cylinder to be replaced if any cracks are found, not just if cracks are found that exceed certain limits.

Since publication of the previous supplemental NPRM, the FAA has re-examined all information related to this subject and determined that the actions proposed in the proposal are a valid safety issue, but that more stringent repetitive inspection intervals should be established. Specifically, the MLG pintle to cylinder interface would be inspected initially ''upon accumulating 8,000 landings on an affected MLG * * *'' (instead of 8,500 landings), ''* * * and, thereafter at intervals not to exceed 1,200 landings * * *'' (instead of 4,000 landings). The more stringent inspection intervals were based on an analysis done by JAL and subsequently evaluated and approved by the FAA.

Applicable Service Information

JAL has issued Jetstream Service Bulletin 32–JA 960142, dated March 15, 1996. This service bulletin specifies procedures for accomplishing the proposed inspections using fluorescent penetrant methods. The FAA has included this inspection method as an alternative to the non-destructive testing eddy current inspection.

The FAA's Determination

The revision of the previous supplemental NPRM would require more stringent repetitive inspection intervals of the MLG pintle to cylinder interface for JAL HP137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes. Since these actions go beyond the scope of what was already proposed and the comment period for the previous supplemental NPRM has closed, the FAA has determined that the public should have the opportunity to comment on the proposal as amended. Therefore, the FAA is issuing this supplemental NPRM to allow all interested persons a further opportunity to participate in the making of this amendment.

Cost Impact

The FAA estimates that 250 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 6 workhours per airplane to accomplish the proposed action, and that the average labor rate is approximately $60 an hour. Based on these figures, the total cost impact of the proposed inspection on U.S. operators is estimated to be $90,000. This figure does not take into account the cost of repetitive inspections or the cost of replacement MLG cylinders if cracks are found. The FAA has no way of determining the number of repetitive inspections each owner/operator would incur over the life of the airplane or the number of MLG cylinders that may be found cracked during the inspections proposed by this action.

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 action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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 has been placed 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 USC 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

Jetstream Aircraft Limited: Docket No. 95–CE–44–AD.

Applicability: HP 137 Mk1, Jetstream series 200, and Jetstream Models 3101 and 3201 airplanes (all serial numbers), certificated in any category, that are equipped with one of the following main landing gear (MLG) part numbers:

1863
1863/4C
1864/4B
BOOA702851A
BOOA703065A
BOOA702926A
BO1A703066A
1863/4A,
1864
1864/4C
BOOA702925A
BO1A703065A
BO1A702926A
BOOA703031A
1863/4B
1864/4A
BOOA702850A
B01A702925A
BOOA703030A
BOOA703066A

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been 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 (d) 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 initially upon accumulating 8,000 landings on an affected MLG or within the next 100 landings after the effective date of this AD, whichever occurs later, unless already accomplished, and thereafter at intervals not to exceed 1,200 landings accumulated on an affected MLG.

Note 2: If the number of landings is unknown, hours time-in-service (TIS) may be used by multiplying the number of hours TIS by 0.75. If hours TIS are utilized to calculate the number of landings, this would make the AD effective ''initially upon accumulating 10,667 hours TIS on an affected MLG or within the next 133 hours TIS after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed to 1,600 hours TIS accumulated on an affected MLG.''

To prevent failure of the MLG caused by cracks in the pintle to cylinder interface area, which could result in loss of control of the airplane during landing operations, accomplish the following:

(a) Inspect the MLG pintle to cylinder interface for cracks in accordance with one of the following:

(1) Using non-destructive testing (NDT) eddy current methods, in accordance with AP Precision Hydraulics Ltd. Service Bulletin 32–56, Revision 3, dated February 1995; or

(2) Using fluorescent penetrant methods, in accordance with APPENDIX 1 in Jetstream Service Bulletin 32–JA 960142, dated March 15, 1996.

(b) If any crack is found during any inspection required by this AD, prior to further flight, replace the MLG cylinder with a new part. Replacing the MLG cylinder does not eliminate the repetitive inspection requirement of this AD.

Note 3: The ''prior to further flight'' replacement compliance time required by this AD if a MLG cylinder is cracked is different from the compliance time referenced in Jetstream Alert Service Bulletin 32–A–JA 941245; and AP Precision Hydraulics Ltd. Service Bulletin 32–56, Revision 3, dated February 1995. This AD takes precedence over any service information.

(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.

(d) An alternative method of compliance or adjustment of the initial and repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Brussels Aircraft Certification Division, Europe, Africa, Middle East office, FAA, c/o American Embassy, B–1000 Brussels, Belgium. The request should be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Brussels Aircraft Certification Division.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Brussels Aircraft Certification Division.

(e) All persons affected by this directive may obtain copies of the documents referred to herein upon request to Jetstream Aircraft Limited, Manager Product Support, Prestwick Airport, Ayrshire, KA9 2RW Scotland; or Jetstream Aircraft Inc., Librarian, P.O. Box 16029, Dulles International Airport, Washington, DC 20041–6029; or may examine these documents at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on December 9, 1996.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–31950 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–13–U

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

Proposed Rulemaking Concerning Contract Market Rule Review Procedures

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is proposing a rulemaking which would amend the Commission's procedures relating to its review of those contract market rules that do not relate to contract terms and conditions. A separate proposal is currently pending for rules relating to terms and conditions. The instant proposal would shorten the Commission's time frame for reviewing complex rules and streamline the review process so that such rule changes generally could be deemed approved or be permitted to be put into effect without Commission approval.

Specifically, all such rule changes meeting the form and content requirements would be deemed approved or be permitted to be put into effect without approval ten days after Commission receipt, unless the Commission took action to commence review of the proposal for a 45-day period (or a 75-day period in the case of rules published for comment in the Federal Register) or the contract market agreed to another, specified review period. At the end of such a period, a proposed rule meeting the form and content requirements would be deemed approved or become effective without approval unless the Commission informed the submitting contract market of its intention to initiate disapproval proceedings, the contract market withdrew the proposal, or the contract market requested that the review period be extended to the current 180-day period.

DATE: Comments on the proposed rulemaking must be received by January 16, 1997.

ADDRESSES: Comments should be mailed to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; transmitted by facsimile to (202) 418–5521; or transmitted electronically to [secretary@cftc.gov].

FOR FURTHER INFORMATION CONTACT: David P. Van Wagner, Special Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5490.

SUPPLEMENTARY INFORMATION

I. Current Statutory and Regulatory Requirements

Section 5a(a)(12)(A) of the Commodity Exchange Act (''Act''), 7 U.S.C. 7a(a)(12)(A), provides that all rules [1] of a contract market that relate to terms and conditions [2] in futures or option contracts traded on or subject to the rules of a contract market must be submitted to the Commission for its prior approval. If the Commission does not approve or begin disapproval proceedings for such a proposed rule within 180 days of the Commission's receipt of the submission, the contract market may make the rule effective.[3]

Section 5a(a)(12)(A) further requires that contract markets submit all other rules to the Commission. Such other rules may be made effective ten days after Commission receipt unless, within the ten-day period, the contract market requests Commission approval or the Commission notifies the contract market that it intends to review the rules for approval. Section 5a(a)(12)(A) also provides that at least thirty days before approving any rules of major economic significance, as determined by the Commission, the Commission shall publish a notice of such rules in the Federal Register.

Commission Regulation 1.41 sets forth procedures for submitting proposed contract market rules for Commission approval, permitting proposed contract market rules to go into effect without Commission approval, and dealing with contract market emergency rules. All proposed contract market rules relating to the terms and conditions of a commodity futures or option contract must, and any other rule may, be submitted for prior Commission approval, under section 5a(a)(12)(A) of the Act, pursuant to procedures set forth in Commission Regulation 1.41(b). (Significantly, certain other sections of the Act require rules addressing specified matters to be explicitly approved by the Commission.) Commission Regulation 1.41(c) sets forth the submission requirements for rules that do not require Commission approval and that may be placed into effect ten days after receipt by the Commission.

On November 22, 1996, the Commission published a proposed rulemaking which would revise the procedures for contract market designations and the review of rules relating to contract terms and conditions under Regulation 1.41(b).[4] Specifically, that proposed rulemaking would establish ''fast-track'' review procedures which would permit certain contract market rules to be deemed approved 45 days after receipt by the Commission (or 75 days after receipt in cases where the Commission decided to extend the review period). These fast-track review procedures would be an alternative to the current 180-day review procedures under section 5a(a)(12)(A) of the Act and Commission Regulation 1.41(b).

The instant rulemaking would revise the review procedures for rules that do not relate to contract terms and conditions. It addresses those rules that, although they do not relate to terms and conditions, nevertheless require approval under a specific provision of the Act and those rules that do not require approval and for which the review period has been extended by the contract market or the Commission.[5]

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[1] Commission Regulation 1.41(a)(1) defines ''rule'' of a contract market to mean:

* * * any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, or instrument corresponding thereto, in whatever form adopted, and any amendment or addition thereto or repeal thereof, made or issued by a contract market, or by the governing board thereof or any committee thereof.

[2] Commission Regulation 1.41(a)(2) defines ''terms and conditions'' to mean:

* * * any definition of the trading unit or the specific commodity underlying a contract for the future delivery of a commodity or commodity option contract, specification of settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the contract. Terms and conditions shall be deemed to include provisions relating to the following:

(i) Quality or quantity standards for a commodity and any applicable exemptions or discounts;

(ii) Trading hours, trading months and the listing of contracts;

(iii) Minimum and maximum price limits and the establishment of settlement prices;

(iv) Position limits and position reporting requirements;

(v) Delivery points and locational price differentials;

(vi) Delivery standards and procedures, including alternatives to delivery and applicable penalties or sanctions for failure to perform;

(vii) Settlement of the contract; and

(viii) Payment or collection of commodity option premiums or margins.

[3] In addition, if the Commission institutes a disapproval proceeding for a proposed rule within 180 days of receipt, but does not conclude the disapproval proceeding within one year of receipt, the contract market may make the rule effective until such time as the Commission disapproves the rule.

[4] 61 FR 59386.

[5] In the past three fiscal years, the Commission has processed 866 non-term and condition submissions. The Commission handled 587 of these in ten days or fewer. This represents approximately 68% of all such submissions received. The Commission processed 613 submissions in 30 days or fewer. This represents approximately 71% of all

Continued

The different review periods set forth in the two proposed rulemakings reflect differences established in the statute between terms and conditions and other types of rules and the volume of contract market rulemakings that are not terms and conditions.[6]

II. Description of Proposed Rulemaking

A. Overview

The Commission believes that the rule review process is essential to ensure the integrity of the markets and to ensure that the public interest is protected. At the same time, the Commission wants to encourage innovation by the contract markets. The proposed rulemaking is designed to expedite the Commission's existing two-track procedures for the review of contract market rule proposals that do not relate to contract terms and conditions. As described in more detail below, the proposal would:

—Permit certain rules to be deemed approved within ten days of receipt that currently are subject to a 180-day deadline;
—Require the Commission to identify the issues raised by novel or complex proposals within 10 days of receipt;
—Reduce by up to 75% the time within which the Commission was required to act on the small portion of rules not handled during the ten-day review period;
—Make clear that a contract market could choose to extend the review period rather than be subject to a disapproval proceeding; and
—Require disapproval proceedings to be initiated no later than 15 days after the submitting contract market advised the Commission that it did not wish to withdraw the proposed rule.

The Commission believes that under the proposed procedures, the Commission would identify issues early in the process and make decisions on proposed rules in an expeditious manner.[7] Similarly, the compressed time frames would increase the incentive for contract markets to ensure that their initial submissions fully articulated the operation, purpose, and effect of their proposals and to attempt to resolve open issues more quickly.[8]

The Commission expects that the proposed procedures would increase the percentage of submissions handled within ten days. Moreover, by simplifying the procedures for routine submissions and by imposing stricter deadlines at various stages, the proposal would enable the Commission and the contract markets to focus resources on the smaller subset of novel and complex submissions that require additional time for review. This would result in quicker identification and resolution of issues in such cases.

The following description consists of a section-by-section analysis of the Commission's proposed rulemaking. In addition to explaining the rationale and operation of the proposal, this description is intended to provide interested persons with a framework for addressing issues which may be raised by particular provisions of the rulemaking.

B. Proposed Regulation 1.41(b)—Rules That Relate to Terms and Conditions

Current Commission Regulation 1.41(b) establishes approval procedures for proposed contract market rules relating to contract terms and conditions, other rules that require approval under a specific provision of the Act, rules for which the submitting contract market requests approval, and rules the Commission determines to review for approval. The Commission is proposing to amend Regulation 1.41(b) so that it would apply only to proposed rules relating to terms and conditions. The procedures for the review of such rules are addressed in the related proposed rulemaking mentioned above.[9]

C. Proposed Regulation 1.41(c)—Rules That Do Not Relate to Terms and Conditions

Current Commission Regulation 1.41(c) establishes review procedures for proposed contract market rules which do not require Commission approval and may be placed into effect ten days after receipt by the Commission. The Commission's proposed rulemaking would revise Regulation 1.41(c) in two significant respects.

First, the rulemaking would expand the scope of rules eligible to be reviewed pursuant to Regulation 1.41(c) to include all proposed rules, other than terms and conditions, that the Commission reviews for approval. These types of rules would include rules that required approval under a provision of the Act other than Section 5a(a)(12)(A),[10] rules that the Commission decided to review for approval, and rules that the submitting contract market requested be reviewed for approval.

Second, the rulemaking would compress the time for review. Under the proposal, the Commission would be required to act on all non-term and condition rule changes within ten days of receipt. Unless the Commission found that a rule proposal involved complex or novel issues or was of major economic significance and affirmatively decided to retain it for further review, all non-term and condition rule changes would be deemed approved or be permitted to be placed into effect without approval, as appropriate, ten days after the Commission's receipt.

For those rule proposals that the Commission decided merited further review, the proposed rulemaking would reduce the Commission's maximum review time from the current 180 days to 45 or 75 days, unless the submitting contract market requested otherwise. Finally, disapproval proceedings for a proposed rule would have to be instituted within 75 or 105 days rather than the current 180 days.

1. Proposed Regulation 1.41(c)(1)(i)—Form and Content of Submissions

Under proposed Regulation 1.41(c)(1)(i), contract markets would be required to submit to the Commission for review all proposed rules that did not relate to terms and conditions and were not otherwise exempt.[11] Because

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such submissions. In many of the instances where the review period exceeded thirty days, in lieu of commencing disapproval proceedings or remitting the rules, the Commission kept such rules under review while the contract market addressed relevant issues or the Commission undertook changes to regulations that otherwise precluded the immediate implementation of the proposed rule.

[6] *See* section 5a(a)(12)(A) of the Act. Submissions related to terms and conditions constitute approximately 40% of all submissions. Other types of rules constitute approximately 60% of all submissions.

[7] The rulemaking would not alter the existing statutory requirement that any determination to extend the ten-day review period for certain rules is not delegable to staff. *See* section 5a(a)(12)(A) of the Act. The Commission would continue to make this determination. Upon implementation of the proposed rulemaking, the Commission anticipates it would adjust its internal processes, as appropriate, to accommodate the new procedures.

[8] For example, under current procedures, contract markets may have an incentive to submit proposals before all the details have been finalized in order to start the running of the 180-day review period. In such cases, the submission would be supplemented during the course of the review. Under the proposal, there would be an incentive to make the initial submission as complete as possible in order to obtain approval within the initial ten-day period.

[9] 61 FR 59386 (November 22, 1996).

[10] Several provisions of the Act other than section 5a(a)(12)(A) require Commission approval of contract market rules: Section 4b(b) (crossing of orders); Section 4c(a) (exchange of futures for physicals, transfer trades and office trades); and Section 4f(b) (financial requirements for futures commission merchants). Several provisions of the Commission's regulations also require Commission approval of contract market rules: Regulation 8.02 (disciplinary proceedings); Regulation 155.2 (trading standards for floor brokers); and Regulation 190.05(b) (deliveries on behalf of a customer of a bankrupt firm).

[11] Commission Regulations 1.41(d) and 1.41(f), respectively, set forth the submission requirements

this rulemaking would substantially reduce the period of time the Commission would have to review and dispose of rule proposals, it would be very important for contract markets to ensure that their submissions fully complied with the form and content requirements.

Each submission would have to comply with all the form and content requirements that currently apply to rules submitted to the Commission pursuant to Regulation 1.41(b) and Regulation 1.41(c). In addition, because proposed Regulation 1.41(c) would establish review procedures for both rules that receive Commission approval and rules that may be put into effect without Commission approval, the proposed rulemaking would require that Regulation 1.41(c) submissions included certain other information to facilitate the Commission's review of both these categories of rules.

Proposed Regulation 1.41(c)(1)(i)(F) would require that contract markets specified in their submissions any sections of the Act or the Commission's regulations that were related to a proposed rule, particularly citing any such provisions that required Commission approval of the rule. To the extent a submission was potentially inconsistent with a provision of the Act or the Commission's regulations, the proposal would require that the submission contained a reasoned analysis addressing that issue and supporting adoption of the rule.

Proposed Regulation 1.41(c)(1)(i)(G) would require that contract markets indicated in their submissions whether they were requesting Commission approval for a proposed rule. This requirement would help the Commission to distinguish rules which did not require Commission approval but for which a submitting contract market was requesting approval from rules that a contract market wished to put into effect without Commission approval.[12]

The proposed rulemaking also would amend the current requirement of Commission Regulation 1.41 that contract markets include in their rule submissions any substantive views expressed by their members or others in opposition to a proposed rule.[13] As a clarification of this requirement, the proposed rulemaking would specify that the views of opposing governing board members also must be included in proposed rule submissions.[14] In addition, the proposed rulemaking would provide that the currently-required description of opposing views must indicate the membership interest categories of persons who were opposed to the proposed contract market rule.

Identification of the actual individual would not be required. The Commission believes that information about the views and categories of persons who opposed a rule would help the Commission to ascertain quickly any issues which were raised by the proposal and, thus, generally would benefit the rule review process.[15]

2. Proposed Regulation 1.41(c)(1)(ii)—Failure to Meet Form and Content Requirements

Under proposed Regulation 1.41(c)(1)(ii), the Commission would retain the authority to remit rule proposals which did not comply with the form and content requirements of Regulation 1.41(c)(1)(i). This provision would simply replicate the remittal provisions of current Regulation 1.41(b) and Regulation 1.41(c).

3. Proposed Regulation 1.41(c)(1)(iii)—Extension of Review Period

Proposed Regulation 1.41(c)(1)(iii) specifies that the Commission might extend the ten-day review period to 45 or 75 days for a proposed rule if it determined within ten days of receipt that the rule ''raises novel or complex issues which require additional time for review or is of major economic significance'' and so notified the submitting contract market.[16] Such rules frequently generate inquiries or comments from the public, the industry, or government agencies. In some cases, the views of such commenters may not have been taken into account in the contract market decision-making process. A review period longer than ten days is often necessary to address such concerns adequately.

The provision would require the Commission's notification to specify the nature of the issues that necessitated additional review of a rule proposal. The standard is essentially the same as that set forth in the Commission's proposed rulemaking relating to term and condition rule changes for extending the 45-day review period to 75 days.[17]

4. Proposed Regulation 1.41(c)(2)—Action Within Ten Days

Proposed Regulation 1.41(c)(2) would provide that proposed rules (other than terms and conditions) that required approval or that could be placed into effect without approval would be deemed approved or allowed to go into effect without approval, as appropriate, ten days after their receipt by the Commission unless the Commission notified the submitting contract market otherwise. As previously noted, the ten-day period within which rules would be deemed approved is much shorter than the 180-day period provided for in the Act.

Under this provision, the only bases for such notification would be if the submission did not comply with Regulation 1.41(c)(1)(i)'s form and content requirements, the Commission decided to extend the review period pursuant to Regulation 1.41(c)(1)(iii), or the contract market agreed to another, specified review period. The last provision reflects an informal procedure that has been followed in the past with respect to ten day rules where a contract market grants an extension or tolls the time period while it amends the proposed rule, rather than having the Commission remit the rule or convert it to a 180-day track.

for contract market rules that are exempt from the requirements of section 5a(a)(12)(A) of the Act and that relate to temporary emergencies. These regulations are not affected by the subject rulemaking.

[12] With the exception of certain emergency actions, contract markets may request Commission approval of proposed rules that otherwise could be put into effect without Commission approval. In some cases, contract markets request approval in order to receive some degree of immunity from the antitrust or other relevant laws. *See* Johnson and Hazen, *Commodities Regulation*, § 2.56.

[13] Current Commission Regulation 1.41(b)(5) requires that rule submissions ''[n]ote and briefly describe any substantive views expressed by the members of the contract market or others with respect to the proposed rule.''

[14] The Commission believes that the disclosure of the views and categories of board members who opposed a proposed rule during board deliberations would aid the Commission in its oversight of the self-governance processes of the contract markets and in determining whether rules should be subject to public comment.

[15] The proposed revisions to Regulation 1.41's form and content requirements merely would reflect information that Commission staff customarily requests from contract markets submitting rule proposals that potentially raise regulatory concerns. By clarifying that such information must be included in a contract market's original submission of a rule, the proposed rulemaking would ensure that the Commission would have such information at the outset of the rule review process and, thus, should facilitate the Commission's review of proposed rules within the compressed time frames of this rulemaking.

[16] Examples of the types of rules that might require more than ten days for review would include:

—Rules relating to the financial integrity of markets or their participants;

—Rules establishing novel trading procedures or providing for non-competitive trading;

—Rules providing for the differential treatment of different classes of market participants;

—Rules establishing linkages among exchanges; and,

—Rules relating to the application of new technology to the marketplace.

[17] *See* 61 FR 59386 (November 22, 1996).

5. Proposed Regulation 1.41(c)(3)—Action Within 45 or 75 days

Generally, under proposed Regulation 1.41(c)(3), any proposed rule which the Commission retained for further review under Regulation 1.41(c)(1)(iii) would be deemed approved or allowed to go into effect, as determined by the Commission, 45 days after Commission receipt (or 75 days in the case of rules which were published for comment in the Federal Register).[18] By providing the Commission with the discretion to approve a proposed rule or to allow it into effect at the end of the 45- or 75-day review period, the rulemaking would replicate the options currently available to the Commission under section 5a(a)(12)(A) of the Act at the end of 180 days. The proposed rulemaking would simply compress the time frame to 45 or 75 days.

Proposed Regulation 1.41(c)(3) provides for two exceptions to this deadline: rule submissions that have not satisfied the form and content requirements of Regulation 1.41(c)(1)(i)[19] or proposed rules as to which the Commission notified the contract market of its intention to initiate a disapproval proceeding. Again, both the 45-day and 75-day time periods are considerably shorter than the 180-day period currently provided for rules reviewed pursuant to Commission Regulation 1.41(b).

6. Proposed Regulation 1.41(c)(4)—Disapproval Proceedings

Under proposed Regulation 1.41(c)(4), any Commission notice to a contract market that the Commission intended to commence disapproval proceedings with respect to a proposed rule change would be required to specify the nature of the issues raised by the proposal and the sections of the Act or the Commission's regulations that the rule appeared to violate. Under the provision, the submitting contract market would have 15 days from the issuance of the notification either to withdraw the proposal or to request that the Commission consider the proposal pursuant to the regular 180-day review procedures of section 5a(a)(12)(A) of the Act. If the submitting contract market chose neither of these options, the Commission would commence disapproval proceedings no later than 30 days after its issuance of the notification. Section 5a(a)(A)(12) sets forth procedures for Commission disapproval of proposed rules and provides, among other things, an opportunity for the submitting contract market to appear on its own behalf at a Commission hearing.

Under the proposed rulemaking, disapproval proceedings would commence within 75 days of a rule's submission (or 105 days in the case of rules which were published for comment in the Federal Register). Currently, the Commission may institute disapproval proceedings up to 180 days after a rule's submission. The Commission's proposed shortened time frame for rule disapproval is intended to advance the general purpose of this proposed rulemaking: to accelerate the Commission's review of proposed rule changes and to allow contract markets to implement rule changes in a more timely manner than is the case under the current rule review scheme of Regulation 1.41.

III. Conclusion

The Commission believes that the proposed amendments to Regulation 1.41 would shorten the review time for non-term and condition rule changes and streamline the rule review process. Accordingly, the proposed rulemaking should enable contract markets to implement rule proposals in a more timely manner than can be done at the present time, without sacrificing the ability of the Commission to assure an adequate public comment process and consistency of a proposed rule with the Act and the regulations. The proposal also would provide the Commission with the necessary experience to determine whether further streamlining could be achieved. The Commission invites public comment on any aspect of its proposed rulemaking and, in particular, on the appropriateness of the proposed time frames.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously determined that contract markets are not ''small entities'' for purposes of the RFA, and that the Commission, therefore, need not consider the effect of proposed rules on contract markets.[20] Accordingly, the Chairperson, on behalf of the Commission, hereby certifies, pursuant to section 3(a) of the RFA, 5 U.S.C. 605(b), that the proposed rulemaking, if adopted, would not have a significant economic impact on a substantial number of small entities.

B. Agency Information Activities: Proposed Collection; Comment Request

The Paperwork Reduction Act of 1980 (''PRA''), 44 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. While the proposed rulemaking has no burden, the group of rules (3038–0022) of which this is a part has the following burden:

Average burden hours per response...3,546.26
Number of respondents 10,971.00
Frequency of response.....On Occasion

Persons wishing to comment on the information that would be required by the proposed rulemaking should contact David Rostker, Office of Management and Budget (''OMB''), Room 3228, NEOB, Washington, DC 20503, (202) 395–7340. Copies of the information collection submission to OMB are available from Gerald P. Smith, Clearance Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581. Telephone: (202) 418–5160.

List of Subjects in 17 CFR Part 1

Commodity exchanges, Contract markets, Rule review procedures.

In consideration of the foregoing, and based on the authority contained in the

[18] Under section 5a(a)(12)(A) of the Act, the Commission is required to publish in the Federal Register for public comment any proposed rule of major economic significance. In addition, the Commission generally publishes significant rule changes when it believes that it is in the public interest to do so and that it would be beneficial to ascertain the views of persons or entities that might be affected by the proposal. While section 5a(a)(12)(A) of the Act specifies that rules of major economic significance must be published at least 30 days prior to approval of any such rules, neither the Act nor the Commission's regulations specify any minimum length for public comment periods.

[19] Historically, the Commission and its staff have always attempted to have contract markets cure defects in the form and content of their submissions as early as possible in the rule review process. However, the Commission's experience also has been that questions about the operation, purpose and effect of significant rule proposals can arise at any point in the review process, especially when issues are raised during the course of a public comment period. For example, other government agencies such as the Securities and Exchange Commission (''SEC''), the Department of the Treasury, the Federal Reserve Board, and the Department of Justice have expressed their regulatory interests in or identified issues relating to contract market rule proposals during the course of Commission review. Moreover, in some circumstances, such as the development of capital or reporting requirements, the gathering of information from the SEC and commodities and securities self-regulatory organizations may be necessary to avoid duplicative requirements and to assure adequate coverage. Accordingly, under proposed Regulation 1.41(c)(3)(i), the Commission would retain the discretion to remit a proposal for failure to satisfy form and content requirements throughout the specified review period.

[20] *See* 47 FR 18618, 18619 (April 30, 1982).

Commodity Exchange Act and, in particular, sections 4c, 5, 5a, 6 and 8a thereof, 7 U.S.C. 6c, 7, 7a, 8 and 12a, the Commission is hereby proposing to amend title 17, chapter I, part 1 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 2a, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24.

2. Section 1.41 would be proposed to be amended be revising the first sentence of paragraph (b) and paragraph (c) to read as follows:

§ 1.41 Contract market rules; submission of rules to the Commission; exemption of certain rules.

* * * * *

(b) *Rules that relate to terms and conditions.* Except as provided herein and in paragraph (f) of this section, all proposed contract market rules that relate to terms and conditions must be submitted to the Commission for approval pursuant to section 5a(a)(12)(A) of the Act prior to their proposed effective dates. * * *

(c) *Rules that do not relate to terms and conditions.* (1)(i) Except as provided in paragraphs (d) and (f) of this section (exempt or temporary emergency rules), each contract market shall submit to the Commission pursuant to section 5a(a)(12)(A) of the Act prior to the proposed effective dates all proposed rules that do not relate to terms and conditions. One copy of the rule shall be furnished to the Commission at its Washington, DC headquarters, and one copy shall be transmitted by the contract market to the regional office of the Commission having local jurisdiction over the contract market. Each such submission under this paragraph (c) shall, in the following order:

(A) State that it is being submitted pursuant to Commission regulation 1.41(c);

(B) Set forth the text of the proposed rule (in the case of any change in, addition to, or deletion from any current rule of the contact market, the current rule shall be fully set forth, with brackets used to indicate words to be deleted and underscoring used to indicate words to be added);

(C) Describe the proposed effective date of the proposed rule and any action taken or anticipated to be taken to adopt the proposed rule by the contract market, or by the governing board thereof or any committee thereof, and cite the rules of the contract market which authorize the adoption of the proposed rule;

(D) Explain the operation, purpose, and effect of the proposed rule, including, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants, or others, how the rule fits into the contract market's scheme of self-regulation, information which demonstrates that the proposed rule is not inconsistent with the policies and purposes of the Act, and any other information which may be beneficial to the Commission in analyzing the proposed rule. If a proposed rule affects, directly or indirectly, the application of any other rule of the contract market, set forth the pertinent text of any such rule and describe the anticipated effect;

(E) Note and briefly describe any substantive opposing views expressed by governing board members, members of the contract market, or others with respect to the proposed rule which were not incorporated into the proposed rule prior to its submission to the Commission. Any such description also should identify the membership interest categories, as that term is defined by Commission regulation 1.64(a)(4), of persons who were opposed to the proposed rule;

(F) Identify any sections of the Act or the Commission's regulations that are related to the rule, including any provisions that require Commission approval of the rule, and, to the extent of any potential inconsistency between the proposed rule and the Act or the Commission's regulations, provide a reasoned analysis addressing the issue and supporting the submission; and

(G) State whether the contract market is requesting approval of the proposed rule by the Commission.

(ii) The Commission may remit to the contract market, with an appropriate explanation where practicable, and not accept for review any rule submission that does not comply with the form and content requirements of paragraphs (c)(1)(i) (A)–(F) of this section.

(iii) The Commission may notify the contract market within ten days after receipt of a submission filed pursuant to paragraph (c)(1) of this section, that the proposed rule raises novel or complex issues which require additional time for review or is of major economic significance and therefore that the review period has been extended as specified in paragraph (c)(3) of this section. This notification will briefly specify the nature of the issues for which additional time for review is required.

(2) All proposed contract market rules submitted for review under paragraph (c) of this section may be deemed approved or be placed into effect, as appropriate, ten days after Commission receipt (or at such earlier time as may be determined by the Commission) unless:

(i) The Commission notifies the contract market that the submission does not comply with the form and content requirements of paragraphs (c)(1)(i) (A)–(F) of this section;

(ii) The Commission notifies the contract market that the review period for the submission has been extended pursuant to paragraph (c)(1)(iii) of this section; or

(iii) The contract market agrees to another, specified review period.

(3) Any rule for which the Commission extends the review period pursuant to paragraph (c)(1)(iii) of this section may be deemed approved or be placed into effect, as determined by the Commission, forty-five days after Commission receipt of such rule or seventy-five days after Commission receipt in the case of rules that have been published for comment in the Federal Register (or at such earlier time as may be determined by the Commission) unless the Commission notifies the contract market that:

(i) The submission, including any supplementary materials and in consideration of any comments from the public or other government agencies, does not comply with the form and content requirements of paragraphs (c)(1)(i) (A)–(F) of this section; or

(ii) The Commission intends to institute a proceeding to disapprove the rule pursuant to the procedures specified in section 5a(a)(12)(A) of the Act.

(4) A notice of intention to commence a disapproval proceeding issued pursuant to paragraph (c)(3) of this section will:

(i) Identify the nature of the issues raised by the proposed rule and the specific sections of the Act or the Commission's regulations that the rule appears to violate; and,

(ii) State that the Commission will commence disapproval proceedings for the proposed rule within thirty days after the Commission's issuance of the notification, unless within fifteen days of such issuance the contract market:

(A) Withdraws the rule, or

(B) Requests the Commission to review the rule pursuant to the one hundred and eighty day review procedures set forth in section 5a(a)(12)(A) of the Act.

Issued in Washington, DC, on December 10, 1996, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–31836 Filed 12–16–96; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 48

[REG–247678–96]

RIN 1545–AU53

Gasoline and Diesel Fuel Excise Tax; Special Rules for Alaska; Definition of Aviation Gasoline and Kerosene

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Proposed rule and notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the Federal Register, the IRS is issuing temporary regulations relating to the application of the diesel fuel excise tax to fuel used in Alaska. The text of those temporary regulations also serves as a portion of the text of these proposed regulations. This document also contains other proposed regulations relating to gasoline and diesel fuel excise taxes. The proposed regulations implement certain changes made by the Omnibus Budget Reconciliation Act of 1993 and the Small Business Job Protection Act of 1996 and affect certain enterers, refiners, retailers, terminal operators, throughputters, and users.

DATES: Written comments and requests for a public hearing must be received by March 17, 1997.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–247678–96), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG–247678–96), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/comments/html.

FOR FURTHER INFORMATION CONTACT: Frank Boland (202) 622–3130 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations published in the Rules and Regulations section of this issue of the Federal Register provide rules relating to diesel fuel that is removed, entered, or sold in the state of Alaska. The text of those temporary regulations also serves as the text of these proposed regulations relating to Alaska. The preamble to the temporary regulations explains the temporary rules.

In addition, this document proposes definitions of *aviation gasoline*, for purposes of the tax on aviation gasoline as added by the Small Business Job Protection Act of 1996, and *kerosene*, for purposes of the tax on diesel fuel. These definitions are based on definitions used by the Department of Energy. This document also proposes changes to the effective date of proposed regulations relating to gasoline and diesel fuel that were published in the Federal Register on March 14, 1996 (61 FR 10490).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, a notice of the date, time, and place for the hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Frank Boland, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 48 is proposed to be amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 is amended by adding an entry in numerical order to read in part as follows:

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

Section 48.4082–5 also issued under 26 U.S.C. 4082. * * *

Par. 2. Section 48.4081–1 is amended as follows:

1. Paragraph (b) is amended by adding new definitions in alphabetical order.

2. The second sentence of paragraph (c)(2)(i) is amended by adding the language ''aviation fuel (as defined in section 4093(a)),'' after ''does not include''.

3. Paragraph (d) is revised.

The additions and revision read as follows:

§ 48.4081–1 Taxable fuel; definitions.

* * * * *

(b) * * *

* * * * *

Aviation gasoline means all special grades of gasoline that are suitable for use in aviation reciprocating engines, as described in ASTM Specification D 910 and Military Specification MIL–G–5572 (For availability see paragraph (c)(2)(i) of this section.).

* * * * *

Kerosene means No. 1–K and No. 2–K kerosene described in ASTM Specification D 3699 (the specification), applied without regard to any agreement permitted by the specification (For availability see paragraph (c)(2)(i) of this section.). Any other fuel is not kerosene even if an agreement permitted by the specification modifies the applicable requirements and the fuel is treated as kerosene under the agreement.

* * * * *

(d) *Effective date.* This section is effective January 1, 1994, except that in paragraph (b) of this section the

definitions of *aviation gasoline* and *kerosene* are effective on the date the final regulations are published in the Federal Register.

Par. 3. In § 48.4081–8(c) (as proposed to be added in the Federal Register for March 14, 1996 (61 FR 10491)), the language ''October 1, 1996.'' is removed and ''the date that is 60 days after the date that the final regulations are published in the Federal Register.'' is added in its place.

Par. 4. In § 48.4082–1(d)(7) (as proposed in the Federal Register for March 14, 1996 (61 FR 10491)), the language ''April 1, 1997.'' is removed and ''the date that is 180 days after the date that the final regulations are published in the Federal Register.'' is added in its place.

Par. 5. Section 48.4082–5 is added to read as follows:

§ 48.4082–5 Diesel fuel; Alaska.

[The text of this proposed section is the same as the text of § 48.4082–5T published elsewhere in this issue of the Federal Register].

Par. 6. Section 48.6715–2 is added to read as follows:

§ 48.6715–2 Application of section 6715(a)(3) to Alaska.

[The text of this proposed section is the same as the text of § 48.6715–2T published elsewhere in this issue of the Federal Register].

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 96–31856 Filed 12–16–96; 8:45 am]

BILLING CODE 4830–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4007

RIN 1212–AA66

Disclosure of Premium-Related Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The Pension Benefit Guaranty Corporation proposes to amend its premium payment regulation to provide for the submission to the PBGC of information contained in records relating to premium filings.

DATES: Comments must be received on or before February 18, 1997.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or delivered to Suite 340 at the above address. Comments also may be sent by Internet e-mail to reg.comments@pbgc.gov. Comments will be available for inspection at the PBGC's Communications and Public Affairs Department in Suite 240 at the above address during normal business hours.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024 (202–326–4179 for TTY and TDD).

SUPPLEMENTARY INFORMATION: The PBGC's premium payment regulation (29 CFR Part 4007) requires plan administrators to make available to the PBGC for audit those plan records that are necessary to support premium filings, but does not explicitly require that the records be submitted to the PBGC on request. The PBGC proposes to amend the regulation to provide for such submission within a specified time period.

This change will allow PBGC auditors to review plan documents at their desks in their own offices. In some cases, this will eliminate the need for ''on-site'' audits at plans' offices. These ''desk'' audits will be an efficient way to assure premium payment requirements are met. Desk audits will help to ensure the integrity of the premium collection program and be less disruptive of pension plan operations than on-site audits.

The rule requires respondents to provide the information within 30 days of receipt of the PBGC's request, or by a different time specified therein. The PBGC will require compliance within less than 30 days only if it determines that the payment of premiums (or any associated interest or penalties) would otherwise be jeopardized, *e.g.*, because a statutory limitations period is about to expire.

The PBGC welcomes public comment on the impact and burden on plans of desk audits versus on-site audits, and on the time allowed for responding to the PBGC's requests for information.

Paperwork Reduction Act

This proposed rule modifies the PBGC's collection of information requirements relating to premiums (29 CFR Part 4007). The premium requirements, which have been approved by the Office of Management and Budget under control number 1212–0009, relate primarily to the obligation to file annual premium forms with the PBGC. The same approval also covers certifications of compliance (and related correspondence) with participant notice requirements (29 CFR Part 4011). 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 PBGC has submitted the premium and participant notice collection of information, as amended by this proposed rule, to the Office of Management and Budget for review under section 3507(d) of the Paperwork Reduction Act of 1995, and has requested extension of OMB's existing approval for a 3-year period. The PBGC needs the information plan administrators submit under the premium and participant notice collection of information in order to enforce compliance with the premium payment and participant notice requirements.

The PBGC expects to receive approximately 60,500 PBGC Form 1 or Form 1–ES filings each year. In addition, the PBGC expects to receive, during the requested 3-year approval period, an average of 400 responses per year to surveys relating to the participant notice requirements of Part 4011. The estimated annual reporting and recordkeeping burden is 3,804 hours and $10,553,550.

Comments on the paperwork provisions of the premium and participant notice collection of information should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Pension Benefit Guaranty Corporation, Washington, DC 20503. Comments may address (among other things)—

- whether the collection of information is needed for the proper performance of the PBGC's functions and will have practical utility;
- the accuracy of the PBGC's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- enhancement of the quality, utility, and clarity of the information to be collected; and
- minimizing the burden of the collection of information on respondents through the use of automated collection techniques (or other forms of information technology) or in other ways.

E.O. 12866 and the Regulatory Flexibility Act

The PBGC has determined that this proposed rule is not a ''significant

regulatory action'' under the criteria set forth in Executive Order 12866.

Because this proposed rule would merely amend the procedures for ensuring compliance with premium requirements, the PBGC certifies that, if adopted, the amendment will not have a significant economic effect on a substantial number of small entities. Accordingly, as provided in section 605(b) of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

List of Subjects in 29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons set forth above, the PBGC proposes to amend 29 CFR Part 4007 as follows:

PART 4007—PAYMENT OF PREMIUMS

1. The authority citation for part 4007 is revised to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.

2. In § 4007.10, the section heading is revised; paragraph (a) is amended by removing the last sentence; and new paragraphs (c) and (d) are added, to read as follows:

§ 4007.10 Recordkeeping; audits; disclosure of information.

* * * * *

(c) *Providing record information.* The plan administrator shall make the records retained pursuant to paragraph (a) of this section available to the PBGC upon request for inspection and photocopying at the location where they are kept (or another, mutually agreeable, location) and shall submit information in such records to the PBGC within 30 days of the date of the PBGC's written request therefor, or by a different time specified therein. The PBGC may in its discretion shorten the time period where it determines that collection of unpaid premiums (or any associated interest or penalties) would otherwise be jeopardized.

(d) *Address and timeliness.* Information required to be submitted under paragraph (c) of this section shall be submitted to the address specified in the PBGC's request. The timeliness of a submission shall be determined in accordance with §§ 4007.5 and 4007.6.

Issued in Washington, D.C. this 11th day of December 1996.

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 96–31972 Filed 12–16–96; 8:45 am]

BILLING CODE 7708–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 96–252; RM–8959]

Radio Broadcasting Services; Gillette, WY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Montgomery Broadcasting Limited Liability Company proposing the allotment of Channel 249A at Gillette, Wyoming, as the community's third local commercial FM transmission service. Channel 249A can be allotted to Gillette in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates for Channel 249A at Gillette are North Latitude 44–17–36 and West Longitude 105–30–06.

DATES: Comments must be filed on or before February 3, 1997, and reply comments on or before February 18, 1997.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Allan G. Moskowitz, Esq., Kaye, Scholer, Fierman, Hays & Handler, LLP, 901 15th Street, N.W., Suite 1100, Washington, D.C. 20005 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–252, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31942 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–250; RM–8952]

Radio Broadcasting Services; Parris Island and Hampton, SC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Simmons Broadcasting Company proposing the substitution of Channel 276C3 for Channel 221A at Parris Island, South Carolina, and the modification of Station WLWS(FM)'s license accordingly. To accommodate the upgrade, petitioner also proposes the substitution of Channel 221A for Channel 276A at Hampton, South Carolina, and the modification of Station WBHC–FM's license accordingly. Channel 276C3 can be allotted to Parris Island in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site. The coordinates for Channel 276C3 at Parris Island are North Latitude 32–27–00 and West Longitude 80–47–30. Additionally, Channel 221A can be allotted to Hampton in compliance with the Commission's minimum distance separation requirements at Station WBHC–FM's presently authorized site. The coordinates for Channel 221A at Hampton are North Latitude 32–50–39 and West Longitude 81–07–28. *See* Supplementary Information, *infra.*

DATES: Comments must be filed on or before February 3, 1997, and reply comments on or before February 18, 1997.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the

FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Michelle A. McClure, Irwin, Campbell & Tannenwald, P.C., 1730 Rhode Island Ave., N.W., Suite 200, Washington, D.C. 20036–3101 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–250, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

In accordance with Section 1.420(g)(3) of the Commission's Rules, this proposal constitutes an ''incompatible channel swap.'' Therefore, any persons expressing an interest in the respective channels should demonstrate why this proposal is not an ''incompatible channel swap'' such that its expression of interest is foreclosed.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31941 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–249, RM–8926]

Radio Broadcasting Services; St. Maries, ID

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Pentacle Investments, Inc., seeking the allotment of FM Channel 221A to St. Maries, Idaho, as that community's first local FM transmission service. Coordinates used for this proposal are 47–18–54 and 116–34–30. As St. Maries, Idaho, is located within 320 kilometers (199 miles) of the Canadian border, the Commission must obtain the concurrence of the Canadian government to this proposal.

DATES: Comments must be filed on or before February 3, 1997, and reply comments on or before February 18, 1997.

ADDRESSES: Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Leonard S. Joyce, Esq., Law Offices of Leonard S. Joyce, Suite 400, 5335 Wisconsin Ave. N.W., Washington, D.C. 20015.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–249, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140,Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31940 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–251, RM–8956]

Radio Broadcasting Services; Kingfisher, OK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Kingfisher County Broadcasting seeking the allotment of Channel 287A to Kingfisher, Oklahoma, as the community's first local aural transmission service. Channel 287A can be allotted to Kingfisher in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6 miles) south, at coordinates 35–46–33 North Latitude and 97–56–58 West Longitude, to avoid a short-spacing to Stations KVCS–FM, Channel 286A, Perry, OK, and KWSJ, Channel 287C, Haysville, KS.

DATES: Comments must be filed on or before February 3, 1997, and reply comments on or before February 18, 1997.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Thomas McCoy, 616 Gray Fox Run, Edmond, OK 73003 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–251, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The

complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31939 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 73

[MM Docket No. 96–248, RM–8950]

Radio Broadcasting Services; Dickson, OK

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Redwood Broadcasting, Inc., seeking the allotment of Channel 278C3 to Dickson, Oklahoma, as the community's first local aural transmission service. Channel 278C3 can be allotted to Dickson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates 34–11–14 North Latitude and 96–59–03 West Longitude.

DATES: Comments must be filed on or before February 3, 1997, and reply comments on or before February 18, 1997.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Ronald G. London, Esq., Pepper & Corazzini, L.L.P., 1776 K Street, N.W., Suite 200, Washington, D.C. 20006 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 96–248, adopted December 6, 1996, and released December 13, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96–31938 Filed 12–16–96; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 383 and 391

[FHWA Docket No. MC–93–23]

RIN 2125–AD20

Commercial Driver Physical Qualifications as Part of the Commercial Driver's License Process

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of meeting of negotiated rulemaking advisory committee.

SUMMARY: The FHWA announces the meeting date of an advisory committee (the Committee) established under the Federal Advisory Committee Act and the Negotiated Rulemaking Act to consider the relevant issues and attempt to reach a consensus in developing regulations governing the proposed merger of the State-administered commercial driver's license (CDL) procedures of 49 CFR Part 383 and the driver physical qualifications requirements of 49 CFR Part 391. The Committee is composed of persons who represent the interests that would be substantially affected by the rule.

The FHWA believes that public participation is critical to the success of this proceeding. Participation at meetings is not limited to Committee members. Negotiation sessions are open to the public, so interested parties may observe the negotiations and communicate their views in the appropriate time and manner to Committee members.

For a listing of Committee members, see the notice published on July 23, 1996, 61 FR 38133. Please note that the United Motorcoach Association and the American Bus Association will serve as full members of the Committee. For additional background information on this negotiated rulemaking, see the notice published on April 29, 1996, at 61 FR 18713.

DATES: The fifth meeting of the advisory committee will begin at 9:00 a.m. on January 22–23, 1997.

ADDRESSES: The fifth meeting of the advisory committee will be held at the Department of Transportation, Nassif Building, Room 9230, 400 7th Street, SW, Washington, D.C. Subsequent meetings will be held at locations to be announced.

FOR FURTHER INFORMATION CONTACT: Ms. Teresa Doggett, Office of Motor Carrier Research and Standards, (202) 366–4001, or the Office of Chief Counsel, (202) 366–0834, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

Authority: 5 U.S.C. §§ 561–570; 5 U.S.C. App. 2 §§ 1–15).

Issued on: December 4, 1996.

Jill L. Hochman,

Acting Associate Administrator for Motor Carriers.

[FR Doc. 96–31988 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–22–M

Notices

Federal Register
Vol. 61, No. 243
Tuesday, December 17, 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

Forest Service

Bull Lake Estates Access; Kootenai National Forest, Lincoln County, Montana

AGENCY: Forest Service, USDA.

ACTION: Revised Notice of intent to prepare an environmental impact statement (original notice of intent was published February 3, 1995, 60 FR 6692).

SUMMARY: A Notice of Intent to prepare an Environmental Impact Statement for the Bull Lake Easement was published in the Federal Register (60 FR 6692) on February 3, 1995. The project analysis was deferred shortly thereafter pending further information on the proposed action. This notice is a revision of the original notice of intent as follows: The proposed action would be to grant an initial easement to the landowner and reconstruct the road to a width of 24 feet. The DEIS is expected to be filed with the EPA and available for public review in the spring of 1997.

The EIS will tier to the Kootenai National Forest Land and Resource Management Plan and Final EIS of September 1987, which provides overall guidance for forest management of the area.

DATES: Written comments and suggestions should be received on or before January 31, 1997.

ADDRESSES: The Responsible Official is Robert L. Schrenk, Forest Supervisor, Kootenai National Forest. Written comments and suggestions concerning the scope of the analysis should be sent to Michael L. Balboni, District Ranger, Three Rivers Ranger District, 1437 N. Hwy 2, Troy, Montana 59935.

FOR FURTHER INFORMATION: Contact Mark Natale, Inderdisciplinary Team Leader, Three Rivers Ranger District, 1437 N. Hwy 2, Troy, MT 59935. Phone: (406) 295–4693.

SUPPLEMENTARY INFORMATION: The private land lies on the west side of Bull Lake and vehicle access is via Forest Service road #398 and #8019. A portion of road #8019 is currently closed yearlong to motorized use. The decision area is located within the grizzly bear recovery area within the Cabinet Yaak Ecosystem.

Propposed Action: The Kootenai National Forest is proposing to grant an easement on approximately 1.0 mile of road #398 and 2.0 miles of road #8019 to access a subdivision on private land that has received conditional approval from Lincoln County, Mt. If approved, the road would then be reconstructed to meet current road standards. The roads would be upgraded where needed to provide a 24 ft. driving surface.

The Kootenai Forest Plan provides guidance for management activities within the potentially affected area through its goals, objectives, standards and guidelines, and management area direction. The area of the proposed easement would occur within Management Areas 6 and 11. Road reconstruction would occur in these two management areas. Below is a brief description of the applicable management direction.

Management Area 6—These are recreational areas (campgrounds, boat ramps, picnic areas, etc.). There is no restriction on easements within this management area.

Management Area 11—These are areas of big game winter range that allow for easement while including provisions for scheduling to prevent conflicts during periods of wildlife use.

The EIS will analyze the direct, indirect, and cumulative environmental effects of the alternatives. Past, present, and projected activities on both private and National Forest lands will be considered. The EIS will disclose the analysis of site-specific mitigation measures and their effectiveness.

Preliminary Issues: Several preliminary issues of concern have been identified by the Forest Service. These issues are briefly described below:

- How would the proposed action affect the water quality in Bull Lake?
- How would the proposed action affect threatened, endangered and sensitive species in the area?
- How would the proposed action affect big game winter range use?
- How would the proposed action affect dispersed recreation use including effects on cultural resource sites?

Other issues commonly associated with such activities include: effects on soils, old growth and visual resources. This list may be verified, expanded, or modified based on public scoping for this proposal.

Decisions To Be Made: The Kootenai Forest Supervisor will decide the following:

- Whether or not to grant the easement and allow road reconstruction to provide for access to the private land?
- What mitigation measures would be required for protection of National Forest resources?
- If Forest Plan exception or amendments are necessary to proceed with the proposed action within the decision area?

Public Involvement and Scoping: Public participation is an important part of the analysis process, commencing with the initial scoping process (40 CFR 1501.7). Scoping will take place in December 1996 and January 1997. An Open House will be scheduled in January 1997 in Troy, MT. The public is encouraged to take part in the process. The Forest Service will be seeking information, comments and assistance from Federal, State, and local agencies and other individuals or organizations who may be interested in, or affected by, the proposed action. This input will be used in preparation of the draft and final EIS.

The scoping process will include:

- Identifying potential issues.
- Identifying major issues to be analyzed in depth.
- Identify alternatives to the proposed action.
- Exploring additional alternatives which will be derived from issues recognized during scoping activities.
- Identifying potential environmental effects of this project and alternatives (i.e. direct, indirect, and cumulative effects and connected actions).

The analysis will consider a range of alternatives, including the proposed action, no action, and other reasonable action alternatives.

Estimated Dates for Filing: The draft Bull Lake Estates Access EIS is expected to be field with the Environmental Protection Agency (EPA) and to be available for public review by April 1997. At that time EPA will publish a

Notice of Availability of the draft EIS in Federal Register. The comment period on the draft EIS will be 45 days from the date the EPA publishes the Notice of Availability in the Federal Register. It is very important that those interested in the management of this area participate at that time.

The final EIS is scheduled to be completed by July, 1997. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and regulations, and policies considered in making a decision regarding the proposal.

Reviewer's Obligations: The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available for the Forest Service at a time when it can meaningfully consider and respond to them in the final EIS.

To be most helpful, comments on he draft EIS should be as specific as possible and may address the adequacy of the statement or the merit of the alternatives discussed. Reviewers may wish to refer to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Responsible Official: Robert L. Schrenk, Forest Supervisor, Kootenai National Forest, 506 US Highway 2 West, Libby, MT 59923 is the Responsible Official. As the Responsible Official I will decide if the proposed project will be implemented. I will document the decision and reasons for the decision in the Record of Decision. That decision will be subject to Forest Service Appeal Regulations.

Dated: December 5, 1996.

Robert L. Schrenk,

Forest Supervisor.

[FR Doc. 96–31915 Filed 12–16–96; 8:45 am]

BILLING CODE 3410–11–M

Rural Utilities Service

Municipal Interest Rates for the First Quarter of 1997

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of municipal interest rates on advances from insured electric loans for the first quarter of 1997.

SUMMARY: The Rural Utilities Service hereby announces the interest rates for advances on municipal rate loans with interest rate terms beginning during the first calendar quarter of 1997.

DATES: These interest rates are effective for interest rate terms that commence during the period beginning January 1, 1997, and ending March 31, 1997.

FOR FURTHER INFORMATION CONTACT: Carolyn Dotson, Loan Funds Control Assistant, U.S. Department of Agriculture, Rural Utilities Service, room 2234–S, 1400 Independence Avenue, SW., Stop 1522, Washington, DC 20250–1522. Telephone: 202–720–1928. FAX: 202–720–4120. E-mail: CDotson@rus.usda.gov.

SUPPLEMENTARY INFORMATION: The Rural Utilities Service (RUS) hereby announces the interest rates on advances made during the first calendar quarter of 1997 for municipal rate electric loans. Pursuant to RUS regulations at 7 CFR 1714.4, each advance of funds on a municipal rate loan shall bear interest at a single rate for each interest rate term. Pursuant to 7 CFR 1714.5, the interest rates on these advances are based on indexes published in the ''Bond buyer'' for the four weeks prior to the first Friday of the last month before the beginning of the quarter.

In accordance with 7 CFR 1714.5, the interest rates are established as shown in the following table for all interest rate terms that begin at any time during the first calendar quarter of 1997.

Interest rate term ends in (year)	RUS rate (0.000 percent)
2018	5.500
2017	5.500
2016	5.375
2015	5.375
2014	5.375
2013	5.375
2012	5.375
2011	5.250
2010	5.250
2009	5.125
2008	5.000
2007	4.875
2006	4.875
2005	4.750
2004	4.625
2003	4.500
2002	4.500
2001	4.375
2000	4.250
1999	4.125
1998	3.875

Dated: December 10, 1996.

Wally Beyer,

Administrator, Rural Utilities Service.

[FR Doc. 96–31886 Filed 12–16–96; 8:45 am]

BILLING CODE 3410–15–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Hawaii 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 Hawaii Advisory Committee to the Commission will convene at 9:00 a.m. and adjourn at 12:00 p.m. on Wednesday, January 29, 1997, at the Federal Building, 300 Ala Moana Boulevard, Room 5311, Honolulu, Hawaii 96850. The purpose of the meeting is to review current civil rights developments in the State, and plan future program activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Oswald Stender, 808–523–6203, 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, December 9, 1996.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 96–31912 Filed 12–16–96; 8:45 am]

BILLING CODE 6335–01–P

Agenda and Notice of Public Meeting of the Idaho 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 Idaho Advisory Committee to the Commission will convene at 1:00 p.m. and adjourn at 4:00 p.m. on Thursday, January 16, 1997, at the Red Lion Hotel, the Garnet Room, 29th and Chinden, Boise, Idaho 83714. The purpose of the meeting is to review current civil rights developments in the State, and plan future program activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Gladys Esquibel, 208–678–3835, 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, December 9, 1996.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 96–31910 Filed 12–16–96; 8:45 am]

BILLING CODE 6335–01–P

Agenda and Notice of Public Meeting of the New Mexico 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 New Mexico Advisory Committee to the Commission will convene at 11:30 a.m. and adjourn at 2:30 p.m. on Saturday, January 18, 1997, at the Pastoral Center of the Catholic Diocese, 1280 Med Park Drive, Las Cruces, New Mexico 88005. The purpose of the meeting is to hear the Farmington subcommittee report on a recommended course of action for additional civil rights evaluation, and review civil rights developments in the State.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Lynda Eaton, 505–326–4338, 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, December 9, 1996.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 96–31911 Filed 12–16–96; 8:45 am]

BILLING CODE 6335–01–P

Agenda and Notice of Public Meeting of the Oregon 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 Oregon Advisory Committee to the Commission will convene at 1:00 p.m. and adjourn at 4:00 p.m. on Friday, January 31, 1997, at the Red Lion Hotel Columbia River, 1401 North Hayden Island Drive, Nestucca Room, Portland, Oregon 97217. The purpose of the meeting is to review current civil rights developments in the State and plan future program activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Thomas J. Sloan, 503–626–7527, 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, December 9, 1996.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 96–31913 Filed 12–16–96; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Bureau of the Census

National Employers Survey; Proposed Agency Information Collection Activity; Comment Request

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before February 18, 1997.

ADDRESSES: Direct all written comments to Linda Engelmeier, Acting Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Steven Rudolph, Bureau of the Census, Department of Commerce, EPCD–FB3, Washington, DC 20233, (301) 457–2594 or (301) 457–4433 (fax).

SUPPLEMENTARY INFORMATION:

I. Abstract

In the Fall of 1994, the Census Bureau conducted the National Employers Survey (NES) for the National Center on the Employment Quality of the Workforce (EQW), a non-profit research group. The NES collected data for a regression-based econometric study of how employment, hiring, training, investment, and productivity relate to each other. We surveyed a representative panel of just over 3,000 domestic business establishments with 20 or more employees. In the Spring of 1995, we conducted the NES–II, a follow-up survey of the business establishments that completed the interviews in the original survey. These surveys were the first attempts to measure these factors. The EQW began issuing findings from the study in February 1995 and the results generated great interest from all levels. Subsequently, they released several studies and they are performing additional analyses which will generate further studies.

(The EQW's continued work on how employment, hiring, training, investment, and productivity relate to each other is now being sponsored by the Consortium for Policy Research in Education (CPRE) and the new National Center for Postsecondary Improvement (NCPI). CPRE is located at the University of Pennsylvania and the NCPI is a joint endeavor of Stanford University, the University of Pennsylvania, and the University of Michigan.)

Major findings included information on what attributes firms looked for when hiring employees. They found that attitude and communications skills were highly valued by employers while grades and teachers' recommendations were not. Their analysis indicates that investment in human capital (training) had at least as big a return, (in many groups, including services, a bigger return) on investment in physical capital. They also were able to estimate production functions, using regression-based techniques, from the data sets. These findings provide a baseline for employers, public and private, for formulating and gauging human resources decisions and policies in a manner that will provide the most effective return on productivity in the workplace.

The NES–3 is designed to provide more precise measurements of the relationship between employers and the providers of educational and training services. It will ask questions that will identify the apparent disconnect between schools and employers the previous surveys found.

In all, we plan to complete 6,500 interviews with business establishments throughout the United States. In order to reduce burden and increase information, the NES–3 will exclude those with under 20 employees as this group accounts for a large number of establishments (with a relatively small number of employees) that generally do little training and do not have complex hiring and workplace-related practices. If these smaller establishments were included in the panel, it would have increased the number of businesses substantially while providing little information. The panel oversamples the large establishments and those in manufacturing as these units have programs and policies the survey is measuring.

The NES–3 panel has three components:

—A national sample of 4,000 that will produce about 3,000 completed observations.

—A sample of five States (California, Kentucky, Michigan, Maryland and Pennsylvania) of about 3,300 that will produce 2,500 completed interview that will include a few questions on State-specific programs to explain their effect and to relate their impact to the Nation as a whole.

—Those business establishments that completed the first two NES surveys—about 1,300—that will produce about 1,000 completed interviews to investigate stability and dynamics.

In addition to the Department of Education, other governmental agencies have shown a strong interest. These include the General Accounting Office and the Department of Labor. Education, in particular, has a direct interest in and need for some of the information from the proposed survey. They have requested that the survey include questions to collect information to measure two indicators (job turnover and remedial education) that will be used by the Department of Education to assess the progress and results from the implementation of the School-To-Work Act.

II. Method of Collection

We will continue to use Computer Assisted Telephone Interviewing (CATI) to collect the information from the respondents in the NES–3, as it proved very efficient and effective. CATI minimizes improper responses as the interviewers are well trained and the data can be edited and corrected while the respondent is on the phone. In this survey, CATI should also minimize response time by automatically skipping unnecessary questions based on prior responses or specific characteristics and by ensuring that the proper person or office answers the questions. We have designed the interview to be as conversational as possible. Most of the questions request information on characteristics, programs and policies. Quantitative questions are very broad and we encourage reasonable estimates as it keeps the flow of information moving. On the whole, respondents of the previous surveys found the interview to be fast paced and even enjoyable. Response rates for these voluntary survey were quite good—around 75 percent. As with the original surveys we will provide all respondents with a copy of the findings.

We will send an advance letter to 8,600 businesses in the panel, giving a basic overview of the survey. We estimate that it will take the respondent ten minutes to read the letter. It will not ask them to answer any questions in advance of the interview. As the survey requests only general information and accepts estimates, we expect the respondent would require very minimal time to prepare for the interview. Based on our experience with the previous surveys, the NES–3 interview should require an average of thirty minutes to complete.

III. Data

OMB Number: 0607–0787.

Form Number: NES–3.

Type of Review: Regular.

Affected Public: Businesses with 20 or more employees.

Estimated Number of Respondents: 8,600 (6,500 interviewed cases and 2,100 other cases).

Estimated Time Per Response: 40 minutes (letter and interview) for interviewed cases, 10 minutes (letter only) for other cases.

Estimated Total Annual Burden Hours: 4,683.

Estimated Total Annual Cost: $279,000.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Sections 8 and 9.

IV. Request for Comments

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 (including hours and cost) 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 technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 11, 1996.

Linda Engelmeier,

Acting Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 96–31981 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–07–P

1998 Dress Rehearsal—Special Place Facility Questionnaire

ACTION: Proposed Agency Information Collection Activity; Comment Request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before February 18, 1997.

ADDRESSES: Direct all written comments to Linda Engelmeier, Acting Departmental Forms Clearance Officer, Department of Commerce, Room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Charles Moore, Bureau of the Census, Room 1769#3, Washington, DC 20230, phone number (301) 457–2050.

SUPPLEMENTARY INFORMATION:

I. Abstract

Planning is currently underway for the 1998 Dress Rehearsal which is an integral part of the overall planning process for the Year 2000 Decennial Census. The Census Bureau must provide everyone in our test sites the opportunity to be counted including persons living at group quarters (GQs) student dorms, shelters and housing units (HUs) at and/or associated with special places (SPs). One of the major requirements for enumeration of persons at SP facilities is to identify the GQs and any associated HUs at each SP.

We will phone each SP within the 1998 Dress Rehearsal sites and conduct interviews to identify and collect updated information about the GQs and HUs at each SP using the DX–351 Special Place Facility Questionnaire.

II. Method of Collection

Computer Assisted Telephone Interviewing (CATI) will be used for the majority of cases using a computerized questionnaire. Form modifications should reduce the amount of time needed to conduct the interview as well as eliminate other problems caused by personal visit interviews. Personal visit interviews using a paper questionnaire will be conducted for a limited number of cases.

III. Data

OMB Number: Not available.

Form Number: DX–351.

Type of review: Regular Submission.

Affected Public: Individuals, businesses or other for-profit organizations, non-profit institutions and small businesses or organizations.

Estimated number of Respondents: 500 SPs in the 1998 Dress Rehearsal sites.

Estimated Time Per Response: Each interview should take about 15 minutes (0.250 hours).

Estimated Total Annual Burden Hours: 125 hours.

Estimated Total Annual Cost: All costs for the Special Place Facility Questionnaire Operation ($33,000) are covered by funding for the 1998 Dress Rehearsal. There is no cost to respondents for providing information on this operation, except for a few minutes of their time.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, Sections 141 and 193.

IV. Request for Comments

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 (including hours and cost) 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 technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 11, 1996.

Linda Engelmeier,

Acting Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 96-31982 Filed 12-16-96; 8:45 a.m.]

BILLING CODE 3510–07–P

International Trade Administration

[A–570–822]

Certain Helical Spring Lock Washers From The People's Republic of China; Final Results of Antidumping Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of the Antidumping Duty Administrative Review.

SUMMARY: On August 13, 1996, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the administrative review of the antidumping duty order on certain helical spring lock washers (HSLWs) from the People's Republic of China (PRC) (61 FR 42000). This review covers shipments of this merchandise to the United States during the period October 1, 1994 through September 30, 1995. We gave interested parties an opportunity to comment on our preliminary results. Based upon our analysis of the comments received we have changed the results from those presented in the preliminary results of review.

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Donald Little or Maureen Flannery, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone (202) 482–4733.

Background

The Department published in the Federal Register the antidumping duty order on HSLWs from the PRC on October 19, 1993 (58 FR 53914). On October 5, 1995, the Department published in the Federal Register (60 FR 52149) a notice of opportunity to request administrative review of the antidumping duty order on HSLWs from the PRC covering the period October 1, 1994 through September 30, 1995.

On October 30 and 31, 1995, in accordance with 19 CFR 353.22(a), petitioner, Shakeproof Industrial Products of Illinois Works, and Zhejiang Wanxin Group, Co., Ltd, (ZWG), respectively, requested that we conduct an administrative review of ZWG, also known as Hangzhou Spring Washer Plant. We published a notice of initiation of this antidumping duty administrative review on November 16, 1995 (60 FR 57573).

On August 13, 1996, the Department published in the Federal Register the preliminary results of this review of the antidumping duty order on HSLWs from the PRC (61 FR 42000). We held a hearing on September 30, 1996. The Department has now completed this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Applicable Statute and Regulations

Unless otherwise stated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise stated, all citations to the Department's regulations are references to the regulations as amended by the interim regulations published in the Federal Register on May 11, 1995 (60 FR 25130).

Scope of Review

The products covered by this review are HSLWs of carbon steel, of carbon alloy steel, or of stainless steel, heat-treated or non heat-treated, plated or non-plated, with ends that are off-line. HSLWs are designed to: (1) function as a spring to compensate for developed looseness between the component parts of a fastened assembly; (2) distribute the load over a larger area for screws or bolts; and (3) provide a hardened bearing surface. The scope does not include internal or external tooth washers, nor does it include spring lock washers made of other metals, such as copper.

HSLWs subject to this review are currently classifiable under subheading 7318.21.0030 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS subheading is provided for convenience and Customs purposes, the written description of the scope of this proceeding is dispositive.

This review covers one exporter of HSLWs from the PRC, ZWG, and the period October 1, 1994 through September 30, 1995.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received case and rebuttal briefs from petitioner, ZWG, and the American Association of Fastener Importers (AAFI), an interested party. At the request of the petitioner, we held a public hearing on September 30, 1996.

Comment 1: ZWG asserts that the Department may not value wire rod based on Indian import prices from countries that the Department has found to be dumping or subsidizing exports. ZWG states that, for more than 80 percent of the steel bar and rod covered by the Indian import statistics, the Department has made dumping or subsidy findings. ZWG contends that the antidumping statute and court rulings prohibit the use of dumped or subsidized prices to value factors of production. ZWG cites the House Report to the Omnibus Trade and Competitiveness Act of 1988, with respect to factors of production: ''In valuing such factors, Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices * * *.'' ZWG contends that the Department has expressly acknowledged the House Report in *Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China (Construction Castings),* 57 FR 10644 (March 27, 1992), citing *Tehnoimportexport, UCF America Inc.* v. *U.S.*, 783 F. Supp. 1401 (CIT 1991) (*Tehnoimportexport*). ZWG states that the Court of International Trade (CIT), in *Tehnoimportexport,* interpreted the House Report's ''believe or suspect'' standard to mean that the Department correctly rejected all Yugoslavian steel export prices, where the Department had found non-product specific export subsidies for Yugoslavian steel. ZWG argues that the CIT, quoting *China National Metal & Minerals Import & Export Corp.* v. *United States,* 674 F. Supp. 1482 (CIT 1987), pointed out that ''the main consideration is the unreliability of the price information due to the unknown dumping margin if any.'' ZWG asserts that the ''believe or suspect'' standard requires the Department to reject any export price to any country if the Department has found the export price to be dumped or subsidized in the United States.

ZWG argues that the Department has an established practice not to value factors based on export prices from countries that are subject to dumping or subsidy findings in the United States. ZWG asserts that, in the *Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers From the People's Republic of China,* 58 FR 48833 (September 20, 1993) (*Lock Washers*), the Department acknowledged the practice of not considering pricing information from any country found by the Department to be selling dumped or subsidized merchandise. ZWG contends that the Department reiterated this policy in *Partial Extension Steel Drawer Slides with Rollers From the People's Republic of China,* 60 FR 29571 (June 5, 1995) (*Drawer Slides*). ZWG contends that the Department rejected the use of actual prices of cold-rolled steel imported from Korea on the grounds that the Korean steel is subject to dumping and subsidy findings in the United States. ZWG argues that the Department reached this determination despite the fact that there had never been any finding that Korean steel imported into China was dumped or subsidized.

ZWG argues that the Department ignored its established practice in the preliminary results of this review and the simultaneously announced *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Administrative Review,* 61 FR 41994 (August 13, 1996) (*Lock Washers Review*), despite the fact that almost all of the prices originated from countries found to be subsidizing exports. ZWG asserts that the Department justified its decision by stating that there is no evidence that India has found dumping or subsidizing of steel imports into India. ZWG contends that this reasoning contradicts the established practice that requires the Department to reject import prices for products for which the United States has made dumping or subsidy findings, whether or not the importing country has made such findings. ZWG argues that the Department does not require a finding of dumping or subsidization in the importing country to fulfill the ''reason to believe or suspect'' standard, and that a finding by the Department fulfills that standard; therefore, the Department's findings with respect to bar and rod preclude the use of surrogate values from certain exporting countries.

ZWG argues that the Department, therefore, may not use the Indian import statistics for valuing steel wire rod, to the extent that the United States has made dumping and subsidy findings from the country that exported the wire rod to India. ZWG argues that, if the Department decides to use Indian import statistics to value wire rod, the Department must exclude Indian imports of bar and rod that the Department has found to be dumped or subsidized. Therefore, ZWG argues the Department may use Indian import statistics of bar and rod only from Indonesia, Italy, Luxembourg, Singapore, and Thailand.

AAFI states that, although it supports the Department's preliminary determination in general, it believes the Department should not have based its surrogate material cost for steel wire rod on Indian import statistics. AAFI argues that the Department cannot use Indian import statistics from countries the Department previously determined to be shipping dumped or subsidized product. AAFI states that the fact that steel wire rod has been subject to dumping determinations raises a doubt as to the accuracy of the data.

Petitioner argues that the fact that certain third countries are subject to a U.S. antidumping or countervailing duty order does not preclude the Department from using data related to Indian imports from those countries. Petitioner argues that, absent evidence which shows that exports of the merchandise to the surrogate country are themselves dumped or subsidized, the Department should use that data. Petitioner points out that ZWG made the same argument in the *Lock Washers Review* and no new arguments have been made in this review. Petitioner notes that the Department rejected ZWG's argument in the first review and

argues that, contrary to ZWG's assertions, the prior administrative decisions and court case cited by ZWG support the Department's position in the first review. For example, in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Romania; Final Results of Antidumping Duty Administrative Review*, 56 FR 1169 (January 11, 1991) (*TRBs From Romania*), the Department rejected the use of Yugoslavian steel prices (domestic and export) because of the prevalence of dumping and countervailing duty cases directly involving Yugoslavian steel, and instead, the Department used Yugoslavian import prices for steel. Petitioner argues that, in the *Lock Washers* less than fair value (LTFV) investigation, the Department rejected the argument that Indian import data from countries involved in ''dumping'' should be disregarded and used Indian import prices from countries subject to antidumping and countervailing duty orders. Petitioner argues that, in *Drawer Slides*, the Department rejected actual Chinese import prices from Korea, stating that ''cold-rolled steel imports from Korea are subject to U.S. antidumping and countervailing duties orders and therefore the prices are likely to be unsuitable for use in this context.''

Petitioner argues that ZWG cited *Tehnoimportexport* for the proposition that the Department should reject the Indian import prices as it rejected the use of export Yugoslavian steel prices. Petitioner quotes the CIT in that case:

> Commerce's decision in this case, however, was based on *final* antidumping determinations upon comparable merchandise and two *final* countervailing duty determinations in which Commerce determined that countervailable, non-product specific export subsidies were bestowed upon exports of steel products. Their decision was also based on several European Community (EC) cases. In total, there was substantial evidence to allow a reasonable mind to conclude that there were dumping and subsidies favoring Yugoslavian steel exports.

Tehnoimportexport, 16 CIT 13, 18 (1992).

Petitioner asserts that there is no statutory or Department regulatory provision that requires the rejection of surrogate import prices based on a ''reason to believe or suspect'' standard. Furthermore, petitioner argues that ZWG has failed to cite any case to support its contention that the Department has an established ''reason to believe or suspect'' practice for rejecting *import* prices in determining a surrogate value. Petitioner argues that the legislative intent of the 1988 statutory amendments to which ZWG refers do not support the rigid approach ZWG proposes. Petitioner argues that the Department would soon have to make a company-by-company analysis and a review of all third country (not just surrogate country) antidumping and countervailing duty actions if the Department were to accept ZWG's position. Petitioner argues that Congress did not expect the Department to conduct such special investigations. Rather, petitioner argues, the intent of Congress was to afford relief to a U.S. industry and to prohibit the use by the Department of prices that are demonstrably ''low'' as a consequence of dumping or subsidization. Petitioner asserts that the standard that the Department should use is whether the Indian imports in fact benefit from dumped or subsidized prices. Petitioner argues that, in determining the surrogate for 1060 steel wire rod in India, the Department is trying to determine the price in India, and that import prices are simply a guide.

Petitioner asserts that, if prices of Indian steel imports reflect dumping and subsidization, those prices should be low, not high. Petitioner argues that the opposite is the case here. Petitioner argues that, if India has imposed antidumping or countervailing duty measures against steel imports, the decision would be different.

Department's Position: We agree with petitioner. The facts do not establish a reasonable basis to ''believe or suspect'' the imports of wire rod into India are dumped or subsidized. The Indian government has not determined that steel imports into India are dumped or subsidized. As stated in the *Lock Washers Review*, the fact that the Department has made determinations of sales at less than fair value into the United States is not a sufficient basis for a belief or suspicion that those countries also dumped imports into India. Further, there is no evidence that any general subsidies applied to production and exports of carbon steel wire rod to India.

We disagree with ZWG that the use of the Indian import prices from countries subject to U.S. antidumping and countervailing determinations is inconsistent with prior Department decisions. In *Lock Washers*, although parties argued against using import prices into India from countries found to be selling at prices below fair market value, the Department did use Indian import statistics for steel wire rod from countries subject to antidumping and countervailing duty investigations. In *TRBs From Romania*, the Department rejected the use of Yugoslavian steel prices and used import steel prices into Yugoslavia. As noted by petitioner, the CIT upheld the decision not to use Yugoslavian export prices in *Tehnoimportexport*.

Although the basis for the rejection in *Drawer Slides* of the import prices from Korea, a country subject to an antidumping order by the United States, is not fully discussed in the Notice of the final determination, we do not find that there is a *per se* prohibition on using third country import statistics as surrogate values when those statistics include imports from countries subject to U.S. antidumping orders. Rather, the preference is to use the most accurate surrogate data available in the circumstances of a particular case. For this reason, we decline to follow *Drawer Slides* in this review.

We also disagree with ZWG's claim that the legislative history of the Omnibus Trade Act of 1988 compels us to reject the Indian import statistics. As stated in the House Report, Congress did not intend for the Department to conduct a formal investigation to insure that the prices it uses in valuing factors of production are not dumped or subsidized. As stated above, there are insufficient grounds to ''believe or suspect'' that the prices of wire rod in the Indian import statistics are dumped and subsidized and should not be used as a surrogate to value carbon steel wire rod.

Comment 2: ZWG argues that the Department should value steel using the domestic Indian prices quoted from the *Steel Scenario* (a monthly journal, published by Sparke Steel & Economy Research Centre Pvt. Ltd.). ZWG argues that it is the Department's practice to give priority to surrogate values that are (a) contemporaneous with the period of investigation; (b) product-specific; and (c) tax-exclusive. ZWG asserts that the *Steel Scenario* price information is more contemporaneous with the period of review (POR) than are the Indian import statistics used in the preliminary results. ZWG argues that more than half the Indian import statistics used in the preliminary results are from before this period of review. ZWG also argues that the *Steel Scenario* prices are size-specific and, therefore, can be specific to ZWG's actual inputs. ZWG asserts that information is available to make the price data tax-exclusive.

AAFI asserts that the Department should use the most accurate input data on the record, which it believes to be the steel wire rod prices, submitted by ZWG, adjusted to remove excise duty and statutory levy. AAFI contends that the data submitted by ZWG is the only data which provides size-specific prices

that match the steel wire rod used by ZWG. AAFI further states that the basic principle of determining surrogate costs is to accurately estimate the costs of production of the good in the surrogate country, which includes using domestically sourced inputs. AAFI maintains that the data submitted by ZWG is based upon actual prices of steel wire rod in India and is a more accurate reflection of the price than import statistics, especially import statistics that are suspect.

Petitioner argues that, as with the Steel Authority of India Limited (SAIL) data that ZWG proposed in the first review, the *Steel Scenario* data do not address the important issue of chemistry, while the Indian import statistics do. Petitioner argues that, with the exception of *Drawer Slides*, the Department has not used Indian domestic steel prices since the Omnibus Trade and Competitiveness Act of 1988. Petitioner also argues that the Department used Indian imports covering most of the period, and that the Indian imports are contemporaneous. Petitioner also argues that, in the overwhelming number of NME cases involving the People's Republic of China, the Department has used Indian import statistics.

Department's Position: We disagree with ZWG. ZWG has not established that there is a stronger factual basis for using the *Steel Scenario* data than there is for using the import statistics. As stated in the first administrative review of this case, the scope of this review covers HSLWs made from stainless steel, carbon alloy steel, or carbon steel. The grade or chemistry of the steel is an important consideration, as evidenced by the range of HSLWs covered by the order. The chemistry of the steel determines the mechanical and physical properties of the steel, and, therefore, is the driving factor in determining the end use. Therefore, in this case, the grade of steel is a more important consideration for the Department than size when choosing between different PAPI sources. *See Lock Washers Review*. Furthermore, although the *Steel Scenario* data is more size-specific than the Indian import statistics, it is less grade-specific. *See also, Chrome-Plated Lug Nuts From the People's Republic of China; Final Results of Antidumping Administrative Review*, 60 FR 48687 (September 20, 1995). In addition, because the Indian import statistics cover the majority of the POR, we agree with petitioner that the Indian import statistics are contemporaneous. Therefore, we have continued to use the Indian import statistics to value steel wire rod.

Comment 3: Petitioner asserts that the Department should determine a constructed value for HSLWs which entered the United States from October 1, 1994 through December 31, 1994 using the statutory minimum eight percent profit then in effect. Petitioner contends that the Department wrongly applied the provisions of the antidumping statutory amendment 19 U.S.C. sec. 1677b(c), which sets no minimum amounts for profits and selling, general, and administrative (SG&A) expenses on reviews initiated after January 1, 1995. Petitioner argues that the Department's application of the statute in the preliminary results to entries between October 1, 1994 and December 31, 1994 has the effect of retroactively reducing the antidumping duties on entries of merchandise which occurred before the effective date of the amendments. Petitioner's position is that as a tax measure, retroactive application of the antidumping statute to the disadvantage of a party affected by those changes is unlawful. Petitioner argues that the remedy provided by the Congress in the form of antidumping duties cannot be changed retroactively for entries of the subject merchandise on which the liability for the antidumping duties has already been attached.

ZWG argues that the Department should apply the current statute to every U.S. sale covered in this review for purposes of both the future deposit rate determination and the dumping duty assessment. ZWG contends that petitioner's argument, current statute, and legislative history provide no grounds for allowing the Department to apply the law that existed prior to the URAA to this review. ZWG states that the URAA amendments must apply to antidumping administrative reviews initiated on or after January 1, 1995 and the Department must conduct this review in accordance with the current provisions for calculating profit and SG&A expenses.

Department's Position: We agree with ZWG. As stated in section 291(2) of the URAA, the URAA amendments apply to antidumping administrative reviews initiated on or after January 1, 1995. We disagree with petitioner that application of the URAA amendments to entries prior to January 1, 1995 is an improper retroactive application of the antidumping law. The entries between October 1, 1994 and December 31, 1994 were made subject to estimated antidumping duty deposits. The antidumping duties assessed may increase or decrease at the time of assessment pursuant to an administrative review conducted in accordance with the then current statute. Since this review was initiated on November 16, 1995, the current antidumping statute, which was in effect at the time of initiation, applies. Therefore, we are calculating profit and SG&A for all entries covered by this review in accordance with the provisions of the current antidumping statute.

Comment 4: Petitioner asserts that, to value the steel input factor, the Department should consider from the Indian import statistics three HTS subcategories of steel, 7213.41, 7213.49, and 7213.50, instead of selecting only the one category, 7213.50, which specifically includes ''1060'' steel. Petitioner contends that, while it agrees that the Department should use data which is most specific for valuing factor inputs, it believes it is necessary to understand that with the tolerances allowed for ''1060'' steel, it is possible that the steel could be properly classified under one of the other categories. Petitioner states that the Department used three steel categories in the antidumping investigation of HSLWs, but concluded in the final results of the first administrative review that it was no longer appropriate to use all three subcategories.

ZWG argues that the Department may not use Indian import statistics classified under HTS 7213.41 and 7213.49 because, it claims, these two subcategories are irrelevant to the wire rod it uses. ZWG claims to have demonstrated its use of steel wire rod with 0.6 carbon content during this POR. ZWG argues that the Department properly determined in the first administrative review and the preliminary results of this review that HTS 7213.41 and 7213.49 are not relevant to the carbon steel wire rod used by ZWG.

AAFI argues that the Department should reject petitioner's claim that three HTS steel wire rod categories should be used to determine surrogate steel prices. AAFI claims that HTS 7213.50 most accurately describes the raw material actually used by ZWG in HSLW production.

Department's Position: We disagree with the petitioner that in this review we must use the three HTS subcategories used in the LTFV investigation. As in the first administrative review, the 1060 wire rod used by ZWG is a high carbon steel. Although tolerance levels could allow a carbon content slightly below 0.6 percent, 1060 grade steel wire rod imports nevertheless properly would be classified under HTS 7213.50. The HTS subcategories 7312.41 and 7213.49 suggested by the petitioner contain wire

rod with a carbon content between .25 and .59 percent carbon. Therefore, for these final results we continued to use the HTS subcategory which contains 1060 steel wire rod. *See Lock Washers Review.*

Comment 5: Petitioner asserts that the Department should use truck rates from the August 1993 embassy cable for truck freight values instead of truck rates derived from *The Times of India.* Petitioner argues that the Department's use of the embassy cable, also used in the final determination of the first review, would maintain consistency from one review to the next for the same subject merchandise. Petitioner contends that such consistency promotes predictability and provides a strong basis for the selection of particular value sources. Petitioner argues that the Department should continue to use the cable data unless more contemporaneous and reliable data is provided. Petitioner further asserts that the Department stated no reason for changing sources. Additionally, petitioner claims that the truck rates published in *The Times of India,* which were taken from a government study, may have been selectively reviewed, and were not self-verifying. Petitioner considers the actual government study to be a more reliable source than the newspaper article and, therefore the government study should have been used by the Department.

ZWG supports the Department's use of the truck rates reported in *The Times of India.* ZWG claims that the rates from *The Times of India,* showing truck freight rates as of April 1994, are accurate and more contemporaneous than the data in the embassy cable. ZWG states that rates from *The Times of India* are publicly available published information, whereas the cable became public only when the Department made it publicly available. ZWG argues that the Department consistently determined that the data in *The Times of India* article is preferable to the embassy cable for valuing truck freight rates in cases involving products from the PRC, stating that the Department has used the data from *The Times of India* since the investigation of honey from the PRC. ZWG also references the Department's use of truck freight rate data from *The Times of India* in ''Factors Valuation: Final Determination in the Antidumping Duty Investigation of Bicycles from the People's Republic of China'' (*Bicycles*), dated April 22, 1996. ZWG claims that in *Bicycles,* the Department rejected the respondent's request for the use of the embassy cable and used data from *The Times of India.* ZWG also notes that in *Tapered Roller Bearings and Parts thereof, Finished and Unfinished, from the People's Republic of China; Preliminary Results of Antidumping Administrative Review and Intent to Revoke Antidumping Duty Order in Part,* 61 FR 40610 (August 5, 1996), that the Department reiterated that the truck freight rates in *The Times of India* are ''the most recent publicly available published source.'' Referring to *Lasko Metal Products* v. *United States,* 43 F.3d 1442 (Fed. Cir. 1994) (*Lasko*), ZWG also claims that the Department has never announced a rule that it should adopt values from the first review merely to be consistent.

AAFI alleges that petitioner's argument for use of the embassy cable for truck freight valuation is without merit because the embassy cable is not publicly available information. AAFI contends that the Department should reject petitioner's argument that *The Times of India* article should not be used because it is ''unverifiable.'' AAFI maintains that it is not clear why petitioner alleges publicly available published information from *The Times of India* not to be 'self-verifying,'' while petitioner does believe that the private embassy cable is 'self-verifying.''

Department's Position: We agree with ZWG and AAFI. *The Times of India* article provides the most contemporaneous values for trucking rates. It is the Department's practice to use surrogate values from publicly available sources which are the most contemporaneous with the period of review. While we used the August 1993 embassy cable in the previous review, the Department's goal is to value non-market economy factors in as fair and accurate a manner as possible. As the Federal Circuit expressed in *Lasko,* the antidumping statute ''simply does not say—anywhere—that the factors of production must be ascertained in a single fashion.'' Also, as the Department stated in the *Final Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the Republic of Hungary,* 56 FR 41819 (August 23, 1991), 'simply because a particular source was used in previous reviews of this case does not preclude the Department from relying on alternate sources if the circumstances necessitate a change.'' Therefore, we are continuing to use the *Times of India* trucking rates as the best available surrogate information for this review.

Comment 6: Petitioner asserts that the freight charges associated with the movement of chemicals were not included in the calculations. Petitioner requests that the Department review the calculations to ensure that freight charges for chemicals were included.

Department's Position: We disagree with the petitioner. We have reviewed our calculations and have found that the freight charges are included in the calculation of normal value.

Comments 7: Petitioner objects to the Department's use of a weight-based rate to determine marine insurance premiums and contends that the Department should use shipment value to determine the premiums. Petitioner supports this argument by citing page 22 of the verification report, which states that marine insurance was provided by a PRC state-owned company, using a premium based on the value of the shipment.

ZWG agrees with the Department's determination that marine insurance premiums should be based upon weight. ZWG argues that no value-based marine insurance data are publicly available through other antidumping proceedings, nor were any submitted by petitioner.

Department's Position: We agree with ZWG. There was no appropriate marine insurance surrogate based on value submitted for or available in this review. Therefore, we are continuing to value marine insurance based on weight of the subject merchandise.

Additional Change for the Final Results

For these final results we have recalculated labor using data from the *Yearbook of Labor Statistics (YLS).* As we stated in the *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China,* 61 FR 19026 (April 30, 1996), the Economic Intelligence Unit report *Investing, Licensing & Trading Conditions Abroad: India (IL&T),* released November 1995, reports estimates based not on actual wage rates, but on rates stipulated in various Indian laws. Therefore, we have not used *IL&T* data for the final results. The *YLS* provides wage rates on an industry-specific basis. We used the daily wage rate specified for SIC code 381, ''manufacture of fabricated metal products, except machinery and equipment,'' because the description of the various industries this category covers was the best match for the HSLW industry. Having found the *IL&T* data to be an inappropriate source for wage rates, it would be inappropriate to use the *IL&T* data to differentiate among skill levels. Because the *YLS* provides wage rates from 1990, we inflated the data for the review period, using the consumer price index, published in the International Monetary Fund's International Financial Statistics.

Final Results of Reviews

As a result of the comments received, we have changed the results from those presented in our preliminary results of review:

Manufacturer/exporter	Time period	Margin (percent)
Zhejiang Wanxin Group Co., Ltd.	10/01/94–09/30/95	38.27

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between United States price and normal value may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit rates will be effective upon publication of these final results for all shipments of HSLWs from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) for ZWG, which has a separate rate, and all ZWG exports through market-economy trading companies, the cash deposit rate will be the company-specific rate established in these final results of review; (2) for all other PRC exporters, the cash deposit rate will be 128.63 percent, the PRC rate established in the LTFV investigation of this case; and (3) for non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate applicable to the PRC supplier of that exporter.

These deposit rates shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 10, 1996.

Jeffrey P. Bialos,

Principal Deputy Assistant Secretary for Import Administration.

[FR Doc. 96–31980 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–DS–P

[A–475–814]

Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Italy; Notice of Termination of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of termination of antidumping duty administrative review.

EFFECTIVE DATE: December 17, 1996.

SUMMARY: On September 17, 1996, the Department of Commerce (''the Department'') published in the Federal Register (61 FR 48882) a notice announcing the initiation of an administrative review of the antidumping duty order on small diameter seamless carbon and alloy steel standard, line and pressure pipe from Italy, covering the period January 27, 1995, through July 31, 1996. This review has now been terminated as a result of the withdrawal of the request for administrative review by the interested party.

FOR FURTHER INFORMATION CONTACT: Jacqueline Wimbush, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230, telephone: (202) 482–1374.

SUPPLEMENTARY INFORMATION:

Background

On August 30, 1996, the Department received a request from the petitioner in this case, Gulf States Tube Division of Quanex Corporation (''Gulf States''), to conduct an administrative review of Dalmine S.p.A (''Dalmine''), pursuant to section 19 CFR 353.22(a) (1994) of the Department's regulations. The period of review is January 27, 1995 through July 31, 1996. On September 17, 1996, the Department published in the Federal Register (61 FR 48882) a notice announcing the initiation of an administrative review of the antidumping duty order on small diameter seamless carbon and alloy steel standard, line and pressure pipe from Italy, covering the period January 27, 1995 through July 31, 1996.

Termination of Review

On September 30, 1996, we received a timely request for withdrawal of the request for administrative review from Gulf States. Because there were no other requests for administrative review from any other interested party, in accordance with section 353.22(a)(5) of the Department's regulations, we have terminated this administrative review.

This notice is published in accordance with section 751 of the Tariff Act of 1930, as amended (19 U.S.C. 1675) and 19 CFR 353.22.

Dated: December 6, 1996.

Joseph A. Spetrini,

Deputy Assistant Secretary, Enforcement Group III.

[FR Doc. 96–31979 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–DS–P

Determination Not To Revoke Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of determination not to revoke countervailing duty order.

SUMMARY: The Department of Commerce (the Department) is notifying the public of its determination not to revoke the countervailing duty order listed below.

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Cameron Cardozo or Maria MacKay, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department

of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 1996, the Department published in the Federal Register (61 FR 51277) its intent to revoke the following countervailing duty order:

Countervailing Duty Order—Iran:

Roasted Pistachios, 10/07/86 (C–507–601), 51 FR 35679

Under 19 C.F.R. 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party (as defined in § 355.2 (i)(3), (i)(4), (i)(5), and (i)(6) of the regulations) objects to revocation and no interested party requests an administrative review by the last day of the 5th anniversary month.

Within the specified time frame, we received from a domestic interested party an objection to our intent to revoke this countervailing duty order. Therefore, because the requirements of 19 C.F.R. 355.25(d)(4)(iii) have not been met, we will not revoke the order.

This determination is in accordance with 19 C.F.R. 355.25(d)(4).

Dated: December 9, 1996.

Jeffrey P. Bialos,

Principal Deputy Assistant Secretary for Import Administration.

[FR Doc. 96–31978 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–DS–M

Minority Business Development Agency

Solicitation of Business Development Center Applications for Orlando, Florida

AGENCY: Minority Business Development Agency, Commerce.

SUMMARY: In accordance with Executive Order 11625 and 15 U.S.C. 1512, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate the Orlando, Florida Minority Business Development Centers (MBDC).

The purpose of the MBDC Program is to provide business development assistance to persons who are members of groups determined by MBDA to be socially or economically disadvantaged, and to business concerns owned and controlled by such individuals. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; to offer a full range of client services to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business. The award number of the MBDC will be 04–10–97005–01.

DATES: The closing date for applications is February 18, 1997.

ADDRESSES: Completed application packages should be submitted to the U.S. Department of Commerce, Minority Business Development Agency, MBDA Executive Secretariat, 14th and Constitution Avenue, N.W., Room 5073, Washington, D.C. 20230, Telephone Number (202) 482–3763).

FOR FURTHER INFORMATION AND AN APPLICATION PACKAGE, CONTACT: Robert Henderson, Regional Director, at (404) 730–3300.

PRE-APPLICATION CONFERENCE: A pre-application conference will be held. For the exact date, time, and location, contact the Atlanta Regional Office at (404) 730–3300.

Proper Identification Is Required for Entrance Into Any Federal Building

SUPPLEMENTARY INFORMATION: In accordance with the Interim Final Policy published in the Federal Register on May 31, 1996, the cost-share requirement for the MBDCs listed in this notice has been increased to 40%. The Department of Commerce will fund up to 60% of the total cost of operating an MBDC on an annual basis. The MBDC operator is required to contribute at least 40% of the total project cost (the ''cost-share requirement'').

Cost-sharing contributions may be in the form of cash, client fees, third party in-kind contributions, non-cash applicant contributions or combinations thereof. In addition to the traditional sources of an MBDC's cost-share contribution, the 40% may be contributed by local, state and private sector organizations. It is anticipated that some organizations may apply jointly for an award to operate the center. For administrative purposes, one organization must be designated as the recipient organization.

Contingent upon the availability of Federal funds, the cost of performance for the first budget period (13 months) from May 1, 1997 to May 31, 1998, is estimated at $281,875. The total Federal amount is $169,125 and is composed of $165,000 plus the Audit Fee amount of $4,125. The application must include a minimum cost share of 40%, $112,750 in non-federal (cost-sharing) contributions for a total project cost of $281,875.

The funding instrument for this project will be a cooperative agreement. If the recommended applicant is the current incumbent organization, the award will be for 12 months. For those applicants who are not incumbent organizations or who are incumbents that have experienced closure due to a break in service, a 30-day start-up period will be added to their first budget period, making it a 13-month award. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

Applications will be evaluated on the following criteria: the knowledge, background and/or capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (45 points), the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (25 points); and the firm's estimated cost for providing such assistance (20 points). In accordance with Interim Final Policy published in the Federal Register on May 31, 1996, the scoring system will be revised to add ten (10) bonus points to the application of community-based organizations. Each qualifying application will receive the full ten points. Community-based applicant organizations are those organizations whose headquarters and/or principal place of business within the last five years have been located within the geographic service area designated in the solicitation for the award. Where an applicant organization has been in existence for fewer than five years or has been present in the geographic service area for fewer than five years, the individual years of experience of the applicant organization's principals may be applied toward the requirement of five years of organization experience. The individual years of experience must have been acquired in the geographic service area which is the subject of the solicitation. An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA

program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award. Periodic reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

The MBDC shall be required to contribute at least 40% of the total project cost through non-federal contributions. To assist in this effort, the MBDC may charge client fees for services rendered. Fees may range from $10 to $60 per hour based on the gross receipts of the client's business.

Anticipated processing time of this award is 120 days. Executive order 12372, ''Intergovernmental Review of Federal Programs,'' is not applicable to this program. Federal funds for this project include audit funds for non-CPA recipients. In event that a CPA firm wins the competition, the funds allocated for audits are not applicable. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any 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. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640–0006.

Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

Pre-Award Costs

Applicants are hereby notified that if they incur any costs prior to an award being made, they do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs.

Outstanding Account Receivable

No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

Name Check Policy

All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

Award Termination

The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

False Statements

A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

Primary Applicant Certifications

All primary applicants must submit a completed Form CD–511, ''Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying.''

Nonprocurement Debarment and Suspension

Prospective participants (as defined at 15 CFR Part 26, Section 26.105) are subject to 15 CFR Part 26, ''Nonprocurement Debarment and Suspension'' and the related section of the certification form prescribed above applies.

Drug Free Workplace

Grantees (as defined at 15 CFR Part 26, Section 26.605) are subject to 15 CFR Part 26, Subpart F, ''Governmentwide Requirements for Drug-Free Workplace (Grants)'' and the related section of the certification form prescribed above applies.

Anti-Lobbying

Persons (as defined at 15 CFR Part 28, § 28.105) are subject to the lobbying provisions of 31 U.S.C. 1352, ''Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions,'' and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000, and loans and loan guarantees for more than $150,000 or the single family maximum mortgage limit for affected programs, whichever is greater.

Anti-Lobbying Disclosures

Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, ''Disclosure of Lobbying Activities,'' as required under 15 CFR Part 28, Appendix B.

Lower Tier Certifications

Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, ''Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying'' and disclosure form, SF–LLL, ''Disclosure of Lobbying Activities.'' Form CD–512 is intended for the use of recipients and should not be transmitted to DOC. SF–LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

Buy American-made Equipment or Products

Applicants are hereby notified that they are encouraged, to the extent feasible, to purchase American-made equipment and products with funding provided under this program.

11.800 Minority Business Development Center (Catalog of Federal Domestic Assistance)

Dated: December 11, 1996.

Frances B. Douglas,

Alternate Federal Register Liaison Officer, Minority Business Development Agency.

[FR Doc. 96–31946 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–21–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Availability of the Correlation: Textile and Apparel Categories With the Harmonized Tariff Schedule of the United States for 1997

December 11, 1996.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Notice.

FOR FURTHER INFORMATION CONTACT: Lori E. Mennitt, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3400.

SUPPLEMENTARY INFORMATION:

The Committee for the Implementation of Textile Agreements (CITA) announces that the 1997 Correlation, based on the Harmonized Tariff Schedule of the United States, will be available either in December 1996 or January 1997 as part of the Office of Textiles and Apparel (OTEXA) CD-Rom of publications. The Correlation will no longer be available in paper format. The CD-Rom includes most OTEXA publications.

The CD-Rom may be purchased from the U.S. Department of Commerce, Office of Textiles and Apparel, 14th and Constitution Avenue, NW., room H3100, Washington, DC 20230, ATTN: Barbara Anderson, at a cost of $25. Checks or money orders should be made payable to the U.S. Department of Commerce.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.96–31943 Filed 12–16–96; 8:45 am]

BILLING CODE 3510–DR–F

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Collection: Comment Request

December 12, 1996.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3508(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed. Currently, the Corporation for National and Community Service is soliciting comments concerning its proposed evaluation of Learn and Serve America participant outcomes.

Copies of the information collection requests can be obtained by contacting the office listed below in the address section of this notice.

DATES: Written comments must be submitted to the office listed in the addresses section on or before February 10, 1997.

The Corporation for National and Community Service is particularly interested in comments which:

Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;

Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

Enhance the quality, utility and clarity of the information to be collected; and

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 submissions of responses.

ADDRESSES: Send comments to Chuck Helfer, Office of Evaluation, Corporation for National and Community Service, 1201 New York Ave., N.W., Washington, D.C. 20525.

FOR FURTHER INFORMATION CONTACT: Chuck Helfer, (202) 606–5000, ext. 248.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of evaluation plans to administer a mailed survey to a sample of college students who participated in Learn and Serve America Higher Education (LSAHE) supported service-learning courses in spring 1996. The Office will also survey a comparison group of students who participated in traditional courses during the same time period. The goals of this survey are to describe the experiences of students who take service-learning courses and determine if students who take service-learning courses show higher levels of civic responsibility, life skills and educational achievement.

II. Current Action

The Corporation for National and Community Service seeks approval of a new form to evaluate the impact of the LSAHE program on student participants.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: LSAHE Participant Outcome Survey.

OMB Number: 3045—new.

Agency Number: NA.

Affected Public: College students in institutions supported by the LSAHE program.

Total Respondents: 4,000.

Frequency: One time only.

Average Time Per Response: 15 minutes.

Estimated Total Burden Hours: 1,000.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 11, 1996.

Lance Potter,

Director, Office of Evaluation.

[FR Doc. 96–31929 Filed 12–16–96; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Proposed Information Collection; Headquarters, U.S. Marine Corps

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of l995, the Marine Corps announces the proposed extension of a previously approved public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 18, 1997.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to Headquarters Marine Corps, Assistant Chief of Staff for Advertising, Marine Corps Recruiting Command, #2 Navy Annex, Washington, DC 20380–1775.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call Captain T. M. Fox at (703) 614–8640.

Title and OMB Number: Marine Corps Advertising Awareness and Attitude Tracking Study; OMB Control Number 0704–0155.

Needs and Uses: The Marine Corps Advertising Awareness and Attitude Tracking Study is used by the Marine Corps to measure the effectiveness of current advertising campaigns. This information is also used to plan future advertising campaigns.

Affected Public: Individuals or Households; *Annual Burden Hours:* 630; *Number of Respondents:* 900; *Responses per Respondent:* 2; *Average Burden per Response:* 21 minutes; *Frequency:* Semi-annually.

SUPPLEMENTARY INFORMATION: The Marine Corps Advertising Awareness and Attitude Tracking Study will be used by the Marine Corps to gauge the effectiveness of current advertising campaigns. The study also serves as an important planning tool in shaping the strategy for future advertising efforts.

Dated: December 9, 1996.

D.E. Koenig, Jr.,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 96–31927 Filed 12–16–96; 8:45 am]

BILLING CODE 3810–FF–P

Notice on Garbage Discharges for Navy Ships in MARPOL Annex V Special Areas

SUMMARY: Under Section 1003 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160, the Secretary of Defense must report annually in years 1994 through 2000 on the amount and nature of garbage discharges from Navy ships operating in special areas, when such discharges are not otherwise authorized under Annex V of the International Convention on the Prevention of Pollution from Ships (MARPOL). This notice is the third annual report.

SUPPLEMENTARY INFORMATION: The International Convention on the Prevention of Pollution from ships (MARPOL) as amended by the MARPOL Protocol of 1978, protects the ocean environment by prohibiting some discharges altogether, restricting other discharges to particular distances from land, and establishing ''special areas'' within which additional discharge limitations apply. Special areas are particular bodies of water which, because of their oceanographic characteristics and ecological significance, require protective measures more strict than other areas of the ocean. Within special areas that are in effect internationally, except under emergency circumstances the only authorized garbage discharge from vessels in food waste. At present, three special areas are in effect: the North Sea, the Baltic Sea, and the Antarctic Region.

Section 1003 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160, 107 Stat. 1745, established deadlines for compliance by U.S. Navy ships with the Annex V special area requirements. Surface ships must comply with the special area requirements. Surface ships must comply with the special area requirements by 31 December 2000. Submarines must comply with the special area requirements by 31 December 2008. The Act further requires the Secretary of Defense to report in the Federal Register the amount and nature of Navy ship discharges in special areas, not otherwise authorized under MARPOL Annex V. This Federal Register notice is the third of the required annual reports. This report covers the period between 1 August 1995 and 31 July 1996. The end date of July 31st is necessary to allow time for data collection and report preparation. During the period 1 August 1995 through 31 July 1996 there were no garbage discharges from Navy Ships into MARPOL Annex V special areas that were not authorized under MARPOL Annex V.

FOR FURTHER INFORMATION CONTACT: Mr. Louis Maiuri, Office of the Chief of Naval Operations Environmental Protection, Safety and Occupational Health Division, Crystal Plaza #4, Room 654, 2211 South Clark Place, Arlington, Virginia 22244–5108; telephone 703–602–2602.

Dated: December 9, 1996.

D. E. Koenig, Jr.,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 96–31925 Filed 12–16–96; 8:45 am]

BILLING CODE 3810–FF–P

Notice on Plastic Processor Installation on Navy Ships

SUMMARY: Under Section 1003 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160, the Secretary of Defense must report annually in years 1996 through 1998 a list of ships equipped with plastic processors. This notice is the first annual report.

SUPPLEMENTARY INFORMATION: The International Convention on the Prevention of Pollution from ships (MARPOL) as amended by the MARPOL Protocol of 1978, protects the ocean environment by prohibiting some discharges altogether, restricting other discharges to particular distances from land, and establishing ''special area'' within which additional discharge limitations apply. One of the discharges specified for restriction under MARPOL Annex V is plastics.

Section 1003 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160, 107 Stat. 1745, requires ships equipped with plastics processors to comply with MARPOL Annex V provisions for the disposal of plastics. The Act also establishes an installation schedule for plastics processor equipment aboard ships. The first production unit shall be installed by July 1, 1996 on board a Navy ship. At least 25 percent of ships requiring processors shall be equipped by March 1, 1997. At least 50 percent of ships requiring processors shall be equipped by July 1, 1997. No less than 75 percent of ships requiring processors shall be equipped by July 1, 1998, and all vessels requiring plastics processors shall be equipped by December 31, 1998. The Act further requires the Secretary of Defense to report in the Federal Register a list of the names of ships equipped with plastics processors.

This Federal Register notice is the first of the required annual reports. A

list of the ten Navy ships equipped with plastics processors by October 1, 1996 follows:

AO–178 USS Monongahela
CG–50 USS Valley Forge
CG–57 USS Lake Champlain
CGN–37 USS South Carolina
DDG–54 USS Curtis Wilbur
DDG–63 USS Stethem
DDG–996 USS Chandler
FFG–48 USS Vandegrift
FFG–55 USS Elrod
LPD–12 USS Shreveport

FOR FURTHER INFORMATION CONTACT: Mr. Louis Maiuri, Office of the Chief of Naval Operations Environmental Protection, Safety and Occupational Health Division, Crystal Plaza #4, Room 654, 2211 South Clark Place, Arlington, Virginia 22244–5108; telephone 703–602–2602.

Dated: December 9, 1996.

D.E. Koenig, Jr.,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 96–31926 Filed 12–16–96; 8:45 am]

BILLING CODE 3810–FF–P

Notice of Intent To Prepare an Environmental Impact Statement for Improved Ordnance Storage at Marine Corps Air Station Yuma, Arizona

SUMMARY: Pursuant to Section 102 (2)(c) of the National Environmental Policy Act (NEPA) of 1969 as implemented by the Council on Environmental Quality Regulations (40 CFR Parts 1500–1508), the Marine Corps announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the environmental effects of improving ordnance storage at Marine Corps Air Station (MCAS) Yuma. MCAS Yuma is located in the southwestern corner of Arizona near both the California border and the international border with Mexico. Current ordnance storage at MCAS Yuma is limited by the size and location of the station's existing ordnance storage magazines. The proposed action is to purchase 1,641 acres of land adjacent to the southern boundary of MCAS Yuma and construct new ordnance storage facilities. Alternatives being considered include: constructing new ordnance storage facilities in the vicinity of existing ordnance storage facilities; constructing new ordnance storage facilities on the nearby Barry M. Goldwater U.S. Air Force Range (BMGR) and transporting ordnance over public roads to MCAS Yuma as required; constructing a complete outlying landing field with ordnance storage magazines at Auxiliary Airfield 2 in the BMGR; and continuing to use the existing ordnance storage area with no expansion (No Action). Additional alternatives may be identified during the scoping period and included in the EIS.

Environmental issues to be addressed in the EIS include: socioeconomics, geology and soils, biological resources, water resources, noise, air quality, land use, cultural resources, transportation/circulation, public health and safety, and utilities.

ADDRESSES: The Marine Corps will initiate a scoping process for the purpose of determining the scope of issues to be addressed and for identifying significant issues relative to this action. The Marine Corps will hold public scoping meetings at 1:00 p.m. on Tuesday, January 14, 1996, and at 7:00 p.m. on Wednesday, January 22, 1996. Both meetings will be held at the Best Western Chilton Inn and Conference Center, located at 300 East 32nd Street in Yuma, Arizona. A formal presentation will precede public testimony. Marine Corps representatives will be available at the scoping meetings to receive comments from the public. It is important that federal, state, and local agencies, as well as interested individuals, take this opportunity to identify environmental concerns that should be addressed during preparation of the EIS. In the interest of available time, each speaker will be asked to limit their oral comments to five minutes.

Agencies and the public are also invited and encouraged to provide written comments in addition, or in lieu of, oral comments at the public meetings. To be most helpful, scoping comments should clearly describe specific issues or topics that the EIS should address.

FOR FURTHER INFORMATION: Written statements and/or questions regarding the scoping process should be mailed no later than January 31, 1996, to: Ms. Christine Bates, Environmental Planner; Box 99110; MCAS Yuma; Yuma, AZ 85369–9110. Questions or requests for information regarding the proposed action may also be directed to Ms. Bates at that address.

Dated: December 11, 1996.

Donald E. Koenig, Jr.,

LCDR, JAGC, U.S. NAVY, Federal Register Liaison Officer.

[FR Doc. 96–31893 Filed 12–16–96; 8:45 am]

BILLING CODE 3810–FF–P

Notice of Government-Owned Inventions; Availability for Licensing

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy. Copies of patents cited are available from the Commissioner of Patents and Trademarks, Washington, DC 20231, for $3.00 each. Requests for copies of patents must include the patent number. Copies of patent applications cited are available from the National Technical Information Service (NTIS), Springfield, Virginia 22161 for $6.95 each ($10.95 outside North American Continent).

Requests for copies of patent applications must include the patent application serial number. Claims are deleted from the copies of patent applications sold to avoid premature disclosure. The following patents are available for Licensing:

Patent 5,500,315: PROCESSES AND COMPOSITIONS FOR ELECTROLESS METALLIZATION; filed 4 October 1994; patented 19 March 1996.//Patent 5,504, 338: APPARATUS AND METHOD USING LOW-VOLTAGE AND/OR LOW-CURRENT SCANNING PROBE LITHOGRAPHY; filed 30 June 1993; patented 2 April 1996.//Patent 5,504,714: ACOUSTIC AND ENVIRONMENTAL MONITORING SYSTEM; filed 24 February 1995; patented 2 April 1996.//Patent 5,505,158: APPARATUS AND METHOD FOR ACHIEVING GROWTH-ETCH DEPOSITION OF DIAMOND USING A CHOPPED OXYGEN-ACETYLENE FLAME; filed 4 November 1994; patented 9 April 1996.//Patent 5,506,616: DIFFERENTIAL IMAGING FOR SENSITIVE PATTERN RECOGNITION; filed 8 June 1994; patented 9 April 1996.//Patent 5,509,032: NON-ADAPTIVE AMPLITUDE-DIFFERENCE INTERFERENCE FILTER; filed 11 June 1991; patented 16 April 1996.//Patent 5,509,202: METHODS FOR UTILIZING HYDROSTATIC SEALING SLEEVE WIRE CONNECTIONS; filed 30 May 1995; patented 23 April 1996.//Patent 5,510,088: LOW TEMPERATURE PLASMA FILM DEPOSITION USING DIELECTRIC CHAMBER AS SOURCE MATERIAL; filed 11 June 1992; patented 23 April 1996.//Patent 5,510,627: INFRARED-TO-VISIBLE CONVERTER; filed 29 June 1994; patented 23 April 1996.//Patent 5,511,042: ENHANCED ADAPTIVE STATISTICAL FILTER PROVIDING

IMPROVED PERFORMANCE FOR TARGET MOTION ANALYSIS NOISE DISCRIMINATION; filed 25 May 1995; patented 23 April 1996.//Patent 5,511,043: MULTIPLE FREQUENCY STEERABLE ACOUSTIC TRANSDUCER; filed 6 April 1995; patented 23 April 1996.//Patent 5,511,122: INTERMEDIATE NETWORK AUTHENTICATION; filed 3 June 1994; patented 23 April 1996.//Patent 5,512,743: SPACE-BASED ASTEROID DETECTION AND MONITORING SYSTEM; filed 25 January 1994; patented 30 April 1996.//Patent 5,513,295: FIBER OPTIC HOLDER; filed 11 July 1995; patented 30 April 1996.//Patent 5,513,526: HYDROFOIL FORCE BALANCE; 20 July 1994; patented 7 May 1996.//Patent 5,513,533: DETECTION OF VIBRATIONAL ENERGY VIA OPTICAL INTERFERENCE PATTERNS; filed 15 April 1993; patented 7 May 1996.//Patent 5,513,591: UNDERWATER BODY AND INTAKE SCOOP; filed 7 October 1994; patented 7 May 1996.//Patent 5,515,061: SYSTEM FOR BROADCASTING MARKER BEACON SIGNALS AND PROCESSING RESPONSES FROM SEEKING ENTITIES; filed 23 March 1994; patented 7 May 1996.//Patent 5,515,300: COHERENT SIGNAL POWER DETECTOR USING HIGHER-ORDER STATISTICS; filed 30 September 1993; patented 7 May 1996.//Patent 5,515,465: FIBER OPTIC HULL PENETRATOR INSERT; filed 1 July 1982; patented 7 May 1996.//Patent 5,515,537: REAL-TIME DISTRIBUTED DATA BASE LOCKING MANAGER; filed 1 June 1993; patented 7 May 1996.//Patent 5,515,783: ELECTRONIC PRIMER IGNITION SYSTEM; filed 15 November 1993; patented 14 May 1996.//Patent 5,516,388: SOL-GEL BONDING; filed 11 September 1994; patented 14 May 1996.//Patent 5,516,462: ENHANCED CYCLE LIFETIME ELECTROCHROMIC SYSTEMS: filed 18 March 1993; patented 14 May 1996.//Patent 5,516,662: PROCESS FOR THE PREPARATION OF HEADGROUP-MODIFIED PHOSPHOLIPIDS USING PHOSPHATIDYLHYDROXYALKANOLS AS INTERMEDIATES; filed 11 May 1995; patented 14 May 1996.//Patent 5,517,202: MINIMAL WASHOVER, INLINE HIGH FREQUENCY BUOYANT ANTENNA; filed 30 December 1994; patented 14 May 1996.//Patent 5,517,315: REFLECTOMETER EMPLOYING AN INTEGRATING SPHERE AND LENS-MIRROR CONCENTRATOR; filed 29 October 1993; patented 14 May 1996.//Patent 5,517,935: UNDERWATER VEHICLE POLYMER EJECTION CONTROL VALVE ASSEMBLY; filed 27 March 1995; patented 21 May 1996.//Patent 5,517,938: DRAG INDUCING DROGUE FOR MULTIPLE TOWED ARRAYS; filed 10 July 1995; patented 21 May 1996.//Patent 5,518,664: PROGRAMMABLE ELECTROSET PROCESSES; filed 23 September 1994; patented 21 May 1996.//Patent 5,519,226: DETECTION OF THERMAL NEUTRONS THROUGH THE USE OF INTERNAL WAVELENGTH SHIFTING OPTICAL FIBERS; filed 11 January 1995; patented 21 May 1996.//Patent 5,519,278: ACTUATORS WITH GRADED ACTIVITY; filed 23 December 1994; patented 21 May 1996.//Patent 5,519,318: TRIAXIAL MAGNETIC HEADING SENSING APPARATUS HAVING MAGNETARESISTORS AND NULLING COILS; filed 28 December 1992; patented 21 May 1996.//Patent 5,519,407: CIRCULARLY POLARIZED DUAL FREQUENCY LIGHTWEIGHT DEPLOYABLE ANTENNA SYSTEM; filed 7 October 1994; patented 21 May 1996.//Patent 5,520,314: REMOVABLE ONE-PIECE TRUCK BED DIVIDER; filed 11 October 1994; patented 28 May 1996.//Patent 5,520,331: LIQUID ATOMIZING NOZZLE; filed 19 September 1994; filed 28 May 1996.//Patent 5,520,459: ENHANCEMENT OF FLOW MIXING BY A FREQUENCY TUNABLE CAVITY; filed 30 June 1994; patented 28 May 1996.//Patent 5,520,826: FLAME EXTINGUISHING PYROTECHNIC AND EXPLOSIVE COMPOSITION; filed 16 May 1994; patented 28 May 1996.//Patent 5,520,837: METHOD OF MAKING AN ENVIRONMENTALLY SAFE, READY-TO-USE, NON-TOXIC, NON-FLAMMABLE, INORGANIC, AQUEOUS CLEANING COMPOSITION; filed 28 June 1995; patented 28 May 1996.//Patent 5,520,968: MULTILAYER SECOND-ORDER NONLINEAR OPTICAL, FILMS OF HEAD-TO-HEAD, MAINCHAIN CHROMOPHORIC POLYMERS; filed 5 May 1995; patented 28 May 1996.//Patent 5,521,132: ASH-BASED CERAMIC MATERIALS; filed 1 September 1994; patented 28 May 1996.//Patent 5,521,242: HIGH CONCENTRATION SLURRY-FORMULATION AND APPLICATION; filed 30 September 1971; patented 28 May 1996.//Patent 5,521,376: OPTICAL MOTION SENSOR FOR AN UNDERWATER OBJECT; filed 29 April 1994; patented 28 May 1996.//Patent 5,521,412: LOW AND HIGH MINORITY CARRIER LIFETIME LAYERS IN A SINGLE SEMICONDUCTOR STRUCTURE; filed 26 June 1995; patented 28 May 1996.//Patent 5,521,996: ELECTRICAL AND FIBER-OPTIC CONNECTOR; filed 25 November 1994; patented 28 May 1996.//Patent 5,522,561: FIBER OPTIC CABLE PAYOUT SYSTEM; filed 3 June 1992; patented 4 June 1996.//Patent 5,522,710: FLOWTHROUGH MANIFOLD ASSEMBLY FOR A LINEAR PUMP; filed 22 December 1994; patented 4 June 1996.//Patent 5,522,863: PULSATING BEHAVIOR MONITORING AND MODIFICATION SYSTEM FOR NEURAL NETWORKS; filed 19 August 1994; patented 4 June 1996.//Patent 5,523,951: SYSTEM AND METHOD FOR AUTOMATIC SHIP STEERING; filed 18 July 1994; patented 4 June 1996.//Patent 5,524,239: REPLAY RECOVERY PROTOCOL FOR REAL-TIME DATABASE MANAGEMENT SYSTEMS; filed 28 April 1994; patented 4 June 1996.//Patent 5,524,546: BREECHING DEVICE; filed 30 June 1995; patented 11 June 1996.//Patent 5,525,538: METHOD FOR INTRINSICALLY DOPED III–A AND V–A COMPOUNDS; filed 8 March 1995; patented 11 June 1996.//Patent 5,525,800: SELECTIVE MULTI-CHEMICAL FIBER OPTIC SENSOR; filed 31 October 1994; patented 11 June 1996.//Patent 5,526,009: DUAL FREQUENCY LIGHTWEIGHT DEPLOYABLE ANTENNA SYSTEM; filed 22 May 1995; patented 11 June 1996.//Patent 5,526,170: FIBER OPTIC CONTINUOUS TRUE TIME-DELAY MODULATOR; filed 6 August 1993; patented 11 June 1996.//Patent 5,526,325: STEERABLE BEAMFORMER; filed 21 September 1995; patented 11 June 1996.//Patent 5,526,690: CIRCUMFERENTIAL ACTUATOR FOR PIPING SYSTEM; filed 17 May 1995; patented 18 June 1996.//Patent 5,527,131: LIQUID-BLOCKING RING ASSEMBLY FOR SURFACE DRAINS; filed 1 September 1994; patented 18 June 1996.//Patent 5,527,392: SUBSTRATE TEMPERATURE CONTROL APPARATUS FOR CVDREACTORS; filed 15 March 1994; patented 18 June 1996.//Patent 5,528,367: IN-LINE FIBER ETALON STRAIN SENSOR; filed 9 September 1994; patented 18 June 1996.//Patent 5,528,555: SYSTEM AND METHOD FOR COMPENSATING FOR TOWED ARRAY MOTION INDUCED ERRORS; filed 9 December 1994; patented 18 June 1996.//Patent 5,529,841: HYDROGEN SULFIDE ANALYZER WITH PROTECTIVE BARRIER; filed 29 September 1994: patented 25 June 1996.//Patent 5,530,214: VENTURI MUFFLER; filed 20 September 1994; patented 25 June 1996.//Patent 5,530,312: MULTI-CYCLE ELECTRIC

MOTOR SYSTEM; filed 22 June 1995; patented 25 June 1996.//Patent 5,530,448: THREE-PULSE MTI WITHOUT BLIND SPEEDS; filed 5 December 1983; patented 25 June 1996.//Patent 5,530,851: EARLY COMMIT TIMESTAMP COMPUTER DATABASE PROTOCOL; filed 28 April 1994; patented 25 June 1996.//Patent 5,531,844: ENERGETIC COMPOSITIONS CONTAINING NO VOLATILE SOLVENTS; filed 14 February 1994; patented 2 July 1996.//Patent 5,532,057: INDIA-STABILIZED ZIRCONIA COATING FOR COMPOSITES; filed 27 April 1995; patented 2 July 1996.//Patent 5,532,717: METHOD OF DISPLAYING TIME SERIES DATA ON FINITE RESOLUTION DISPLAY DEVICE; filed 19 May 1994; patented 2 July 1996.//Patent 5,532,979: TOWED ARRAY STRAIN-SENSING NOISE CANCELLER; filed 9 September 1981; patented 2 July 1996.//Patent 5,533,699: ADJUSTABLE TWO-AXIS INSTRUMENT MOUNT; filed 5 December 1994; patented 9 July 1996.//Patent 5,534,311: PRODUCTION OF STRUCTURES BY ELECTROSTATICALLY-FOCUSED DEPOSITION; filed 31 May 1995; patented 9 July 1996.//Patent 5,534,759: ELECTRIC VEHICLE MONITORING SYSTEM: filed 19 May 1995; patented 9 July 1996.//Patent 5,535,176: METHOD AND SYSTEM FOR SENSING WITH AN ACTIVE ACOUSTIC ARRAY; filed 28 June 1993; patented 9 July 1996.//Patent 5,535,232: OPTICALLY PUMPED, PRASEODYMIUM BASED SOLID STATE LASER; filed 31 January 1995; patented 9 July 1996.//Patent 5,535,402: SYSTEM FOR (N.M)-BIT CORRELATION USING N M-BIT CORRELATORS; filed 30 April 1992; patented 9 July 1996.//Patent 5,535,815: PACKAGE-INTERFACE THERMAL SWITCH; filed 24 May 1995; patented 16 July 1996.//Patent 5,535,904: SURFACE PREPARATION FOR BONDING IRON; filed 25 January 1995; patented 16 July 1996.//Patent 5,537,044: SURGE VOLTAGE GENERATOR FOR PULSING GROUNDED AND UNGROUNDED ELECTRICAL EQUIPMENT; filed 30 September 1994; patented 16 July 1996.//Patent 5,537,368: ENHANCED ADAPTIVE STATISTICAL FILTER PROVIDING IMPROVED PERFORMANCE FOR TARGET MOTION ANALYSIS NOISE DISCRIMINATION; filed 22 September 1993; patented 16 July 1996.//Patent 5,537,511: NEURAL NETWORK BASED DATA FUSION SYSTEM FOR SOURCE LOCALIZATION; filed 18 October 1994; patented 16 July 1996.//Patent 5,538,580: SPLIT GASKET ATTACHMENT METHOD; filed 17 January 1995; patented 23 July 1996.//Patent 5,539,032: CORROSION RESISTANT SELF-PRIMING ALKYD TOPCOATS; filed 7 June 1995; patented 23 July 1996.//Patent 5,539,758: UPCONVERSION PUMPED THULIUM FIBER AMPLIFIER AND LASER OPERATING AT 790 TO 830 NM; filed 20 January 1995; patented 23 July 1996.//Patent 5,541,868: ANNULAR GMR-BASED MEMORY ELEMENT; filed 21 February 1995; patented 30 July 1996.//Patent 5,543,800: RADAR DECODER: filed 6 November 1995; patented 6 August 1996.//Patent 5,546,356: WIDE BEAM ACOUSTIC PROJECTOR WITH SHARP CUTOFF AND LOW SIDE LOBES; filed 30 June 1993; patented 13 August 1996.//Patent 5,546,357: MONOSTATIC PROJECTOR SYNTHETIC APERTURE SONAR; filed 27 December 1994; patented 13 August 1996.//Patent 5,551,349: INTERNAL CONDUIT VEHICLE; filed 29 June 1995; patented 3 September 1996.//Patent application 08/042,682: SHOULDER-LAUNCHED, MULTIPLE-PURPOSE ASSAULT WEAPON; filed 14 August 1995.//Patent application 08/129,500: COHERENT SIGNAL POWER DETECTOR USING HIGHER-ORDER STATISTICS; filed 30 September 1993.//Patent application 08/310,539: RESPIRATORY SYSTEM PARTICULARLY SUITED FOR AIRCREW USE; filed 5 December 1994.//Patent application 08/320,617: CIRCULARLY POLARIZED DUAL FREQUENCY LIGHT-WEIGHT DEPLOYABLE ANTENNA SYSTEM; filed 7 October 1994.//Patent application 08/411,234: UNDERWATER VEHICLE AND COMBINATION DIRECTIONAL CONTROL AND CABLE INTERCONNECT MEANS; filed 27 March 1995.//Patent application 08/411,235: UNDERWATER VEHICLE AND COMBINATION DIRECTIONAL CONTROL AND CABLE INTERCONNECT DEVICE; filed 27 March 1995.//Patent application: 08/472,375: CORROSION RESISTANT SELF-PRIMING ALKYD TOPCOATS; filed 7 June 1996.//Patent application 08/491,692: INTRINSICALLY SELF DEFORMING FIBER OPTIC MICROBEND PRESSURE AND STRAIN SENSOR; filed 19 June 1995.//Patent application 08/492,831: MICROBUBBLE POSITIONING AND CONTROL SYSTEM; filed 28 July 1995.//Patent application 08/494,141: MULTI-CYCLE ELECTRIC MOTOR SYSTEM; filed 22 June 1995.//Patent application 08/494,423: APPARATUS FOR CHEMICAL REMOVAL OF PROTECTIVE COATING AND ETCHING OF CABLES WITH FIBER-LIKE SUBSTRATE; filed 26 June 1995.//Patent application 08/499,338: LOW POWER TRANSMITTER PROVIDING SELECTABLE WAVEFORM GENERATION; filed 7 July 1995.//Patent application 08/505,547: FORCE AMPLIFIED CHEMICAL AND BIOLOGICAL SENSOR; filed 21 July 1995.//Patent application 08/514,464: METHOD AND SYSTEM FOR DETECTING OBJECTS AT OR BELOW THE WATER'S SURFACE; filed 9 September 1995.//Patent application 08/514,573: SPOTTING ROUND BORE ALIGNMENT MECHANISM FOR ROCKET LAUNCHER; filed 14 August 1995.//Patent application 08/514,575: SHOULDER-LAUNCHED MULTIPLE-PURPOSE ASSAULT WEAPON; filed 30 October 1995.//Patent application 08/514,576: SINGLE SPRING BOLT LOCK AND CARTRIDGE EJECTOR; filed 14 August 1996.//Patent application 08/514,883: SINGLE TRIGGER DUAL FIRING MECHANISM; filed 14 August 1995.//Patent application 08/514,885: COMBINATION OPTICAL AND IRON SIGHT SYSTEM FOR ROCKET LAUNCHER; filed 14 August 1995.//Patent application 08/521,380: APPARATUS AND METHOD FOR FLOATING A TOWED DEVICE FROM A SUBMERGED VEHICLE; filed 16 August 1995.//Patent application 08/530,462: UNDERWATER VEHICLE SONAR SYSTEM WITH EXTENDIBLE ARRAY; filed 6 December 1995.//Patent application 08/530,463: INTERFACE MODULE FOR A TOWED ARRAY; filed 8 December 1995.//Patent application 08/530,464: OCEANOGRAPHIC SENSOR SUITE WET WELL SYSTEM; filed 8 December 1995.//Patent application 08/533,161: METHOD AND APPARATUS FOR SEGMENTING A SPEECH WAVEFORM; filed 7 November 1995.//Patent application 08/538,266: NON-ARCING CLAMP FOR AUTOMOTIVE BATTERY JUMPER CABLES; filed 3 October 1995.//Patent application 08/540,607: UNMANNED UNDERSEA VEHICLE INCLUDING KEEL-MOUNTED PAYLOAD DEPLOYMENT ARRANGEMENT WITH PAYLOAD COMPARTMENT FLOODING ARRANGEMENT TO MAINTAIN AXI-SYMMETRICAL MASS DISTRIBUTION; filed 11 October 1995.//Patent application 08/540,608: UNMANNED UNDERSEA VEHICLE WITH ERECTABLE SENSOR MAST FOR OBTAINING POSITION AND ENVIRONMENTAL VEHICLE STATUS; filed 11 October 1995.//Patent application 08/540,609: SYSTEM FOR DEPLOYING WEAPONS CARRIED IN

AN ANNULAR CONFIGURATION IN A UUV; filed 11 October 1995.//Patent application 08/540,610: UNMANNED UNDERSEA WEAPON DEPLOYMENT STRUCTURE WITH CYLINDRICAL PAYLOAD CONFIGURATION; filed 11 October 1995.//Patent application 08/540,612: UNMANNED UNDERSEA VEHICLE WITH KEEL-MOUNTED PAYLOAD DEPLOYMENT SYSTEM; filed 11 October 1995.//Patent application 08/540,613: UNMANNED UNDERSEA WEAPON DEPLOYMENT STRUCTURE WITH CYLINDRICAL PAYLOAD DEPLOYMENT SYSTEM; filed 11 October 1996.//Patent application 08/543,412: CONDUCTIVE POLYMER COATED FABRICS FOR CHEMICAL SENSING; filed 16 October 1995.//Patent application 08/550,039: TWO-PHASE-FLOW MUFFLER IN A ROTATING SHAFT; filed 30 October 1995.//Patent application 08/551,081: SYSTEM FOR DETERMINING AN INTERIOR OR EXTERIOR ACOUSTIC NOISE LEVEL OF AN ENCLOSED STRUCTURE AND NOISE REDUCTION DEVICE INCORPORATING SUCH SYSTEM; filed 31 October 1995.//Patent application 08/551,214: THERMAL BOND SYSTEM; filed 31 October 1995.//Patent application 08/551,725: FIBER OPTICAL DATA INTERFACE SYSTEM; filed 25 October 1995.//Patent application 08/556,301: SYSTEM AND METHOD FOR ACOUSTICALLY IMAGING AN UNDERGROUND TANK; filed 7 November 1995.//Patent application 08/558,313: MAKING AGGREGATES AND ARTICLES MADE THERE-FROM; filed 15 November 1995.//Patent application 08/558,998: BISTABLE PHOTOCONDUCTIVE SWITCHES PARTICULARLY SUITED FOR FREQUENCY-AGILE, RADIO-FREQUENCY SOURCES; filed 16 November 1995.//Patent application 08/562,548: MULTIPLE STRAP CARRIER; filed 17 November 1995.//Patent application 08/562,919: OPTICAL CORRELATOR USING SPATIAL LIGHT MODULATOR; filed 27 November 1995.//Patent application 08/562,920: OPTICAL CORRELATOR USING OPTICAL DELAY LOOPS; filed 27 November 1995.//Patent application 08/565,487: METHOD OF CONTROLLING A SUPERCONDUCTOR; filed 30 November 1995.//Patent application 08/568,859: METHOD AND APPARATUS FOR SIDE PUMPING AN OPTICAL FIBER; filed 7 December 1995.//Patent application 08/570,466: SYSTEM LEVEL AID FOR TROUBLESHOOTING (SLAT); filed 9 November 1995.//Patent application 08/572,389: FIBER OPTIC INFRARED CONE PENETROMETER SYSTEM; filed 14 December 1995.//Patent application 08/583,912: DISPLACEMENT ASSAY ON A POROUS MEMBRANE; filed 11 January 1996.//Patent application 08/587,412: BLADDER ASSEMBLY FOR RETAINING FLUID UNDER PRESSURE; filed 17 January 1996.//Patent application 08/587,766: METHOD AND SYSTEM FOR DETERMINING AXIAL MODULUS; filed 18 December 1995.//Patent application 08/587,798: INTERNAL GELATION METHOD FOR FORMING MULTIPLAYER MICROSPHERES AND PRODUCT THEREOF; filed 26 December 1995.//Patent application 08/591,181: DRAG REDUCTION POLYMER EJECTION SYSTEM FOR UNDERWATER VEHICLE; filed 16 January 1996.//Patent application 08/591,183: SUBMARINE DEPLOYED SEA-STATE SENSOR; filed 16 January 1996.//Patent application 08/591,184: BUOYANT TEST VEHICLE POLYMER EJECTION NOSE ASSEMBLY; filed 16 January 1996.//Patent application 08/591,187: INTEGRATED MOTOR/MARINE PROPULSOR WITH PERMANENT MAGNET BLADES; filed 21 December 1995.//Patent application 08/591,691: OPTICAL FIBER WITH HIGH ACCELERATION SENSITIVITY AND LOW PRESSURE SENSITIVITY FOR USE IN SPATIALLY AVERAGING FIBER OPTIC ACCELEROMETER SENSORS; filed 24 January 1996.//Patent application 08/594,825: ACOUSTIC TRANSDUCER; filed 11 December 1995.//Patent application 08/594,975: ADHESION ENHANCEMENT FOR UNDERPLATING PROBLEM; filed 31 January 1996.//Patent application 08/598,677: THERMOLUMINESCENCE RADIATION DOSIMETRY USING TRANSPARENT GLASS CONTAINING NANOCRYSTALLINE PHOSPHOR; filed 8 February 1996.//Patent application 08/599,391: SHOULDER-LAUNCHED MULTI-PURPOSE ASSAULT WEAPON WITH A REMOVABLE ROCKET TUBE AND SPOTTER BARREL; filed 8 December 1995.//Patent application 08/601,560: SITE-CONTROLLED LOCKING DEVICE, SPECIFICATION; filed 14 February 1996.//Patent application 08/603,296: SYNTHESIS OF UNAGGLOMERATED METAL NANO-PARTICLES AT MEMBRANE INTERFACE; filed 25 July 1995.//Patent application 08/604,144: CABLE INTEGRITY TESTER; filed 20 February 1996.//Patent application 08/605,233: PORTABLE ACOUSTIC TURBULENCE DETECTOR; filed 2 February 1996.//Patent application 08/605,235: SUBMERGIBLE TOWED BODY SYSTEM; filed 2 February 1996.//Patent application 08/605,243: BRISK MANEUVERING DEVICE FOR UNDERSEA VEHICLES; filed 12 February 1996.//Patent application 08/605,290: ROTARY PUMP SYSTEM; filed 17 January 1996.//Patent application 08/605,291: PHOTOELASTIC STRESS SENSOR; filed 17 January 1996.//Patent application 08/605,292: SYSTEM FOR ASSESSING STOCHASTIC PROPERTIES OF SIGNALS REPRESENTING THREE ITEMS OF MUTUALLY ORTHOGONAL MEASUREMENT INFORMATION; filed 17 January 1996.//Patent application 08/605,311: METHOD AND APPARATUS FOR OPTIMAL GUIDANCE; filed 7 February 1996.//Patent application 08/605,312: TEMPERATURE CONTROL VALVE WITHOUT MOVING PARTS; filed 7 February 1996.//Patent application 08/605,313: UNDERWATER VEHICLE AND A FIN ASSEMBLY THEREFOR; filed 7 February 1996.//Patent application 08/605,314: METHOD AND APPARATUS FOR AVOIDING DETECTION BY A THREAT PROJECTILE; filed 7 February 1996.//Patent application 08/605,315: CIRCUMFERENTIAL CIRCULATION CONTROL SYSTEM; filed 7 February 1996.//Patent application 08/606,107: ROBUST, NONTOXIC, ANTIFOULING POLYMER; filed 23 February 1996.//Patent application 08/613,747: APPARATUS AND METHOD FOR COMPUTING UNSTEADY FLOWS BY DIRECT SOLUTION OF THE VORTICITY EQUATION; filed 22 February 1996.//Patent application 08/613,771: METHOD AND APPARATUS FOR SEPARATING PARTICULATE MATTER FROM A FLUID; filed 28 February 1996.//Patent application 08/613,772: METHOD AND APPARATUS FOR SEPARATING SUSPENDED PARTICLES FROM A FLOWING FLUID; filed 28 February 1996.//Patent application 08/613,809: COMBINATION MOTOR AND PUMP ASSEMBLY; filed 6 March 1996.//Patent application 08/613,814: SEALING APPARATUS FOR EXCLUSION OF WATER FROM UNDERWATER GUN BARRELS; filed 3 March 1996.//Patent application 08/615,348: CHEMICAL WARFARE AGENT DECONTAMINANT SOLUTION USING QUATERNARY AMMONIUM COMPLEXES; filed 15 March 1996.//Patent application 08/621,149: FLUOROALIPHATIC CYANATE RESINS FOR LOW DIELECTRIC APPLICATIONS; filed 21 March 1996.//Patent application 08/621,404: LOW TEMPERATURE CATALYTIC DESULFURIZATION OF CARBON-BASED MATERIAL, AND THE USE OF LOW SULFUR-CONTENT

CARBON IN POWER SOURCE APPLICATIONS; filed 25 March 1996./ /Patent application 08/624,833: ULTRA-BROADBAND HYDROPHONE; filed 22 March 1996.//Patent application 08/624,835: ACOUSTIC ELEMENT TESTER FOR AN ARRAY OF HYDROPHONES; filed 22 March 1996.//Patent application 08/641,018: SYSTEM AND METHOD FOR DATA COMPRESSION; filed 15 April 1996.

FOR FURTHER INFORMATION CONTACT: Mr. R.J. Erickson, Staff Patent Attorney, Office of Naval Research (Code 00CC), Arlington, VA 22217–5660, telephone (703) 696–4001.

Dated: December 6, 1996.

D.E. Koenig,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 96–31922 Filed 12–16–96; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

DOE Implementation Plan for Recommendation 96–1 of the Defense Nuclear Facilities Safety Board, In-Tank Precipitation System at the Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: The Defense Nuclear Facilities Safety Board published Recommendation 96–1, concerning the In-Tank Precipitation System at the Savannah River Site, in the Federal Register on August 23, 1996 (61 FR 43534). Section 315(e) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(e) requires the Department of Energy to transmit an implementation plan to the Defense Nuclear Facilities Safety Board after acceptance of the Recommendation by the Secretary. The Department's implementation plan was sent to the Defense Nuclear Facilities Safety Board on November 12, 1996, and is available for review in the Department of Energy Public Reading Rooms.

DATES: Comments, or views concerning the implementation plan are due on or before January 16, 1997.

ADDRESSES: Send Comments, data, or views concerning the implementation plan to: Department of Energy, Savannah River Operations Office, Road 1, Aiken, South Carolina 29801. Attention: Mr. Lee Watkins, Assistant Manager for High Level Waste.

FOR FURTHER INFORMATION CONTACT: Mr. Lee Watkins, Assistant Manager for High Level Waste, Department of Energy, Savannah River Operations Office, Road 1, Aiken, South Carolina 29801.

Issued in Washington, D.C., on November 26, 1996.

Mark B. Whitaker, Jr.,

Departmental Representative to the Defense Nuclear Facilities Safety Board.

November 12, 1996.

The Honorable John T. Conway,
Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, N.W., Suite 700, Washington, D.C. 20004

Dear Mr. Chairman: This letter forwards the Department's implementation plan for addressing the issues raised in the Defense Nuclear Facilities Safety Board's Recommendation 96–1.

The implementation plan presents a comprehensive strategy to resolve the safety issues related to the benzene generation at the In-Tank Precipitation Facility. The implementation plan addresses three major areas of investigation regarding the chemical and physical mechanisms of benzene generation, retention, and release. The consolidation and evaluation of the specific laboratory tests will provide the information necessary to revise the Authorization Basis and indicate any modifications needed to resume full operation of the facility.

The implementation plan was prepared by Mr. Lee Watkins, Assistant Manager for High Level Waste, Savannah River Operations Office, in coordination with senior Department managers and Defense Nuclear Facilities Safety Board staff. We appreciate your staff's dedication and support of the development of this plan.

Sincerely,

Hazel R. O'Leary

[FR Doc. 96–31960 Filed 12–16–96; 8:45 am]

BILLING CODE 6450–01–M

DOE Response to Recommendation 96–1 of the Defense Nuclear Facilities Safety Board, In-Tank Precipitation System of the Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: The Defense Nuclear Facilities Safety Board published Recommendation 96–1, concerning the In-Tank Precipitation System at the Savannah River Site, in the Federal Register on August 23, 1996 (61 FR 43534). Section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b) requires the Department of Energy to transmit a response to the Defense Nuclear Facilities Safety Board by October 7, 1996. The Secretary's response follows:

DATES: Comments, data, views, or arguments concerning the Secretary's response are due on or before January 16, 1997.

ADDRESSES: Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW, Suite 700, Washington, D.C. 20004.

FOR FURTHER INFORMATION CONTACT: Mr. Lee Watkins, Assistant Manager for High Level Waste, Department of Energy, Savannah River Operations Office, Road 1, Aiken, South Carolina 29801.

Issued in Washington, D.C., on October 8, 1996.

Mark B. Whitaker,

Departmental Representative to the Defense Nuclear Facilities Safety Board.

September 16, 1996.

The Honorable John T. Conway,
Chairman, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, N.W., Suite 700, Washington, D.C. 20004.

Dear Mr. Chairman: Thank you for your August 14, 1996, letter transmitting the Defense Nuclear Facilities Safety Board's Recommendation 96–1. The Department accepts Recommendation 96–1.

Safe operation of the In-Tank Precipitation System is vital to the success of the entire high-level waste system at the Savannah River Site, and an adequate understanding of benzene generation and release is necessary for safe operation. We appreciate your offer to allocate priority resources to join in the expedited development of a mutually acceptable Implementation Plan, and we look forward to your assistance in this matter.

The Savannah River Operations Office has directed that necessary modifications are completed and approval of a revised safety basis be obtained prior to resuming process operations of the In-Tank Precipitation System. Discussions between the Board, Board staff members, and Savannah River personnel on August 28, 1996, were beneficial in clarifying expectations for:

- The identification of catalysts that contribute to benzene generation in the facility;
- Investigation of the chemical and physical mechanisms that could influence the retention or release of benzene in the waste slurry;
- Adequacy of safety measures, including the Authorization Basis, for in-plant testing and full operation of the system; and
- Laboratory testing to improve the understanding of the tetraphenylborate chemistry in the waste slurries.

As stated in the Recommendation, the Department and Westinghouse Savannah River Company have brought substantial expertise to bear on understanding the science of the In-Tank Precipitation System process, and we will continue to do so as we work to ensure a successful resolution of this Recommendation.

Given the site-specific nature of the Recommendation, I have designated Mr. Lee Watkins, the Assistant Manager for High Level Waste, Savannah River Operations Office, as the responsible manager for the preparation of the Implementation Plan. Mr. Watkins can be reached on (803) 208–6053.

Sincerely,

Hazel R. O'Leary

[FR Doc. 96–31961 Filed 12–16–96; 8:45 am]

BILLING CODE 6450–01–M

Office of Energy Efficiency and Renewable Energy

Energy Conservation Program for Consumer Products: Meeting of the Advisory Committee on Appliance Energy Efficiency Standards

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of meeting of the Advisory Committee on Appliance Energy Efficiency Standards.

SUMMARY: The Department of Energy (the Department or DOE) will hold a meeting of the Advisory Committee on Appliance Energy Efficiency. The Department will consider the information and comments received at this meeting in preparation of its rulemakings. All persons are hereby given notice of the first meeting of the Advisory Committee on Appliance Energy Efficiency Standards.

DATES: The first meeting of the advisory committee will be held on Wednesday, January 8, 1997, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: The Advisory Committee meeting will be held at the Embassy Row Hotel, 2015 Massachusetts Avenue, N.W., Washington D.C. 20036, (202)265–1600. Rooms are available at the discounted government rate.

Copies of the Committee's charter and this notice may be viewed at the DOE Freedom of Information Reading Room, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–6020 between the hours of 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Kathi Epping, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–43, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–7425

Michael McCabe, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–43, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9127

SUPPLEMENTARY INFORMATION: The Energy Policy and Conservation Act, as amended by the National Energy Policy Conservation Act, the National Appliance Energy Conservation Act, the National Appliance Energy Conservation Amendments of 1988, and the Energy Policy Act of 1992, prescribes energy conservation standards for certain major appliances and equipment and requires the Department of Energy to administer an energy conservation program for the products. Recent appliance rulemakings have highlighted the need to address a number of complex issues concerning the impact of standards on consumers and manufacturers. In response to these issues, the Department initiated a comprehensive process improvement effort to examine, through a series of stakeholder meetings and interviews, issues surrounding the appliance standards program. On March 19–20, 1996, the Department held a workshop to discuss the initial findings from these meetings and interviews. Discussion topics included the planning and prioritization process, data collection and analysis, and decision making criteria. On June 14, 1996, the Department held the first prioritization public workshop to discuss criteria to be used in planning and prioritizing future rules. On July 15, 1996, DOE issued 10 CFR Part 430 Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products final rule (interpretive rule) resulting from the process improvement effort.

The establishment of an Advisory Committee was one of the primary recommendations of this effort. The Committee will serve to improve the quality of the Appliance Energy Efficiency Standards rulemaking process and serve as a vehicle for evaluation and refinement of the appliance standards rulemaking process. The Committee will provide an official, organized forum for a diverse set of interested stakeholders to provide the Department with advice, information, and recommendations on the appliance standards rulemaking process. Some of the major objectives of the process improvement are to seek early involvement of stakeholders, increase predictability of the rulemaking timetable, increase use of technically adept individuals, eliminate impractical or problematic designs early in the process, consider alternatives to standards, support consensus rulemaking, reduce the time and cost of developing standards, and enhance the analysis of the standards' impacts.

The Committee will evaluate the development, implementation, and workability of the new rulemaking process. The Committee will serve as the focal point for discussion of the desirability of making changes to the procedures, interpretations, and policies set out in the interpretative rule and on cross cutting analytical issues affecting all product standards.

The Committee members were chosen to ensure an appropriately balanced membership to bring into account a diversity of viewpoints, including representatives from manufacturer trade associations, energy conservation advocates, utilities, state energy offices, consumers, and others who may significantly contribute to the deliberations of the committee.

The first advisory committee meeting will be professionally facilitated. Copies of the draft agenda are available upon request by calling one of the individuals listed below.

A copy of the workshop transcript will be available in the DOE public reading room approximately 10 days after the workshop.

Please notify either Kathi Epping, (202)586–7425, or Sandy Beall, (202)586–7574 of your intention to attend the advisory committee meeting.

Issued in Washington, DC, December 11, 1996.

Brian T. Castelli,

Chief of Staff, Energy Efficiency and Renewable Energy.

[FR Doc. 96–31962 Filed 12–16–96; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. CP97–138–000]

Columbia Gulf Transmission Company; Notice of Application

December 11, 1996.

Take notice that on December 5, 1996, Columbia Gulf Transmission Company (CGT), 2603 Augusta, Suite 125, Houston, Texas 77210–4621, filed in Docket No. CP97–138–000, an application pursuant to Section 7(b) of the Natural Gas Act for permission and approval to abandon an exchange interconnection and related facilities with Tennessee Gas Pipeline Company (Tennessee), which were authorized in Docket No. CP64–141, all as more fully set forth in the application on file with the Commission and open to public inspection.

CGT proposes to abandon an exchange interconnection with Tennessee located in La Salle Parish, Louisiana. CGT states that the facilities proposed for abandonment were constructed in 1965 as an emergency

interconnection between the pipeline systems of CGT and Tennessee. CGT asserts that as a result of existing operations of the pipeline systems and the existence of a similar emergency interconnection located in Rowan County, Kentucky, the facilities proposed for abandonment are no longer needed. CGT further asserts that the proposed abandonment will have no impact on any existing customer.

Any person desiring to be heard or to make protest with reference to said application should on or before January 2, 1997, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required therein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment 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 provided for, unless otherwise advised, it will be unnecessary for CGT to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 96–31901 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2145–029 and Docket No. EL97–12–000]

Public Utility District No. 1 of Chelan County, Washington; Notice of Petition for Declaratory Order or in the Alternative Application for Approval of Contracts for the Sale of Power for a Period Extending Beyond the Term of the License

December 11, 1996.

On November 22, 1996, pursuant to Rule 207 of the Commission's regulations, 18 CFR 385.207, and Section 22 of the Federal Power Act, 16 U.S.C. 815, Public Utility District No. 1 of Chelan County, Washington (Chelan County PUD), petitioned for a declaratory order that the Commission had in 1968 implicitly approved power sales contracts for project power extending beyond the license term, or in the alternative requested that the Commission now approve these power sales contracts for approximately five years beyond 2006 expiration date of the license. The Rocky Reach Project No. 2145 is located on the Columbia River in Chelan and Douglas Counties, Washington.

Section 22 provides that contracts for the sale and delivery of power for periods extending beyond the termination date of a license may be entered into upon the joint approval of the Commission and the appropriate state public service Commission or other similar authority in the state in which the sale or delivery of power is made. Chelan County PUD states in its application that Commission approval of the Rocky Reach Project power sales contracts is in the public interest because the revenues from those contracts have been pledged to secure repayment of bonds that Chelan County PUD issued to finance construction of the Rocky Reach Project and that the contracts were essential to the development of the project.

Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Commission's Rules of practice and procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests and other comments, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Comments, protests, or motions to intervene must be filed by [the 30th day following publication of this notice in the Federal Register]; must bear in all capital letters the title ''COMMENTS,'' ''PROTESTS,'' or ''MOTION TO INTERVENE,'' as applicable, and ''Project No. 2145–029 and EL97–12–000,'' Send the filings (original and 14 copies) to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any filing must also be served upon each representative of the licensee specified in its application.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 96–31902 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2596–003 and Docket No. DI96–5–001]

Rochester Gas & Electric Corp.; Notice of Availability of Navigability Report for the Genesee River, Request for Comments, and Notice of Pending Jurisdictional Inquiry

December 11, 1996.

Rochester Gas & Electric Corp. (RG&E) filed an application for subsequent license to continue operation on its Station 160 Project. On February 20, 1996, RG&E filed a petition for Declaratory Order requesting that the Commission determine whether the project is subject to the Commission's licensing jurisdiction pursuant to Section 23(b)(1) of the Federal Power Act. (FPA).[1] The facility is located on the Genesee River, in Livingston County, New York.

As part of its review of RG&E's relicensing application, and the petition for Declaratory Order, staff is investigating the jurisdictional status of the project and has prepared a navigability report on the Genesee River.

Before making its decision, the staff will accept and consider comments on the navigability report. Comments may be filed no later than January 28, 1997.

Jurisdiction: Under Section 23(b)(1) of the FPA, a license is required for a hydroelectric project if it: (1) is located on navigable waters of the United States; (2) occupies lands or reservations of the United States; (3) uses surplus water on waterpower from a government dam; or (4) is located on a non-navigable Commerce Clause stream, affects the interests of interstate or foreign commerce, and has undergone construction or major modifications after August 26, 1935.[2]

Concurrent with the publication of this notice, all persons whose names appear on the official mailing list for Rochester Gas & Electric Corp.'s

[1] 16 USC 191a–825r.

[2] See Farmington River Power Co. v. Federal Power Commission, 455 F.2d 86 (2d Cir. 1972)

relicensing proceedings and its petition for Declaratory Order will receive a copy of the navigability report. Additional copies are available for review in the Public Reference Branch, Room 2A, of the Commission's offices at 888 First Street, N.E., Washington, D.C. 20426. Comments should be filed within 45 days of the above date and should reference Project No. 2596–003 and Docket No. DI96–5–001.

Comments on the navigability report should be filed with Lois D. Cashell, Secretary, Federal Energy Regulatory Commission 888 N. Capitol St., N.E., Washington, D.C. 20426. Comments should be filed by January 28, 1997. For further information, please contact Etta Foster at (202) 219–2679.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 96–31903 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–123–000]

Southern Natural Gas Company; Notice of Request Under Blanket Authorization

December 11, 1996.

Take notice that on November 25, 1996, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202–2563, filed in the above docket, a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act for authorization to relocate certain delivery point facilities including metering and appurtenant facilities where it serves Mississippi Valley Gas Company (MVG). Such relocation is proposed to be performed by Southern under Southern's blanket certificate issued in Docket No. CP82–406–000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Southern proposes to relocate the existing meter at its existing Clayton Village Delivery Point which is currently located at the end of MVG's 2″ Clayton Village Line. It stated that Southern proposes to relocate the facilities to a site at or near Mile Post 7.500 on Southern's 6-inch Starkville Lateral Line in Oktibbeha County, Mississippi. The estimated cost of the relocation of the delivery point facilities is approximately $3,500. The new location will be more accessible to Southern's general operations in this area of its system.

Southern states that it will continue to transport gas to Clayton Village Delivery Point pursuant to its Rate Schedule FT and its Rate Schedule IT. MVG does not propose to add or change any transportation demand to its firm service as a result of the relocation of the delivery point. Southern states that the installation of the proposed facilities will have no adverse impact on its peak day deliveries or firm requirements.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (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 therefor, the proposed activity is deemed to be authorized effective on 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. 96–31900 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–625–000, et al.]

Central Vermont Public Service Corporation, et al.; Electric Rate and Corporate Regulation Filings

December 11, 1996.

Take notice that the following filings have been made with the Commission:

1. Central Vermont Public Service Corporation

[Docket No. ER97–625–000]

Take notice that on November 27, 1996, Central Vermont Public Service Corporation (CVPS), tendered for filing the Forecast 1997 Cost Report required under Paragraph Q–2 on Original Sheet No. 19 of the Rate Schedule FERC No. 135 (RS–2 rate schedule) under which CVPS sells electric power to Connecticut Valley Electric Company Inc. (Customer). CVPS states that the Cost Report reflects changes to the RS–2 rate schedule which were approved by the Commission's June 6, 1989 order in Docket No. ER88–456–000.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

2. Central Vermont Public Service Corporation

[Docket No. ER97–626–000]

Take notice that on November 27, 1996, Central Vermont Public Service Corporation (CVPS), tendered for filing the Forecast 1997 Cost Report required under Article 2.3 on Second Revised Sheet No. 18 of FERC Electric Tariff, Original Volume No. 3, of CVPS under which CVPS provides transmission and distribution service to the following Customers:

Vermont Electric Cooperative, Inc.
Lyndonville Electric Department
Village of Ludlow Electric Light Department
Village of Johnson Water and Light Department
Village of Hyde Park Water and Light Department
Rochester Electric Light and Power Company
Woodsville Fire District Water and Light Department

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

3. United Illuminating Company

[Docket No. ER97–627–000]

Take notice that on November 26, 1996, The United Illuminating Company (UI) submitted for informational purposes all individual Purchase Agreements executed under UI's Wholesale Electric Sales Tariff, FERC Electric Tariff, Original Volume No. 2 during the six-month period of May 1, 1996 to October 31, 1996.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

4. Jersey Central Power & Light Company; Metropolitan Edison Company; Pennsylvania Electric Company

[Docket No. ER97–628–000]

Take notice that on November 26, 1996, GPU Service, Inc. (GPU), on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (jointly referred to as GPU Energy), filed Service Agreements between GPU and Atlantic Electric, Delmarva Power & Light Company, Heartland Energy Services, Inc., New England Power Company, and The Power Company of America, LP. (Transmission Customers). These Service Agreements specify that the Transmission Customers have agreed to the rates, terms and conditions of the GPU Companies' open access transmission tariff filed on July 9, 1996 in Docket No. OA96–114–000.

GPU requests a waiver of the Commission's notice requirements for

good cause shown and an effective date of November 13, 1996, for these Service Agreements. GPU has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania and on the Transmission Customers.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

5. Jersey Central Power & Light Company; Metropolitan Edison Company; Pennsylvania Electric Company

[Docket No. ER97–630–000]

Take notice that on November 27, 1996, GPU Service, Inc. (GPU), on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (GPU Energy), filed an executed Service Agreement between GPU and Equitable Power Services Company (EPSC), dated November 25, 1996. This Service Agreement specifies that EPSC has agreed to the rates, terms and conditions of GPU Energy's Operating Capacity and/or Energy Sales Tariff (Sales Tariff) designated as FERC Electric Tariff, Original Volume No. 1. The Sales Tariff was accepted by the Commission by letter order issued on February 1, 1995 in *Jersey Central Power & Light Co., Metropolitan Edison Co. and Pennsylvania Electric Co.*, Docket No. ER95–276–000 and allows GPU and EPSC to enter into separately scheduled transactions under which GPU Energy will make available for sale, surplus operating capacity and/or energy at negotiated rates that are no higher than GPU Energy's cost of service.

GPU requests a waiver of the Commission's notice requirements for good cause shown and an effective date of November 25, 1996 for the Service Agreement.

GPU has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

6. The Montana Power Company

[Docket No. ER97–631–000]

Take notice that on November 27, 1996, The Montana Power Company (Montana), tendered for filing with the Federal Energy Regulatory Commission pursuant to 18 CFR 35.13 Non-Firm Point-to-Point Transmission Service Agreements with Idaho Power Company (IPC); PacifiCorp; Portland General Electric Company (PGE); Puget Sound Power & Light Company (Puget); Sierra Pacific Power Company (Sierra); The Washington Water Power Company (WWP) and Western Area Power Administration, Rocky Mountain Region (WAPA) under FERC Electric Tariff, Original Volume No. 5 (Open Access Transmission Tariff). Only the PacifiCorp Service Agreement is signed, while the remainder are filed unsigned.

A copy of the filing was served upon IPC, PacifiCorp, PGE, Puget, Sierra, WWP and WAPA.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

7. New England Power Company

[Docket No. ER97–632–000]

Take notice that on November 27, 1996, New England Power Company, tendered for filing Service Agreements under its FERC Electric Tariff, Original Volume No. 9 for Network Integration Transmission Service to the following customers: Massachusetts Land Bank, Massachusetts Bay Transportation Authority, Norwood (Mass.) Municipal Light Department, Groveland (Mass.) Municipal Light Department and Merrimac (Mass.) Municipal Light Department.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

8. Midwest Energy, Inc.

[Docket No. ER97–633–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, an Interconnect Agreement between Midwest and the City of LaCrosse, previously designated as Rate Schedule FERC No. 2. Midwest requests that such rate schedule retain its original effective date of January 12, 1995.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

9. Midwest Energy, Inc.

[Docket No. ER97–634–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, an Interconnect Agreement between Midwest and the City of Colby, previously designated as Rate Schedule FERC No. 5. Midwest requests that such rate schedule retain its original effective date of January 12, 1995.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

10. Midwest Energy, Inc.

[Docket No. ER97–635–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, an Interconnect Agreement between Midwest and the City of Oakley, previously designated as Rate Schedule FERC No. 4. Midwest requests that such rate schedule retain its original effective date of January 12, 1995.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

11. Midwest Energy, Inc.

[Docket No. ER97–636–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, an Interconnect Agreement between Midwest and the City of Hill City, previously designated as Rate Schedule FERC No. 1. Midwest requests that such rate schedule retain its original effective date of January 12, 1995.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

12. Midwest Energy, Inc.

[Docket No. ER97–637–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, an Interconnect Agreement between Midwest and the City of Jetmore, previously designated as Rate Schedule FERC No. 5. Midwest requests that such rate schedule retain its original effective date of January 12, 1995.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

13. Midwest Energy, Inc.

[Docket No. ER97–638–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest),

tendered for filing with the Federal Energy Regulatory Commission, and amended Electric Energy Service Agreement between Midwest and the City of Colby, Kansas.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interested parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

14. Midwest Energy, Inc.

[Docket No. ER97–639–000]

Take notice that on November 27, 1996, Midwest Energy, Inc. (Midwest), tendered for filing with the Federal Energy Regulatory Commission, and Amended Energy Purchase Agreement for Market Based Sales Service between Midwest and the City of Colby, Kansas.

Midwest states that it is serving copies of the instant filing to its customers, State Commissions and other interest parties.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

15. Sierra Pacific Power Company

[Docket No. ER97–640–000]

Take notice that on November 27, 1996, Sierra Pacific Power Company (Sierra), tendered for filing, pursuant to § 205 of the Federal Power Act and 18 CFR Part 35, an energy rate adjustment pursuant to an Electric Service Agreement between Sierra and City of Fallon (Fallon).

Sierra asserts that the filing has been served on Fallon and on the regulatory commissions of Nevada and California.

Comment date: December 26, 1996, in accordance with Standard Paragraph E at the end of this notice.

16. Sierra Pacific Power Company

[Docket No. ER97–641–000]

Take notice that on November 27, 1996, Sierra Pacific Power Company (Sierra), tendered for filing, pursuant to § 205 of the Federal Power Act and 18 CFR Part 35, an energy rate adjustment pursuant to an Electric Service Agreement between Sierra and Truckee Donner Public Utility District (District).

Sierra asserts that the filing has been served on District and on the regulatory commissions of Nevada and California.

Comment date: December 26, 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 said 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. 96–31952 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–P

[Project Nos. 1417 and 1835]

Central Nebraska Public Power and Irrigation District, Nebraska Public Power District; Notice of Public Meeting

December 11, 1996.

On December 17, 1996, at 9:00 a.m., the Commission staff will meet with the Fish and Wildlife Service (FWS) to discuss the draft biological opinion on endangered and threatened species for relicensing the above projects. The meeting will be held in the first floor auditorium of the USDA Forest Service Regional Office, 740 Simms Street, Lakewood, Colorado.

The meeting is part of formal consultation under Section 7 of the Endangered Species Act. The purpose of the meeting is to permit Commission staff and FWS staff to discuss technical differences in the draft biological opinion, which was provided to the Commission on December 4, 1996, and the Commission's analysis in its biological assessment. Although only the FWS and the Commission are consulting parties under Section 7, the license applicants may participate in the meeting. Other parties to the proceeding are invited to attend, and may be afforded a limited opportunity to participate, consistent with the purpose and schedule of the meeting.

Because we do not anticipate holding any additional meetings, formal consultation will be completed at the close of this meeting. Under 50 CFR 402.14(e) , the FWS is required to provide its final biological opinion to the Commission within 45 days after completion of formal consultation. Therefore, we expect to receive a final biological opinion by January 31, 1997.

The meeting will be recorded by a stenographer, and all meeting statements (oral and written) will become part of the Commission's public record of this proceeding. Anyone wishing to receive a copy of the transcripts of the meeting may contact Ann Riley & Associates by calling (202) 293–3950, or writing to 1612 K Street, NW, Suite 300, Washington, DC 20006. Individuals presenting statements at the meeting will be asked to sign in before the meeting starts and to identify themselves for the record.

Anyone wishing to comment in writing on the meeting must do so no later than January 10, 1997. Comments should be addressed to: Lois D. Cashell, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

Reference should be clearly made to: the Kingsley Dam (Project No. 1417) and North Platte/Keystone Diversion Dam (Project No. 1835).

For further information, please contact Frankie Green at (202) 501–7704.

Lois D. Cashell,

Secretary.

[FR Doc. 96–31899 Filed 12–16–96; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5666–7]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Emergency Planning and Community Right-to-Know Act (EPCRA) Emergency Planning and Release Notification Requirements (EPCRA Sections 302, 303, 304)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Emergency Planning and Release Notification Requirements (EPCRA sections 302, 303, 304), OMB #2050–0092, EPA ICR #1395.03, expiring 01/31/97. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 16, 1997.

FOR FURTHER INFORMATION OR A COPY CALL: Sandy Farmer at EPA, (202) 260–2740, and refer to EPA ICR No. 1395.03.

SUPPLEMENTARY INFORMATION:

Title: Emergency Planning and Release Notification Requirements (EPCRA sections 302, 303, 304), (OMB #2050–0092, EPA ICR #1395.03) expiring 01/31/97. This is an extension of a currently approved ICR.

Abstract: EPCRA established broad emergency planning and facility reporting requirements. Section 302 (40 CFR 355.30) requires facilities where an extremely hazardous substance (EHS) is present in an amount at or in excess of the threshold planning quantity (TPQ) to notify the State Emergency Response Commission (SERC) by May 17, 1987. This activity has been completed; the section 302 costs and burden hours for this ICR, therefore, reflect only the estimate of cost and burden incurred by facilities newly regulated during years 1996 through 1999.

Section 303 (40 CFR 355.30) requires local emergency planning committees (LEPCs) to prepare local emergency plans. Facilities subject to section 302 are required to provide information for the development and implementation of these local emergency plans.

Section 304 (40 CFR 355.40) requires facilities to report to SERCs and LEPCs releases of EHSs and hazardous substances in excess of reportable quantities established by EPA. In addition, these facilities must provide written follow-up information on the release, its impacts, and any actions taken in response to the release.

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. The Federal Register Notice required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on September 30, 1996 (61 FR 51107). One comment was received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 20.75 hours per response for newly regulated facilities and 11.5 hours for existing facilities. Burden means 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; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing 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.

Respondents/Affected Entities: Business or other for profit; State, Local or Tribal Governments.

Estimated Number of Respondents: 106,400.

Frequency of Response: one per year.

Estimated Total Annual Hour Burden: 965,982 hours.

Estimated Total Annualized Cost Burden: $21,363,000.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1395.03 and OMB Control No. 2050–0092 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OPPE Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460
and
Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: December 11, 1996.

Joseph Retzer,

Director, Regulatory Information Division.

[FR Doc. 96–31970 Filed 12–16–96; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5666–6]

Notice of Proposed Prospective Purchaser Agreement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: Notice is hereby given that a proposed prospective purchaser agreement associated with the Rutledge Property Superfund Site in York County, South Carolina was executed by the Agency on October 6, 1996, and executed by the Department of Justice on December 3, 1996. This Agreement is subject to final approval after the comment period. The Prospective Purchaser Agreement would resolve certain potential EPA claims under sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act of 1986 (''CERCLA''), against Cherry St. Associates, L.L.C., the prospective purchaser (''the Purchaser''). The settlement would require the Purchaser to exercise due care at the Site with respect to any existing contamination and to provide EPA access to the Site.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement. The Agency's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region 4, 100 Alabama St., S.W., Atlanta, Georgia 30303.

DATES: Comments must be submitted on or before January 16, 1997.

AVAILABILITY: The proposed settlement is available for public inspection at the U.S. Environmental Protection Agency, Region 4, 100 Alabama St., S.W., Atlanta, Georgia 30303. A copy of the proposed agreement may be obtained from Sherri Panabaker, Remedial Project Manager, U.S. Environmental Protection Agency, Region 4, 100 Alabama St., S.W., Atlanta, Georgia 30303. Comments should reference the ''Rutledge Property Superfund Site Prospective Purchaser Agreement'' and should be forwarded to Sherri Panabaker, Remedial Project Manager, at the above address.

FOR FURTHER INFORMATION CONTACT:

Kevin T. Beswick, Assistant Regional Counsel, United States Environmental Protection Agency, Region 4, 100 Alabama St., S.W., Atlanta, Georgia 30303, (404) 562–9580, or by E-Mail at ''beswick.kevin@epamail.epa.gov''.

A. Stanley Meiburg,

Acting Regional Administrator.

[FR Doc. 96–31969 Filed 12–16–96; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collections Submitted to OMB for Review and Approval

December 10, 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 Commission's 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.

DATES: Written comments should be submitted on or before January 16, 1997. 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, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to dconway@fcc.gov and Timothy Fain, OMB Desk Officer, 10236 NEOB 725 17th Street, N.W., Washington, DC 20503 or fain__t@a1.eop.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Dorothy Conway at 202–418–0217 or via internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0250.
Title: Section 74.784 Rebroadcasts.
Form No.: N/A.
Type of Review: Reinstatement of a previously approved collection.
Respondents: Businesses or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.
Number of Respondents: 2,163.
Estimated Time Per Response: 1 hour.
Total Annual Burden: 2,163 hours.
Needs and Uses: Section 74.784 requires licensees of low power television and TV translator stations to notify the FCC when rebroadcasting programs or signals of another station and to certify that written consent has been obtained from originating stations. Data used by FCC staff to ensure compliance with Section 325(a) of the Communications Act, as amended.

OMB Approval Number: 3060–0249.
Title: Section 74.781 Station Records.
Form No.: N/A.
Type of Review: Reinstatement of a previously approved collection.
Respondents: Businesses or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.
Number of Respondents: 6,556.
Estimated Time Per Response: 0.25–0.75 hour.
Total Annual Burden: 5,081 hours.
Needs and Uses: Section 74.781 requires licensees of low power television, TV translator and TV booster stations to maintain adequate records. The records are used by FCC staff in field inspections to assure that reasonable measures are taken to maintain proper station operations and to assure compliance with the Commission's Rules.

Federal Communications Commission.
William F. Caton,
Acting Secretary.

[FR Doc. 96–31885 Filed 12–16–96; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

Fee for Services to Support FEMA's Offsite Radiological Emergency Preparedness (REP) Program

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: In accordance with FEMA's final rule, 44 CFR part 354, published in the Federal Register on March 24, 1995, (60 FR 15628), FEMA has established a fiscal year (FY) 1997 hourly rate of $29.64 for assessing and collecting fees from Nuclear Regulatory Commission (NRC) licensees for services provided by FEMA personnel for FEMA's REP Program.

DATES: This user fee hourly rate is effective for FY 1997 (October 1, 1996 to September 30, 1997).

FOR FURTHER INFORMATION CONTACT: O. Megs Hepler, III, Division Director, Exercise Division, Preparedness, Training and Exercise Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2867.

SUPPLEMENTARY INFORMATION: As authorized by Public Law 104–204 (110 Stat. 2916), an hourly user fee rate of $29.64 will be charged to NRC licensees of commercial nuclear power plants for all site-specific biennial exercise related services provided by FEMA personnel for FEMA's REP Program under final rule, 44 CFR Part 354, published in the Federal Register on March 24, 1995, (60 FR 15628). All funds collected under this rule will be deposited in the U.S. Department of the Treasury to offset appropriated funds obligated by FEMA for its REP Program.

The hourly rate is established on the basis of the methodology set forth in the referenced FEMA final rule at 44 CFR 354.4(b), ''Determination of site-specific biennial exercise related component for FEMA personnel,'' and will be used to assess and collect fees for site specific biennial exercise related services rendered by FEMA personnel.

The establishment of this hourly rate is intended only to address charges to NRC licenses for service provided by FEMA personnel, not FEMA charges for services provided by FEMA personnel under the flat fee component referenced in the final rule at 44 CFR 354.4(d) and for services provided by FEMA contractors, which will be charged under the final rule at 44 CFR 354.4(c) and (d) for the recovery of appropriated funds obligated for the Emergency Management Planning and Assistance (EMPA) portion of FEMA's REP Program budget.

Dated: December 11, 1996.
Kay C. Goss,
Associate Director.

[FR Doc. 96–31996 Filed 12–16–96; 8:45 am]
BILLING CODE 6718–20–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, N.W., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission,

Washington, DC 20573, within 10 days of the date this notice appears in the Federal Register.

Agreement No.: 224–200587–001.

Title: Puerto Rico Authorities/ Intership Army Terminal Agreement.

Parties:

Puerto Rico Ports Authority
International Shipping Agency, Inc (''Intership'')

Synopsis: The proposed Agreement is modified to resolve outstanding issues and disputes (Docket No. 94–25), and to clarify the parties' respective rights and obligations. The Agreement also grants Intership an additional five-year extension option, and makes various other substantive and non-substantive changes.

Agreement No.: 224–201010.

Title: Philadelphia Regional Port Authority/Tioga Fruit Terminal Inc. Lease Agreement.

Parties:

Philadelphia Regional Port Authority
Tioga Fruit Terminal Inc.

Synopsis: Under the proposed lease agreement, Tioga will have exclusive use of certain buildings and yard space as well as berthing and other rights. The initial term of the lease runs through May 31, 1997, with an option to extend for two additional months.

Agreement No.: 224–201011.

Title: Piers M/N/O Terminal Lease and Development Agreement

Parties:

Puerto Rico Ports Authority
International Shipping Agency, Inc (''Intership'')

Synopsis: The proposed Agreement provides for the lease to, and development and operation as a modern public marine terminal by, Intership of specified areas at the eastern end of the Puerto Nuevo Marine Terminal area in the Port of San Juan, which areas will be delivered and developed in phases as they become available. The Agreement also provides for five-year development period, followed by an initial 15-year operating term, with two five-year extension options.

Dated: December 12, 1996.

By order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 96–31965 Filed 12–16–96; 8:45 am]

BILLING CODE 6730–01–M

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

AIT Ocean Systems, Inc., 210 Mittel Drive, Wood Dale, IL 60191; Officers: Steven Leturno, President; Daniel Lisowski, Vice President

Paramount Transportation Service, Inc., 2258 Lazy River Drive, Charleston, SC 29414, Officers: Gregg W. Aselage, President; Robyn G. Aselage, Vice President

International Transport Services, 18747 Sheldon Road, Cleveland, OH 44130; Officer: Lawrence P. Yankow, President

Dated: December 12, 1996.

Joseph C. Polking,

Secretary.

[FR Doc. 96–31964 Filed 12–16–96; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MEDIATION AND CONCILIATION SERVICE

Labor-Management Cooperation Program; Application Solicitation for Labor-Management Committees FY 1997

A. Introduction

The following is the final solicitation for the Fiscal Year (FY) 1997 cycle of the Labor-Management Cooperation Program as it pertains to the support of labor-management committees. These guidelines represent the continuing efforts of the Federal Mediation and Conciliation Service to implement the provisions of the Labor-Management Cooperation Act of 1978 which was initially implemented in FY81. The Act generally authorizes FMCS to provide assistance in the establishment and operation of plant, area, public sector, and industry-wide labor-management committees which:

(A) Have been organized jointly by employers and labor organizations representing employees in that plant, area, government agency, or industry; and

(B) Are established for the purpose of improving labor-management relationships, job security, and organizational effectiveness; enhancing economic development; or involving workers in decisions affecting their jobs, including improving communication with respect to subjects of mutual interest and concern.

The Program Description and other sections that follow, as well as a separately published FMCS Financial and Administrative Grants Manual, make up the basic guidelines, criteria, and program elements a potential applicant for assistance under this program must know in order to develop an application for funding consideration for either a plant, area-wide, industry, or public sector labor-management committee. Directions for obtaining an application kit and an optional video tape may be found in Section H. A copy of the Labor-Management Cooperation Act of 1978, included in the application kit, should be reviewed in conjunction with this solicitation.

B. Program Description

Objectives

The Labor-Management Cooperation Act of 1978 identifies the following seven general areas for which financial assistance would be appropriate:

(1) To improve communication between representatives of labor and management;

(2) To provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;

(3) To assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;

(4) To study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area, or industry;

(5) To enhance the involvement of workers in making decisions that affect their working lives;

(6) To expand and improve working relationships between workers and managers; and

(7) To encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employers through Federal assistance in the formation and operation of labor-management committees.

The primary objective of this program is to encourage and support the establishment and operation of joint labor-management committees to carry out specific objectives that meet the forementioned general criteria. The term ''labor'' refers to employees represented by a labor organization and covered by a formal collective bargaining agreement. These committees may be found at either the plant (worksite), areas, industry, or public sector levels.

A plant or worksite committee is generally characterized as restricted to one or more organizational or productive units operated by a single employer. An area committee is generally composed of multiple employers of diverse industries as well as multiple labor unions operating within and focusing upon city, county, contiguous multicounty, or statewide jurisdictions. An industry committee generally consists of a collection of agencies or enterprises and related labor union(s) producing a common product or service in the private sector on a local, state, regional, or nationwide level. A public sector committee consists either of government employees and managers in one or more units of a local or state government, managers and employees of public institutions of higher education, or of employees and managers of public elementary and secondary schools. Those employees must be covered by a formal collective bargaining agreement or other enforceable labor-management agreement. In deciding whether an application is for an area or industry committee, consideration should be given to the above definitions as well as to the focus of the committee.

In FY 1997, competition will be open to plant, area, private industry, and public sector committees. Public Sector committees will be divided into the sub-categories for scoring purposes. One sub-category will consist of committees representing state/local units of government and public institutions of higher education. The second sub-category will consist of public elementary and secondary schools.

Special consideration will be given to committee applications involving innovative or unique efforts. All application budget requests should focus directly on supporting the committee. Applicants should avoid seeking funds for activities that are clearly available under other Federal programs (e.g., job training, mediation of contract disputes, etc.).

Required Program Elements

1. Problem Statement

The application, which should have numbered pages, must discuss in detail what specific problem(s) face the plant, area, government, or industry and its workforce that will be addressed by the committee. Applicants must document the problem(s) using as much relevant data as possible and discuss the full range of impacts these problem(s) could have or are having on the plant, government, area, or industry. An industrial or economic profile of the area and workforce might prove useful in explaining the problem(s). This section basically discusses *WHY* the effort is needed.

2. Results or Benefits Expected

By using specific goals and objectives, the application must discuss in detail *WHAT* the labor-management committee as a demonstration effort will accomplish during the life of the grant. Applications that offer to provide objectives *after* a grant is awarded will receive little or no credit in this area. While a goal of ''improving communication between employers and employees'' may suffice as one over-all goal of a project, the objectives must, whenever possible, be expressed in specific and measurable terms. Applicants should focus on the impacts or changes that the committee's efforts will have. Existing committees should focus on *expansion* efforts/results expected from FMCS funding. The goals, objectives, and projected impacts will become the foundation for future monitoring and evaluation efforts.

3. Approach

This section of the application specifies *HOW* the goals and objectives will be accomplished. At a minimum, the following elements must be included in all grant applications:

(a) A discussion of the strategy the committee will employ to accomplish its goals and objectives;

(b) A listing, by name and title, of all existing or proposed members of the labor-management committee. The application should also offer a rationale for the selection of the committee members (e.g., members represent 70% of the area or plant workforce).

(c) A discussion of the number, type, and role of all committee staff persons. Include proposed position descriptions for all staff that will have to be hired as well as resumes for staff already on board;

(d) In addressing the proposed approach, applicants must also present their justification as to why Federal funds are needed to implement the proposed approach;

(e) A statement of how often the committee will meet (we require meetings at least every other month) as well as any plans to form subordinate committees for particular purposes; and

(f) For applications from existing committees (i.e., in existence at least 12 months prior to the submission deadline), a discussion of past efforts and accomplishments and how they would integrate with the proposed expanded effort.

4. Major Milestones

This section must include an implementation plan that indicates what major steps, operating activities, and objectives will be accomplished as well as a timetable for *WHEN* they will be finished. A milestone chart must be included that indicates what specific accomplishments (process and impact) will be completed by month over the life of the grant using September 15, 1997, as the start date. The accomplishment of these tasks and objectives, as well as problems and delays therein, will serve as the basis for quarterly progress reports to FMCS.

5. Evaluation

Applicants must provide for either an external evaluation or an internal assessment of the project's success in meeting its goals and objectives. An evaluation plan must be developed which briefly discusses what basic questions or issues the assessment will examine and what baseline data the committee staff already has or will gather for the assessment. This section should be written with the application's own goals and objectives clearly in mind and the impacts or changes that the effort is expected to cause.

6. Letters of Commitment

Applications must include current letters of commitment from all proposed or existing committee participants and chairpersons. These letters should indicate that the participants support the application and will attend scheduled committee meetings. A blanket letter signed by a committee chairperson or other official on behalf of all members is not acceptable. We encourage the use of individual letters submitted on company or union letterhead represented by the individual. The letters should match the names provided under Section 3(b).

7. Other Requirements

Applicants are also responsible for the following:

(a) The submission of data indicating approximately how many employees will be covered or represented through the labor-management committee;

(b) From existing committees, a copy of the existing staffing levels, a copy of the by-laws, a breakout of annual operating costs and identification of all sources and levels of current financial support;

(c) A detailed budget narrative based on policies and procedures contained in the FMCS Financial and Administrative Grants Manual;

(d) An assurance that the labor-management committee will not

interfere with any collective bargaining agreements; and

(e) An assurance that committee meetings will be held at least every other month and that written minutes of all committee meetings will be prepared and made available to FMCS.

Selection Criteria

The following criteria will be used in the scoring and selection of applications for award:

(1) The extent to which the application has clearly identified the problems and justified the needs that the proposed project will address.

(2) The degree to which appropriate and measurable goals and objectives have been developed to address the problems/needs of the area. For existing committees, the extent to which the committee will focus on expanded efforts.

(3) The feasibility of the approach proposed to attain the goals and objectives of the project and the perceived likelihood of accomplishing the intended project results. This section will also address the degree of the innovativeness or uniqueness of the proposed effort.

(4) The appropriateness of committee membership and the degree of commitment of these individuals to the goals of the application as indicated in the letters of support.

(5) The feasibility and thoroughness of the implementation plan in specifying major milestones and target dates.

(6) The cost effectiveness and fiscal soundness of the application's budget request, as well as the application's feasibility vis-a-vis its goals and approach.

(7) The overall feasibility of the proposed project in light of all of the information presented for consideration; and

(8) The value to the government of the application in light of the overall objectives of the Labor-Management Cooperation Act of 1978. This includes such factors as innovativeness, site location, cost, and other qualities that impact upon an applicant's value in encouraging the labor-management committee concept.

C. Eligibility

Eligible grantees include state and local units of government, labor-management committees (or a labor union, management association, or company on behalf of a committee that will be created through the grant), and certain third party private non-profit entities on behalf of one or more committees to be created through the grant. Federal government agencies and their employees are not eligible.

Third-party private, non-profit entities which can document that a major purpose or function of their organization has been the improvement of labor relations are eligible to apply. However, all funding must be directed to the functioning of the labor-management committee, and all requirements under Part B must be followed. Applications from third-party entities must document particularly strong support and participation from all labor and management parties with whom the applicant will be working. Applications from third-parties which do not directly support the operation of a new or expanded committee will not be deemed eligible, nor will applications signed by entities such as law firms or other third parties failing to meet the above criteria.

Applicants who received funding under this program in the past for committee operations are generally not eligible to apply. The only exceptions apply to third-party grantees who seek funds on behalf of an entirely different committee.

D. Allocations

The total FY 1997 appropriation for this program is $1.5 million, of which at least $725,000 will be available competively for new applicants. Specific funding levels will not be established for each type of committee. Instead, the review process will be conducted in such a manner that at least two awards will be made in each category (plant, industry, public sector, and area), providing that FMCS determines that at least two outstanding applications exist in each category. After these applications are selected for award, the remaining applications will be considered according to merit without regard to category. A maximum of $400,000 of the $1.5 million appropriation has been reserved for the limited continuation of FY95-funded grantees.

In addition to the competitive process identified in the preceding paragraph, FMCS will set aside a sum not to exceed thirty percent of its non-reserved appropriation to be awarded on a non-competitive basis. These funds will be used only to support industry-specific national-scope initiatives and/or regional industry models with high potential for widespread replication that have been solicited by the Director of the Service.

FMCS reserves the right to retain up to an additional five percent of the FY97 appropriation to contract for program support purposes (such as evaluation) other than administration. In addition, $25,000 has been reserved to support the Ninth National Labor-Management Conference which will be held in Chicago on April 7–9, 1998.

E. Dollar Range and Length of Grants and Continuation Policy

Awards to continue and expand existing labor-management committees (i.e., in existence 12 months prior to the submission deadline) will be for a period of 12 months. If successful progress is made during this initial budget period and if sufficient appropriations for expansion and continuation projects are available, these grants may be continued for a limited time at a 40 percent cash match ratio. Initial awards to establish new labor-management committees (i.e., not yet established or in existence less than 12 months prior to the submission deadline), will be for a period of 18 months. If successful progress is made during this initial budget period and if sufficient appropriations for expansion and continuation projects are available, these grants may be continued for a limited time at a 40 percent cash match ratio. The dollar range of awards is as follows:

- Up to $35,000 in FMCS funds per annum for existing in-plant or single department public sector applicants;
- Up to $50,000 over 18 months for new in-plant committee or single department public sector applicants;
- Up to $75,000 in FMCS funds per annum for existing area, industry and multi-department public sector committees applicants;
- Up to $100,000 per 18-month period for new area, industry, and multi-department public sector committee applicants.

Applicants are reminded that these figures represent maximum Federal funds only. If total costs to accomplish the objectives of the application exceed the maximum allowable Federal funding level and its required grantee match, applicants may supplement these funds through voluntary contributions from other sources. Applicants are also strongly encouraged to consult with their local or regional FMCS field offices to determine what kinds of training may be available at no cost before budgeting for such training in their applications. A list of our field leadership team and their phone numbers is included in the application kit.

F. Match Requirements and Cost Allowability

Applicants for new labor-management committees must provide at least 10

percent of the total allowable project costs. Applicants for existing committees must provide at least 25 percent of the total allowable project costs. All matching funds may come from state or local government sources or private sector contributions, but may generally not include other Federal funds. Funds generated by grant-supported efforts are considered ''project income,'' and may not be used for matching purposes.

It will be the policy of this program to reject all requests for indirect or overhead costs as well as ''in-kind'' match contributions. In addition, grant funds must not be used to supplant private or local/state government funds currently spent for these purposes. Funding requests from existing committees should focus entirely on the costs associated with the expansion efforts. Also, under no circumstances may business or labor officials participating on a labor-management committee be compensated out of grant funds for their *time* spent at committee meetings or *time* spent in training sessions. Applicants generally will not be allowed to claim all or a portion of *existing* full-time staff time as an expense or match contribution.

For a more complete discussion of cost allowability, applicants are encouraged to consult the FY97 FMCS Financial and Administrative Grants Manual which will be included in the application kit.

G. Application Submission and Review Process

Applications should be signed by *both* a labor and management representative and be postmarked no later than April 19, 1997. No application or supplementary materials can be accepted after the deadline. It is the responsibility of the applicant to ensure that the application is correctly postmarked by the U.S. Postal Service or other carrier. An original application containing numbered pages, plus *three* copies, should be addressed to the Federal Mediation and Conciliation Service, Labor-Management Program Services, 2100 K Street, NW, Washington, D.C. 20427. FMCS will not consider videotaped submissions or video attachments to submissions.

After the deadline has passed, all eligible applications will be reviewed and scored initially by one or more Customer Review Boards. The Board(s) will recommend selected applications for further funding consideration. The Director, Labor-Management Program Services, will finalize the scoring and selection process. The individual listed as contact person in Item 6 on the application form will generally be the only person with whom FMCS will communicate during the application review process.

All FY97 grant applicants will be notified of results and all grant awards will be made before September 15, 1997. Applications submitted after the April 19 deadline date or that fail to adhere to eligibility or other major requirements will be administratively rejected by the Director, Labor-Management Program Services.

H. Contact

Individuals wishing to apply for funding under this program should contact the Federal Mediation and Conciliation Service as soon as possible to obtain an application kit. These kits and additional information or clarification can be obtained free of charge by contacting Karen Pierce or Linda Stubbs, Federal Mediation and Conciliation Service, Labor-Management Program Services, 2100 K Street, NW, Washington, DC 20427; or by calling 202–606–8181.

An optional video tape, entitled ''How to Apply for a Grant From FMCS'', is also available. The tape, however, will only be sent out after we receive a specific *written* request for the video.

John Calhoun Wells,

Director, Federal Mediation and Conciliation Service.

[FR Doc. 96–31916 Filed 12–16–96; 8:45 am]

BILLING CODE 6732–01–M

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act, including whether the acquisition of the nonbanking company can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices'' (12 U.S.C. 1843). Any request for a hearing must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 11, 1997.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Mid-America Bankshares, Inc., Baldwin City, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of State Bank of Esbon, Esbon, Kansas.

Board of Governors of the Federal Reserve System, December 11, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–31906 Filed 12-16-96; 8:45 am]

BILLING CODE 6210-01-F

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: Approximately 11:30 a.m., Friday, December 20, 1996, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 13, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–32065 Filed 12–13–96; 10:27 am]

BILLING CODE 6210–01–P

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:00 a.m., Friday, December 20, 1996.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

Because of its routine nature, no discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Publication for comment of proposed revisions to Regulation B (Equal Credit Opportunity) to implement amendments to the Equal Credit Opportunity Act regarding ''self-testing.''

Discussion Agenda

2. Proposal to increase the limitation on the amount of revenue derived from underwriting and dealing in bank-ineligible securities by section 20 subsidiaries of bank holding companies (proposed earlier for public comment; Docket No. R–0841).

3. Proposed amendment to Regulation B (Equal Credit Opportunity) regarding data collection on all types of credit (proposed earlier for public comment; Docket No. R–0876).

4. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: December 13, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–32066 Filed 12–13–96; 10:27 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Institute for Occupational Safety and Health; Request for Comments on the Proposed NIOSH Document on Guidelines for Protecting the Safety and Health of Health Care Workers

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services.

ACTION: Request for comments.

SUMMARY: NIOSH requests comments concerning the updating of the 1988 NIOSH document, Guidelines for Protecting the Safety and Health of Health Care Workers (NIOSH Publication No. 88–119 [1]).

DATES: Written comments to this notice should be submitted to Diane Manning, NIOSH Docket Office, 4676 Columbia Parkway, Mailstop C–34, Cincinnati, Ohio 45226. Comments or data may be submitted on the following topics (but are not limited to these): (1) Target audience, (2) format, (3) content, and (4) methods of distribution. Comments must be received on or before February 18, 1997. Comments may also be faxed to Diane Manning at (513) 533–8285 or submitted by email to: dmm2@NIOSDT1.em.cdc.gov as WordPerfect 5.0, 5.1/5.2, 6.0/6.1, or ASCII files.

FOR FURTHER INFORMATION CONTACT: Technical information may be obtained from John J. Whalen, NIOSH, CDC, 4676 Columbia Parkway, Mailstop C–14, Cincinnati, Ohio 45226, telephone (513) 533–8270.

SUPPLEMENTARY INFORMATION: Pursuant to Sections 20 and 22 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 669 and 671), NIOSH is authorized to gather information and develop recommendations for improving occupational safety and health.

More than 8 million health care workers are employed in the United States, and they constitute about 6 percent of the entire workforce. These workers represent many different occupations and are found in a wide variety of work settings.

Since health care workers have very diverse functions and duties, they are exposed to many hazards. These hazards include radiation, toxic chemicals, biological agents, ergonomic stressors, violence, stress, and physical hazards such as heat and noise.

Few workplaces are as complex as hospitals, where more than 50 percent of health care workers are employed. The number and types of hazards in hospitals are extremely large. For example, maintenance workers may be exposed to solvents, asbestos, and electrical hazards. Housekeepers are exposed to detergents and disinfectants that can cause skin rashes and eye and throat irritation. Also, housekeepers may be exposed to infectious diseases such as hepatitis or acquired immunodeficiency syndrome (AIDS) from hypodermic needles that have not been properly discarded. Nurses confront such potential hazards as exposure to infectious diseases and toxic substances, back injuries, radiation exposure, and stress.

In 1988, NIOSH published the Guidelines for Protecting the Safety and Health of Health Care Workers. However, since that time, knowledge concerning these hazards has increased, and additional recommendations have been made. For example, CDC recommendations for protecting health care workers from tuberculosis and AIDS have changed significantly, as have NIOSH recommendations concerning relevant respiratory protection.

NIOSH is aware that a number of directions can be taken to update the document; therefore, a draft document outline and list of issues have been prepared by CDC to ascertain the appropriateness of the proposed document content and format. NIOSH is soliciting comments on the document outline provided below:

I. Document Outline

Foreword
Abstract
Contents
Abbreviations
Acknowledgments
Introduction

[1] This publication (NTIS Publication No.PB–89–148621) is available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, telephone (703) 487–4650.

Overview of Health Care Industry
Overview of Hazards
Development of Occupational Safety and Health Programs
  Administrative support
  Employee involvement
  Health and safety committee
  Multidisciplinary team approach
  Medical surveillance program
  Rehabilitation
  Legal and ethical considerations
  Americans with Disabilities Act (ADA)
  Worksite analysis
  Literature review
  Identification of hazard categories
  Worksite survey
  Hazard analysis
  Exposure monitoring (biological and environmental)
  Safety and health training
  Program review and evaluation
  Development of emergency plans
Hazards
  Hazardous agents
  Biological agents
  Chemical agents
  Disinfectants and sterilants
  Antibiotics
  Hormones
  Antineoplastics
  Waste anesthetic gases
  Latex (allergy)
  Aerosolized medications (e.g., ribavirin)
  Hazardous waste
  Physical hazards
  Compressed gases and chemicals (toxic, reactive, corrosive, or flammable properties)
  Extreme temperatures (e.g., burns caused by cryogenic compounds such as dry ice or liquid nitrogen, or burns caused by the use of autoclaves or incinerators for sterilization)
  Mechanical (e.g., lacerations, punctures, and abrasions)
  Electrical
  Radiation (ionizing and nonionizing)
  Noise
  Violence
  Slips and falls
  Ergonomic hazards
  Lifting (strains or back injuries)
  Standing (for long periods of time)
  Poor lighting (eye strain)
  Psychological hazards
  Job specialization
  Discrimination
  Ergonomic factors
  Technological changes
  Work schedules (e.g., shift work, leave policies)
  Downsizing
  Violence
  Staff/patient ratios and occupational mix

Each of the major hazard categories identified above will be divided into the following subsections:

a. Explanation of the hazard

b. Occupations at risk

c. Locations in the health care facility where the hazard may occur

d. Discussion of relevant regulations

e. Discussion of controls that are specific for the hazard that will not otherwise be covered in the general control technology chapter

f. Additional resources (e.g., relevant literature, World Wide Web (www) sites).

Control Technology—General

Directory of Occupational Safety and Health Information for Health Care Workers

Appendices

a. Publications relevant to controlling infectious agents in the health care environment

b. Occupational hazards by location

c. Chemicals encountered in selected health care occupations

d. Annotated bibliography

Index

II. Issues

The draft outline provided above assumes that each chapter or section of the updated document will be developed by an expert in the area. Many of these experts will come from CDC but outside experts will also be utilized. To ensure that the information in the document is appropriate and reaches the target audiences, there are several issues which should be considered by commentors:

a. The 1988 Guidelines discussed only hazards associated with hospitals (not other health care settings such as nursing homes or drug treatment centers). It is assumed that information that is relevant for hospitals is also relevant for other health care facilities. The issue is whether information (e.g., reports of hazards) about health care facilities other than hospitals should be included in the revised guidelines, if available.

b. The draft format is based on the type of hazard (e.g., physical, ergonomic, and chemical). The issue is whether this is the best approach or if another format (e.g., presenting hazards by job task or occupation) would be better. Another issue involving the format structure is whether suggested chapters should be deleted or additional chapters included.

c. The development of small documents for different health care settings (e.g., biomedical laboratory, nursing home, home care, etc.) or occupations (e.g., nursing aids, radiological technicians, pharmacists) would be useful. The issue is whether or not these smaller documents should be done in place of one larger, all inclusive document as outlined above or in addition to this document.

d. The potential users of the health care worker guidelines include occupational physicians, administrators of health care facilities, nurses, engineers, nursing aides, safety professionals, industrial hygienists, and safety and health committees. The issue is whether the language and content should be targeted to specific occupations.

e. Information and recommendations applicable to controlling hazards in the health care industry change on a regular basis. There are a number of mechanisms that can be utilized to update this information such as providing ''updates'' on a website (e.g., as a subsection of the Institute's www site on the internet) and/or providing the information on a CD-ROM that is updated on a regular basis. The issue is what is the best mechanism(s) for reaching each intended audience(s).

Dated: December 2, 1996.

William E. Halperin,

Acting Director, National Institute for Occupational Safety and Health Centers for Disease Control and Prevention (CDC)

[FR Doc. 96–31949 Filed 12–16–96; 8:45 am]

BILLING CODE 4163–19–P

Food and Drug Administration

[Docket No. 96M–0471]

Bartels Prognostics, Inc.; Premarket Approval of Bartels ChemoResponse Assay

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Bartels Prognostics, Inc., Issaquah, WA, for premarket approval, under the Federal Food, Drug, and Cosmetic Act (the act), of Bartels ChemoResponse Assay. After reviewing the recommendation of the Microbiology Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of August 1, 1996, of the approval of the application.

DATES: Petitions for administrative review by January 16, 1997.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Sharon L. Hansen, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1293.

SUPPLEMENTARY INFORMATION: On November 23, 1994, Bartels Prognostics, Inc., Issaquah, WA 98027, submitted to CDRH an application for premarket approval of Bartels ChemoResponse Assay. The device is an in vitro diagnostic device intended for use to determine resistance to 5-Fluorouracil (5–FU) of cells isolated from breast tumors and is indicated for use to assist physicians in determining if 5–FU is an ineffective treatment for relapsed breast cancer patients.

On May 1, 1995, the Microbiology Devices Panel of the Medical Devices Advisory Committee, an FDA advisory committee, reviewed and recommended approval of the application. On August 1, 1996, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

Opportunity for Administrative Review

Section 515(d)(3) of the act (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act, for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under 21 CFR part 12 of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under 21 CFR 10.33(b). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the Federal Register. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before January 16, 1997 file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: October 24, 1996.

Joseph A. Levitt,

Deputy Director for Regulations Policy, Center for Devices and Radiological Health.

[FR Doc. 96–31934 Filed 12–16–96; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96M–0350]

Roche Molecular Systems, Inc.; Premarket Approval of Roche Amplicor HIV–1 Monitor Test

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Roche Molecular Systems, Inc., Somerville, NJ, for premarket approval, under the Federal Food, Drug, and Cosmetic Act (the act), of the Roche Amplicor HIV–1 Monitor Test. After reviewing the recommendation of the Blood Products Advisory Committee (BPAC), FDA's Center for Biologics Evaluation and Research (CBER) notified the applicant, by letter of June 3, 1996, of the approval of the application.

DATES: Petitions for administrative review by January 16, 1997.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Sukza Hwangbo, Center for Biologics Evaluation and Research (HFM–380), 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–3524.

SUPPLEMENTARY INFORMATION: On November 3, 1995, Roche Molecular Systems, Inc., Summerville, NJ 08876–3771, submitted to CBER an application for premarket approval of the Roche Amplicor HIV–1 Monitor Test. The device is intended to quantitate human immunodeficiency virus Type 1 (HIV–1) ribonucleic acid (RNA) in human plasma and is to be used in conjunction with clinical presentation and other laboratory markers as an indicator of HIV–1 disease prognosis. The Amplicor HIV–1 Monitor Test is based on the following processes: (1) Reverse transcriptase (RT) of target HIV–1 RNA to generate complimentary deoxyribonucleic acid (cDNA); (2) polymerase chain reaction (PCR) amplification of target cDNA; (3) hybridization of PCR amplified cDNA to specific oligonucleotide probes; and (4) detection of the probe-cDNA complex by colorimetric means. The device is not intended to be used as a HIV–1 screening test, or as a diagnostic test to confirm the presence of HIV infection.

On March 21, 1996, the premarket approval application (PMA) was referred to BPAC, an FDA advisory committee, for its recommendation regarding the use of the Amplicor HIV–1 Monitor Test to assist in disease prognosis, monitoring therapy, and patient management. From data presented by FDA, BPAC determined the test to be capable of precise and accurate measurement of HIV–1 RNA in samples of human plasma. BPAC recommended that the Amplicor HIV–1 Monitor Test was acceptable for use in the prognosis of HIV disease in specific populations, e.g., patients with CD4 positive cells of a predefined level. BPAC stated that they viewed therapy monitoring and patient management as being closely related, nonseparable issues and that sufficient clinical studies had not been performed to demonstrate the utility of the Amplicor HIV–1 Monitor Test for such uses. BPAC recommended that further postmarket surveillance studies could be conducted to determine whether the Amplicor HIV–1 Monitor Test could be validated for uses other than prognosis, i.e., therapy monitoring and patient management. CBER considered the BPAC recommendations and opinions when conducting its review of the PMA for the Amplicor HIV–1 Monitor Test. On June 3, 1996, CBER approved the application by a letter to the applicant from the Director, Office of Blood Research and Review, CBER.

The June 3, 1996, application approval letter restated postapproval conditions previously agreed to by Roche Molecular Systems, Inc., in a May 31, 1996, letter to FDA, whereby Roche Molecular Systems, Inc., will: (1) Perform postapproval studies to correlate measurements made with the Amplicor HIV–1 Monitor Test with

clinical endpoints; (2) train laboratory personnel in the use of the Amplicor HIV–1 Monitor Test at Roche Diagnostics corporate headquarters training facility and at customers' facilities to include discussions of the basic principles of PCR nucleic acid amplification, the design and maintenance of a nucleic acid amplification laboratory, management of workflow, equipment maintenance, and trouble shooting techniques; (3) provide the agency with lot release test results for the first three commercial lots of the Amplicor HIV–1 Monitor Test, submit lot release data for every third lot for a period of 12 months postapproval, and comply with agency determinations regarding the need for submissions of lot release data beyond the 1-year postapproval period; and (4) develop and provide physician and patient educational materials to include information on HIV infection, acquired immune deficiency syndrome (AIDS), anti-viral treatment modalities, viral load testing, the Amplicor HIV–1 Monitor Test, and a statement that the clinical significance of HIV–1 RNA measurements has not been fully established and that studies are in progress to determine the role of HIV RNA measurements.

A summary of the safety and effectiveness data on which CBER based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

Opportunity for Administrative Review

Section 515(d)(3) of the act (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act, for administrative review of CBER's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative practices and procedures regulations or a review of the application and CBER's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the Federal Register. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before January 16, 1997, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Biologics Evaluation and Research (21 CFR 5.53).

Dated: November 26, 1996.

Kathryn C. Zoon,

Director, Center for Biologics Evaluation and Research.

[FR Doc. 96–31935 Filed 12–16–96; 8:45 am]

BILLING CODE 4160–01–F

Health Care Financing Administration

[HCFA–R–38]

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Revision of a currently approved collection; *Title of Information Collection:* Conditions of Participation for Rural Health Clinics, 42 CFR 491.9 Subpart A; *Form No.:* HCFA–R–38; *Use:* This information is needed to determine if rural health clinics meet the requirements for approval for Medicare participation. *Frequency:* Other (Initial application for Medicare); *Affected Public:* Individuals or Households; Business or other for profit; Not for profit institutions; Farms; Federal Government; and State, Local or Tribal Government; *Number of Respondents:* 3,076; *Total Annual Hours:* 10,642.

To obtain copies of the supporting statement for the proposed paperwork collections referenced above, access HCFA's WEB SITE ADDRESS at http://www.hcfa.gov/regs/prdact95.htm, or to obtain the supporting statement and any related forms, E-mail your request, including your address and phone number, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Financial and Human Resources, Management Analysis and Planning Staff, Attention: Louis Blank, Room C2–26–17, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Date: December 9, 1996.

Edwin J. Glatzel,

Director, Management Analysis and Planning Staff, Office of Financial and Human Resources.

[FR Doc. 96–31907 Filed 12–16–96; 8:45 am]

BILLING CODE 4120–03–P

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

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 Health Resources and Services Administration (HRSA) will publish periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the

HRSA Reports Clearance Officer on (301) 443–1129.

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 or other forms of information technology.

Proposed Project

Grants for Hospital Construction and Modernization—Federal Right of Recovery and Waiver of Recovery (42 CFR 124, Subpart H) (OMB No. 0915–0099)—Extension, no change—The regulation known as ''Federal Right of Recovery and Waiver of Recovery'', provides a means for the Federal Government to recover grant funds and a method of calculating interest when a grant-assisted facility under Title VI and XVI is sold or leased, or there is a change in use of the facility. It also allows for a waiver of the right of recovery under certain circumstances. Facilities are required to provide written notice to the Federal Government when such a change occurs, and to provide copies of sales contracts, lease agreements, estimates of current assets and liabilities, value of equipment, expected value of land on the new owner's books and remaining depreciation for all fixed assets involved in the transactions, and other information and documents pertinent to the change of status.

Estimates of Annualized Hour Burden

Regulation	Number of respondents	Responses per respondent	Hours per response	Total burden hours
124.704 (b) and 707	20	1	3	60

Send comments to Patricia Royston, HRSA Reports Clearance Officer, Room 14–36, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: December 11, 1996.

J. Henry Montes,

Associate Administrator for Policy Coordination.

[FR Doc. 96–31933 Filed 12–15–96; 8:45 am]

BILLING CODE 4160–15–P

Office of Inspector General

Program Exclusions: November 1996

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions.

During the month of November 1996, the HHS Office of Inspector General imposed exclusions in the cases set forth below. When an exclusion is imposed, no program payment is made to anyone for any items or services (other than an emergency item or service not provided in a hospital emergency room) furnished, ordered or prescribed by an excluded party under the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs. In addition, no program payment is made to any business or facility, e.g., a hospital, that submits bills for payment for items or services provided by an excluded party. Program beneficiaries remain free to decide for themselves whether they will continue to use the services of an excluded party even though no program payments will be made for items and services provided by that excluded party. The exclusions have national effect and also apply to all Executive Branch procurement and non-procurement programs and activities.

Subject, city, state	Effective date
PROGRAM-RELATED CONVICTIONS	
BRENNER-JONES, BARBARA, PHOENIX, AZ	12/09/96
CIMINELLO, ROBERT, COLUMBUS, OH	12/11/96
DELOWE, SARAH ELAINE, GOODYEAR, AZ	12/09/96
GIBSON, BUFORD JR., PALOS VERDES, CA	12/09/96
HANSEN, JOSEPH M., LOGAN, UT	12/11/96
HARRIS, SHIRLEY, LEMMON, SD	12/11/96
HEARD, NOVELLA, SOUTHFIELD, MI	12/11/96
HERB, GREGORY W., SAN JOSE, CA	12/12/96
IGNACIO, AZUCENA C., HONOLULU, HI	12/12/96
KIDD, FLOYD R., CORYDON, IN	12/11/96
KIRK, ARCHIE JAMES, REDONDO BEACH, CA	12/09/96
KUTSCH, EUGENE, ALBANY, OR	12/12/96
LAO, VINCENTE P., PITTSBURG, CA	12/12/96
LAYMAN, BOBBY D., EWA BEACH, HI	12/12/96
LONG, NAROEUN, SIGNAL HILL, CA	12/09/96
MACK, JOHN R., OSHKOSH, WI	12/11/96
MACK, RICHARD A., WAUPUN, WI	12/11/96
MOBLEY, CHARLES S., ZACHARY, LA	12/11/96
NELSON, SCOTT NEIL, ABILENE, TX	12/11/96
NEWBY, JEANETTE A., BOISE, ID	12/12/96
O'DELL, DENNIS WILLIAM, COSTA MESA, CA	12/09/96
PATTERSON, TERRY, SIOUX FALLS, SD	12/11/96
REVILLE, DONALD N., BORON, CA	12/09/96
SONGDEJ, NITIVADEE, ROWLAND HGTS, CA	12/09/96

Subject, city, state	Effective date
VALLS, DIANA L., SACRAMENTO, DA	12/09/96
VAN KEAHEY, JADE TINAMARIE, REDONDO BEACH, CA	12/09/96
PATIENT ABUSE/NEGLECT CONVICTIONS	
ALLEN, MELINDA, GURDON, AR	12/11/96
BAILEY, JUANITA JOHNSON, MINDEN, LA	12/11/96
CUTHBERT, ANDREE M., CANAL FULTON, OH	12/11/96
DAVIS, JAMES MICHAEL, FARMERS BRANCH, TX	12/11/96
GIBSON, JOHN W., JONESBORO, AR	12/11/96
HARDEN, NICOLE PLESHETTE, LONG BEACH, CA	12/09/96
HOLLAND, VERONICA A., RANDALLSTOWN, MD	12/11/96
LIGON, EUNICE, CINCINNATI OH	12/11/96
LUNZER, RICHARD G., ST PAUL, MN	12/11/96
MITTS, PAUL, JONESBORO, AR	12/11/96
NOLT, JULIA C., DALTON, OH	12/11/96
PRATER, JERALD D., EVERETT, WA	12/12/96
TRUDO, SHANE, SPEARFISH, SD	12/11/96
VANDEMORE, ADAM M., FAIRVIEW, SD	12/11/96
WILLIAMS, DANNY W., MANSURA, LA	12/11/96
ZIEGLER, GENE CHARLES, PHOENIX, AZ	12/09/96
CONVICTION FOR HEALTH CARE FRAUD	
DAHL, CAROLE ANN, TACOMA, WA	12/09/96
FANDINO, SENADOR V., SAN DIEGO, CA	12/09/96
GALPERIN, MURA, HUNTINGDON, PA	12/11/96
HOLIEN, KATJA DIETLINDE, SPOKANE, WA	12/09/96
MILLER, SABRYNA, HAYDEN LAKE, ID	12/09/96
TSAN, VICTOR, HOLLAND, PA	12/11/96
WATSON, SARAH E., UNION, ME	12/11/96
WILLIAMS, ANDRE L., ANN ARBOR, MI	12/11/96
LICENSE REVOCATION/SUSPENSION/SURRENDER	
BAGLIVIO, ROBIN, DOUGLASVILLE, PA	12/11/96
BLACKOWIAK, TIMOTHY J., FARIBAULT, MN	12/11/96
BUCUR, JOHN C., FAIRFAX, VA	12/11/96
CARROL, RAY, CIRCLEVILLE, OH	12/11/96
CARTER, HERBERT EUGENE, PHOENIX, AZ	12/09/96
CARUSO, ALYCE F., HOLDEN, MA	12/11/96
DOUCETTE, SUSAN, NASHUA, NH	12/11/96
FARBSTEIN, MARTIN E., GALENA, IL	12/11/96
FLAHERTY, MARY F., DORCHESTER, MA	12/11/96
FRONISTA, GEORGE R., DAYTON, OH	12/11/96
GUZZETTA, ROBERT V., CEDAR GROVE, WI	12/11/96
HLAD, LARISSA A., CARNEGIE, PA	12/11/96
JENKINS, VERN W., SPOKANE, WA	12/12/96
MUETZEL, MARLENE A., COTTAGE GROVE, MN	12/11/96
PITMAN, MELISSA, ESSEX, MA	12/11/96
POULIOT, CURTIS, INTERNATIONAL FALLS, MN	12/11/96
RAHKOLA, BETHANY SUSAN, CRYSTAL, MN	12/11/96
RETHERFORD, PAMELA E., BURNSVILLE, MN	12/11/96
SITAR, MELANIE, TEWKSBURY, MA	12/11/96
WELCH, FREDERICK WILLIAM, CORNING, NY	12/11/96
ZUCKER, MARTIN L., SIOUX CITY, IA	12/11/96
FEDERAL/STATE EXCLUSION/SUSPENSION	
BEEM, MARY OSA, FILER, ID	12/12/96
CORBITT, CALVIN P., BRUNSWIDK, OH	12/11/96
JONES, META, AMERICAN FALLS, ID	12/12/96
MORTHLAND, SHIRLEY A., BOISE, ID	12/09/96
OWNED/CONTROLLED BY CONVICTED/EXCLUDED	
KEYSTONE MEDICAL PROPERTIES, LITTLE ROCK, AR	12/11/96
KIRTLEY EXTRA CARE INC., LANCER MEDICAL INC	12/11/96
LANCER MEDICAL INC., LITTLER MEDICAL INC	12/11/96
MEDICAL SUPPORT SERVICES INC., LITTLER ROCK, AR	12/11/96
MEDICO, GRAPEVINE, TX	12/11/96

Subject, city, state	Effective date
MOBLEY CHIROPRACTIC FAMILY, ZACHARY, LA	12/11/96
SOUTHWEST MEDICAL INC., LITTLER ROCK, AR	12/11/96
STACO MARKETING & SUPPLY INC., LITTLER ROCK, AR	12/11/96
DEFAULT ON HEAL LOAN	
AMAYA, ABRAHAM, LOS ALAMITOS, CA	12/09/96
AMUDOAGHAN, WALNETTE C., COUNTRY CLUB HILLS, IL	12/11/96
BRANVOLD, RONALD D., SUSANVILLE, CA	12/09/96
BUTTERFIELD, CATHY L. RICHARDS, BOISE, ID	12/09/96
CATRON, MARK W., CARTHAGE, MO	12/11/96
COLLIER, GEORGE R. JR., PONDERAY, ID	12/09/96
COMER, MICHAEL J., ELK GROVE, CA	12/09/96
CORTEZ, LINDA GUILLEN, CARMICHAEL, CA	12/09/96
DAVIS, PATRICIA M., STAMFORD, CT	12/11/96
EIMERS, JERRY L., MARYVILLE, MO	12/11/96
FICKEL, THEODORE E., SANTA BARBARA, CA	12/09/96
FOROUTANZAD, JOHN, LOS ANGELES, CA	12/09/96
FOX, RICHARD T., ARLINGTON, WA	12/09/96
HAMILTON, AARON J., RANCHO SANTA MARGARITA, CA	12/09/96
HEER, JOEL M., DUBUQUE, IA	12/11/96
KUTLER, MURRAY A., OMAHA, NE	12/11/96
LENTELL, BRIAN M., CLOVIS, CA	12/09/96
LIEN, DOUGLAS A., HOMER, AK	12/09/96
MACKEY, CYNTHIA K., MARINA DEL REY, CA	12/09/96
MCLAUGHLIN, ROBERT M., SUMMERSET, CA	12/09/96
MULLINS, MARILYN E., PLACENTIA, CA	12/12/96
NICHOLS, MARCUS F., CULVER CITY, CA	12/12/96
QUADLANDER, MICHAEL E., NEW BRAUNFELS, TX	12/11/96
ROYAL, DON C., NEWPORT BEACH, CA	12/12/96
SANDERS, THOMAS, KANSAS CITY, MO	12/11/96
SCHLATER, THEODORE L. III, LOS ANGELES, CA	12/09/96
SCHOW, KENNETH M., UNTINGTON BEACH, CA	12/09/96
SCINTA, MARK C., PHOENIX, AZ	12/09/96
SCOTT, BARBARA J. MILANES, NORTHRIDGE, CA	12/09/96
SHAW, MICHAEL G., INGLEWOOD, CA	12/09/96
SHOELEH, HOSSIEN M., COSTA MESA, CA	12/09/96
SIMON, GREG L., MURRIETA, CA	12/09/96
SMITH, CURTIS L., SPENCER, OK	12/11/96
SMULKER, EVIE L., LOS ANGELES, CA	12/09/96
SPARROW, CLEVELAND B. JR., PONTIAC, MI	12/11/96
STEWART, JEANNINE L., NEWPORT BEACH, CA	12/09/96
SUTTON, BRIAN L., MISSION VIEJO, CA	12/09/96
TALLEY, MICHAEL S., BELTON, MO	12/11/96
TAYLOR, DAVID G., BLUE SPRINGS, MO	12/11/96
VAN PATTEN, MERRILL D., MASA, AZ	12/09/96
VARDANIAN, MICHAEL A., BULLERTON, CA	12/09/96
VESSELS, STEVEN L., LOMA LINDA, CA	12/09/96
VORBECK, THERESA M., ST LOUIS, MO	12/11/96
WALLS-FENWICK, JAN D., SAN BERNARDINO, CA	12/09/96
WEBBER, BARRY R., BURBANK, CA	12/09/96
WILLIAMS, PAMELA A., BUENA PARK, CA	12/09/96
WILLIAMS, DAVID L., PASADENA, CA	12/09/96
WOIWOOD, DAVID V., W. DES MOINES, IA	12/11/96
WOLTER, CARL F., LOS ANGELES, CA	12/09/96
YOUNG, KERRY V., IDAHO FALLS, ID	12/09/96

Dated: December 6, 1996.

William M. Libercci,

Director, Health Care Administrative Sanctions, Office of Enforcement and Compliance.

[FR Doc. 96–31986 Filed 12–16–96; 8:45 am]

BILLING CODE 4154–04–P

National Institutes of Health

Submission for OMB Review; Comment Request; Women's Health and Aging Study—Telephone Follow-up

SUMMARY: Under the provisions of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the National Institute on Aging (NIA) of the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. A notice regarding this proposed information collection was previously published in the Federal Register on August 20, 1996, page 43064. The notice allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The NIH may not conduct or sponsor, and the respondent is not required to respond to, an information collection

that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

PROPOSED COLLECTION: *Title:* Women's Health and Aging Study—Telephone Follow-up. *Type of Information Collection Request*: Revision. *Need and Use of Information Collection*: This proposed study is designed to obtain additional data on women (previously examined in the Women's Health and Aging Study, OMB No. 0925–0376, expiration 8/31/97) through telephone interviews with participants or their proxies 1 and 2 years after their final in-home contacts. The Women's Health and Aging Study (WHAS) is a community-based prospective epidemiologic study whose goal is to study the causes and course of physical disability in the one-third most disabled women living in the community. The main objective of this additional data collection is to obtain information on disability and nursing home admission that will serve as end points in 5-year prospective analyses. This information will be a valuable addition to outcome data on death and hospital admissions that will be obtained through linkage with the National Death Index and the Health Care Financing Administration Medicare data base for this same period of time. The variables collected in the follow-up telephone assessments will provide important endpoints for a great many analyses that address the primary goal of the study, evaluating factors related to the progression of disability and need for long-term care. *Frequency of Response*: Once a year. *Affected Public*: Individuals or households. *Type of Respondents*: Women age 68 and older. *Estimated Number of Respondents*: 690; *Estimated Number of Responses per Respondent*: 2; *Average Burden Hours Per Response*: .33; *Estimated Total Annual Burden Hours Requested*: 326. The annualized cost to respondents is estimated at: $7,500. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

REQUEST FOR COMMENTS: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency'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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

DIRECT COMMENTS TO OMB: Written comments and/or suggestions regarding the item(s) contained in this notice especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, D.C. 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Jack Guralnik, Chief Epidemiology and Demography Office, Epidemiology, Demography, and Biometry Program, NIA, NIH, Gateway Building, Room 3C309, 7201 Wisconsin Avenue MSC 9205, Bethesda, MD 20892–9205, or call non-toll-free number (301) 496–1178 or E-mail your request, including your address to: <G48S@nih.gov>.

COMMENTS DUE DATE: Comments regarding this information collection are best assured of having their full effect if received on or before January 16, 1997.

Colleen Barros,

Executive Office, NIA.

[FR Doc. 96–31882 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

ADDRESS: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804 (telephone 301/496–7057; fax 301/402–0220). A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

4′- and 4′,4″-Substituted-3α(diphenylmethoxy)tropane Analogs As Cocaine Therapeutics

AH Newman, AC Allen, RH Kline, S. Izenwasser, JL Katz (NIDA)

Serial No. 08/667,024 filed 20 Jun 96 (claiming benefit of 60/000,378 filed 21 Jun 95)

Licensing Contact: Leopold J. Luberecki, Jr., 301/496–7735 ext. 223

The invention provides a series of 4′- and 4′,4″-substituted benztropine analogs that demonstrate high affinity binding (K_i<30 nM) to the dopamine transporter and bind selectively (>100-fold) over the other monoamine transporters. These compounds block dopamine reuptake *in vitro* and yet do not demonstrate a cocaine-like behavioral profile in animal models of psychomotor stimulant abuse. Structure-Activity Relationships suggest that these compounds interact at a binding domain that differs from that of cocaine at the dopamine transporter. The invention also describes cocaine analogs comprising N-substituted 2′,3′ and 3′,3″ and 3′,4″-analogs, which exhibit a cocaine-like behavioral profile. One of the compounds exhibits cocaine-like activity and anti-muscarinic receptor activity, which may improve its therapeutic utility. These compounds represent an unprecedented class of dopamine uptake inhibitors that may have potential as cocaine-abuse therapeutics, since they have neurochemical similarities to cocaine and yet do not appear to have abuse liability. Further, radiolabeled analogs will be suitable for imaging the dopamine transporter in mammalian brain using SPECT and PET and thus would be useful in the diagnoses and monitoring of neurodegenerative disorders involving the dopaminergic system (e.g., Parkinson's disease). In addition, the invention provides pharmaceutical compositions comprising an analog of the invention and a pharmaceutically acceptable carrier excipient. (portfolios: Central Nervous System—Therapeutics, psychotherapeutics, drug dependence; Central Nervous System—Therapeutics, neurological, antiparkinsonian; Central Nervous System—Diagnostics, in vivo)

Conjugate Vaccine For Nontypeable Haemophilus Influenzae

X–X Gu (NIDCD), C–M Tsai (CBER), DJ Lim (NIDCD), JB Robbins (NICHD)

Serial No. 60/016,020 filed 23 Apr 96

Licensing Contact: Elaine Gese, 301/496–7056 ext. 282

This invention is a vaccine for the prevention of disease caused by nontypeable *H. influenzae,* which causes 25–40% of otitis media cases (middle ear infections) in children and other respiratory tract diseases in humans. The emergence of antibiotic-resistant bacteria has caused concern that treatment of otitis media will become more problematic. This invention offers a new approach to managing otitis media. The vaccine is composed of lipooligosaccharide, isolated from the surface of strains of nontypeable *H. influenzae* and treated with hydrazine to remove esterified fatty acids, covalently conjugated to an immunogenci carrier, such as tetanus toxoid. The conjugates have been shown to be nontoxic by the limulus amebocyte assay, rabbit pyrogen test, and in a mouse lethal toxicity test. Antisera raised in rabbits immunized with the conjugate is bactericidal. (portfolio: Infectious Diseases—Vaccines, bacterial)

Materials And Methods for Detection and Treatment of Insulin Dependent Diabetes

NK Maclaren, AL Notkins, Q Li, MS Lan (NIDR)
Serial No. 08/514,213 filed 11 Aug 95
and
Serial No. 08/548,159 filed 25 Oct 95
Licensing Contact: J. Peter Kim, 301/496–7056 ext. 264

Insulin-dependent diabetes mellitus (IDDM) affects close to one million people in the United States. It is an autoimmune disease in which the immune system produces antibodies that attack the body's own insulin-manufacturing cells in the pancreas. Patients require daily injections of insulin to regulate blood sugar levels. The invention identified two proteins, named IA–2 and IA–2β, that are important markers for type I (juvenile, insulin-dependent) diabetes. IA–2/IA–2β, when used in diagnostic tests, recognized autoantibodies in 70 percent of IDDM patients. Combining IA–2/IA–2β with other known markers increased the level of identification to 90 percent of individuals with IDDM. Moreover, the presence of autoantibodies to IA–2/IA–2β in otherwise normal individuals was highly predictive in identifying those at risk of ultimately developing clinical disease. It is now possible to develop a rapid and effective test that can screen large populations for IDDM. In addition, IA–2/IA–2β are candidates for immune tolerance and prevention of disease development.

Compositions Comprising Vitamin F

C Weinberger, S Kitareewan (NIEHS)
Serial No. 60/003,443 filed 08 Sep 95;
PCT/US96/15205 filed 06 Sep 96
Licensing Contact: Carol Lavrich, 301/496–7056 ext. 287

This invention relates to a collection of potential fat-soluble vitamins that may coordinate animal metabolism and development. RXR is a nuclear receptor that plays a central role in cell signaling by heterodimerizing with receptors binding thyroid hormones, retinoids and vitamin D. The invention and others of its compositions can be characterized as likely physiological effectors that may represent essential components for human nutrition and cell growth. Thus, the invention suggests that it may coordinate cell physiology through RXR–dependent hormone signaling pathways.

Macrocyclic Chelates, And Methods of Use Thereof

OA Gansow, K Kumar (NCI)
Serial No. 08/140,714 filed 22 Oct 93
U.S. Patent 5,428,154 issued 27 Jul 95
Licensing Contact: Raphe Kantor, 301/496–7735 ext. 247

Substituted 1,4,7,10-tetraaza cyclododecane–N,N′, N″, N‴–tetraacetic acid (DOTA) has numerous desirable chelating qualities that make it useful for treating a number of cdellular disorders. Presently available chelating agents lack specificity for their intended targets or do not adequately bind the chelated metal ion. These substituted DOTAs have a strong affinity for a number of metal ions. They can also be linked to biomolecules to form systems for delivering the chelated metal ion, which can be radiolabeled, to specific sites within a cell or organelle. (portfolio: Cancer—Therapeutics, immunoconjugates, conjugate chemistry)

The Cloning of Perilipin Proteins

C Londos, AS Greenberg, AR Kimmel, JJ Egan (NIDDK)
Serial No. 08/132,649 filed 04 Oct 93
U.S. Patent 5,585,462 to issue 17 Dec 96
Licensing Contact: Ken Hemby, 301/496/7735 ext. 265

Perilipins are found at the surface of lipid storage droplets of adipocytes. Little is known about the molecules on the surface of lipid droplets that may be involved in lipid metabolism and trafficking. The present invention provides isolated nucleic acid sequences which encode a family of perilipin proteins as well as isolated, purified perilipin proteins. These are useful as markers for differentiation of true adipocyte cells from non-adipocyte cells which, as a result of pathophysiological conditions, assume adipocyte characteristics. (portfolio: Cancer—Research Materials)

Dated: December 6, 1996.

Barbara M. McGarey,

Deputy Director, Office of Technology Transfer.

[FR Doc. 96–31883 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute, Notice of Meeting

Notice is hereby given of the meeting of the National Cancer Institute Board of Scientific Advisors Prevention Working Group, January 30–31, 1997 at the Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, Virginia.

This meeting will be closed to the public on January 30–31, 1997 from 8:30 a.m. to approximately 10 p.m. each day for the discussion of confidential issues relating to the review, discussion and evaluation of individual programs and projects conducted by the NCI Prevention Program. These discussions will reveal confidential trade secrets or commercial property such as patentable material, and personal information including consideration of personnel qualifications and performance, the competence of individual investigators and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Information pertaining to the meeting may be obtained from Dr. Jack Gruber, Executive Secretary, National Cancer Institute Prevention Working Group, National Cancer Institute, 6130 Executive Blvd., EPN, Rm. 540, Bethesda, MD 20892 (301–496–9740).

Dated: December 10, 1996.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 96–31879 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institutes; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting of the National Cancer Institute Special Emphasis Panel (SEP):

Name of SEP: Cooperative Family Registry for Epidemiologic Studies of Colon Cancer
Date: January 9–10, 1997
Time: 9:00 am
Place: Executive Plaza North, Room G 6130 Executive Boulevard Bethesda, MD 20852
Contact Person: Lalita D. Palekar, Ph.D. Scientific Review Administrator National Cancer Institute, NIH Executive Plaza North,

Room 643 6130 Executive Boulevard, MSC 7405 Bethesda, MD 20892–7405 Telephone: 301/496–7575

Purpose/Agenda: To evaluate and review responses to RFA CA96–011, entitled Cooperative Family Registry for Epidemiologic Studies of Colon Cancer.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: December 10, 1996.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 96–31880 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institutes; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting of the National Cancer Institute Special Emphasis Panel (SEP):

Name of SEP: Neuropsychological Testing for Children and Adults with Chronic Medical Illness (Cancer and HIV–1 infection).

Date: January 8, 1997.

Time: 9:00 am.

Place: Executive Plaza North, Room H, 6130 Executive Boulevard, Bethesda, MD 20852.

Contact Person: Lalita D. Palekar, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH Executive Plaza North, Room 643, 6130 Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405, Telephone: 301/496–7575.

Purpose/Agenda: To evaluate and review responses to NO1 SC 71004–09.

The meeting will be closed in accordance with the provisions set forth in secs. 552(c)(4) and 552(c)(6), Title 5, U.S.C. Applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: December 10, 1996.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 96–31881 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting:

Committee Name: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel (Telephone Conference Call).

Date: December 27, 1996.

Time: 1:00 p.m.

Place: Natcher Building, Room 6AS–25F, National Institutes of Health, 45 Center Drive, Bethesda, Maryland 20892–6600.

Contact Person: Lakshmanan Sankaran, Ph.D., Scientific Review Administrator, Natcher Building, Room 6AS–25F, National Institutes of Health, 45 Center Drive, Bethesda, Maryland 20892–6600, Phone: 301–594–7799.

Agenda/Purpose: To review and evaluate a research grant application.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health)

Dated: December 11, 1996.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 96–31976 Filed 12–16–96; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–3967–N–03]

Notice of Proposed Information Collection for Public Comment

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: February 18, 1997.

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, SW, Room 4240, Washington, D.C. 20410–5000.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–0846, (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).

This 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: Public and Indian Housing—Economic Development and Supportive Services Program (EDSS).

OMB Control Number: 2577–0211.

Description of the need for the information and proposed use: The information is necessary so that applicants can apply and compete for funding opportunities. Under the program, grants will be provided to Public and Indian Housing Authorities (collectively HAs) to provide economic development and supportive services to assist public and Indian housing residents, the elderly and handicapped persons to become economically self-sufficient and to live independently.

Agency forms numbers, if applicable: N/A.

Members of affected public: State or Local Governments, Non-profit institutions.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 350 respondents, on occasion, 42 average hours per response, 14,212 hours for a total reporting burden.

In addition, this year the Department is combining the EDSS and Tenant Opportunity Program (TOP) NOFAs in one announcement for a number of reasons. With the recent passage of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the transformation of the former Aid to Families with Dependent children (AFDC) program to a state administered block grant program, it is imperative that the limited funding that the EDSS and TOP programs provide has the maximum effectiveness possible. The Department believes that it is in the best interests of public housing to encourage increased coordination between these two programs that share many similar goals. The Department also has concluded that it is more useful to potential applicants that HUD announce the NOFAs for the two programs simultaneously. Similarly, the information collection period for public comment for these two programs will also be combined.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 11, 1996.

MaryAnn Russ,

Deputy Assistant Secretary for Public and Assisted Housing Operations.

[FR Doc. 96–31983 Filed 12–16–96; 8:45 am]

BILLING CODE 4210–33–M

[Docket No. FR–4086–N–87]

Submission for OMB Review: Comment Request

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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 date: January 16, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 9, 1996.

David S. Cristy,

Acting Director, Information Resources Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: Fair Housing Initiatives Program Application.

Office: Fair Housing and Equal Opportunity.

OMB Approval Number: 2529–0033.

Description of the Need for the Information and its Proposed Use: The Fair Housing Initiatives Program will provide funds to public and private agencies involved in administering programs to prevent or eliminate discriminatory housing practices. The organizations will develop, implement, and administer programs enforcing the rights guaranteed by the Fair Housing Act.

Form Number: None.

Respondents: Not-For-Profit Institutions and State, Local, or Tribal Government.

Frequency of Submission: Annually, Quarterly, and Recordkeeping.

Reporting Burden

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Information collection	400		4		53		21,200
Quarterly report	70		4		12		3,360
Enforcement log	35		4		7		980
Final report	70		4		20		5,600
Recordkeeping	70		1		21		1,470

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Total estimated burden hours							32,610

Status: Extension, with changes.

Contact: Sherry Fobear, HUD, (202) 755–2215 x303; Joseph F. Lackey, Jr., OMB, (202) 395–7316.

[FR Doc. 96–31895 Filed 12–16–96; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. FR–3962–N–03]

Submission for OMB Review: Comment Request

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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 date:* January 16, 1997.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) the title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 9, 1996.

David S. Cristy,

Acting Director, Information Resources Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: HOME Investment Partnerships Program.

Office: Community Planning and Development.

OMB Approval Number: None.

Description of the Need for the Information and its Proposed Use: The information collection is required to assist HUD in evaluating eligible activities and projects when the participating jurisdiction chooses to refinance multifamily properties, establish locally 95% of the median area purchase price, or do a market analysis to support a presumption of affordability for a homebuyer's program.

Form Number: None.

Respondents: State, Local, or Tribal Government.

Frequency of Submission: On Occasion and Recordkeeping.

REPORTING BURDEN

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Information collection	275		1		8.27		2,275
Total Estimated burden hours							2,275

Status: New.

Contact: Mary Kolesar, HUD, (202) 708–2470 x4604; Joseph F. Lackey, Jr., OMB, (202) 395–7316.

[FR Doc. 96–31897 Filed 12–16–96; 8:45 am]

BILLING CODE 4210–01–M

[Docket No. FR–4037–N–03]

Announcement of Funding Awards for the Comprehensive Improvement Assistance Program—FY 1996

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Notice of Funding Availability (NOFA) for the Comprehensive Improvement Assistance Program (CIAP) for Fiscal Year 1996. The announcement contains the names and addresses of the

competition awardees and the amount of the awards.

FOR FURTHER INFORMATION CONTACT: William Flood, Director, Office of Capital Improvements, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4134, Washington, DC 20410, telephone (202) 708–1640. [This is not a toll-free number].

IHAs may contact Deborah M. LaLancette, Housing Management Director, National Office of Native American Programs, 1999 Broadway, Suite 3390, Denver, CO 80202, telephone (303) 675–1600. [This is not a toll-free number]. Hearing or speech impaired persons may use the Telecommunications Devices for the Deaf (TTY) by contacting the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Comprehensive Improvement Assistance Program is authorized by sec. 14, United States Housing Act of 1937 (42 U.S.C. 14371); Sec. 7(d) Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

The objective of the Comprehensive Improvement Assistance Program (CIAP) is to provide funds to improve the physical condition and upgrade the management and operation of existing Public and Indian Housing projects to assure that they continue to be available to serve low-income families.

On April 18, 1996 (61 FR 16928), the Department published a NOFA in the Federal Register informing Public Housing Agencies and Indian Housing Authorities that own or operate fewer than 250 units of the availability of FY 1996 CIAP funding. The FY 1996 awards announced in this Notice were selected for funding consistent with the provisions of the NOFA.

The Catalog of Federal Domestic Assistance number for the CIAP Program is 14.852.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is hereby publishing, in this notice, the names and addresses of the PHAs and IHAs that received funding awards under the FY 1996 CIAP NOFA, and the amount of the awards. This information is set forth in Appendix A to this notice.

Dated: December 11, 1996.

MaryAnne M. Russ,

Deputy Assistant Secretary for Public and Assisted Housing Operations.

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Aberdeen Housing and Redevelopment Commission, 2222 3rd Ave SE., Aberdeen, SD 57401–0000	$57420
Adams Met.Ha, 900 Cemetery St., Manchester, OH 45144–0000	306971
Afton Housing Commission, P.O. Box 365, Afton, IA 50830–0365	108200
Agra Housing Authority, P.O. Box 137, Agra, KS 67621	60000
Ahoskie Housing Authority, P.O. Box 1195, Roanoke Rapids, NC 27870	135000
Ainsworth Housing Authority, P.O. Box 153, Ainsworth, NE 69210	43600
Aitkin County Hra, 215 Third Street Southeast, Aitkin, MN 56431–1799	138000
Akwesasne Indian Hsg Auth, Route 37, Credit Union Building, Hogansburg, NY 13655–0000	56392
Alameda County Hsg Auth, 22941 Atherton Street, Hayward, CA 94541–6633	10000
Albert Lea Hra, 221 E. Clark Street, Albert Lea, MN 56007–2421	185000
Albertville Housing Authority, P.O. Box 1126, Albertville, AL 35950–0000	783600
Albia Low Rent Housing Agency, City Hall 120 South A Street, Albia, IA 52531–0000	91000
Albion Hgs Comm, 507 West, Broadwell P.O. Box 62, Albion, MI 49224–0000	573580
Albion Housing Authority, 827 W. Columbia, Albion, NE 68620–1575	55000
Algoma Housing Authority, 145 Grand View Court, Algoma, WI 54201–1158	242800
Algonac Housing Commission, 1205 St. Clair River, Algonac, MI 48001–1471	658000
Alice Housing Authority, P.O. Box 1407, Alice, TX 78333–0000	100000
Allegany County Housing Authority, P.O. Box 250, Ellerslie, MD 21529–0250	202600
Allen Mha 160001003 A/C #, 600 South Main St., 041201198 Lima, OH 45804–0000	213000
Alliance Housing Authority, 300 South Potash #27, Alliance, NE 69301–0000	84800
Alma Housing Authority, P.O. Box 1036, Alma, NE 68920–1036	53950
Altoona Housing Authority, P.O. Box 733, Boaz, AL 35957	283369
Amherst, Housing Authority, 33 Kellogg Avenue, Amherst, MA 01002–0000	66000
Anderson Ha, 528 West, 11th St., Anderson, IN 46016–0000	404475
Andrews Housing Authority, 101–C Whitaker St., Andrews, NC 28901	150000
Ansley Housing Authority, Box 415, Ansley, NE 68814–0303	16500
Apache, 211 N. Country Club Rd., Anadarko, OK 73005	1108470
Area Xv Multi-County Housing Agency, 417 North College, P.O. Box 276, Agency, IA 52530–0000	211560
Arkadelphia Ha, 670 South 6th, Arkadelphia, AR 71923–0000	363105
Ashland Ha, 319 Chapple Avenue, Ashland, WI 54806–0000	217230
Ashley Public Housing, Third Floor Mcintosh Cty Court, Ashley, ND 58413–0000	16050
Atchison Housing Authority, 103 South 7th Street Mall Tow, Atchison, KS 66002–0000	755000
Athens Met Ha, 490 Richland Avenue, Athens, OH 45701–0000	238000
Auburn Hsg Authority, P.O. Box 3037, 143 Mill St., Auburn, ME 04212–0000	220000
Augusta Housing Authority, 620 Osage St., Augusta, KS 67010–1245	112000
Aurora Housing Authority, 1505 P St., #1003, Aurora, NE 68818–1366	150000
Bad River, P.O. Box 57, Odanah, WI 54861	380656
Baldwin Housing Commission, P.O. Box 337, Baldwin, MI 49304–0337	233000
Bar Harbor Housing Authority, 15 Eagle Lake Road, Bar Harbor, ME 04609–0000	200000
Barnstable Hsg Authority, 146 South St., Hyannis, MA 02601–0000	51500
Bath Housing Authority, 125 Congress Ave., Bath, ME 04530–0000	200000
Bay City Housing Authority, 3012 Sycamore, Bay City, TX 77414–0000	220000
Bayard Housing Authority, P.O. Box L, Bayard, NE 69334–0685	54500
Bedford City Ha, 1305 K Street, Bedford, IN 47421–0000	671504

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Beemer Housing Authority, 400 Blaine Street, Beemer, NE 68716	31250
Belding Housing Commission, 41 Belhaven Belding, MI 48809–0000	405523
Bellevue Housing Authority, 8214 Armstrong Circle Omaha, NE 68147–0000	97200
Belmont Housing Authority, P.O. Box 984, Belmont, NC 28012	116233
Benkelman Housing Authority, P.O. Box 319, Benkelman, NE 69021	53800
Bennington Housing Authority, Willow Road, Bennington, VT 05201–0000	45000
Benson Housing Authority, P.O. Box 26, Benson, NC 27504	361593
Berks County Housing Authority, 1803 Butter Lane, Reading, PA 19606–0000	440000
Beverly Housing Authority, P.O. Box 503, Beverly, MA 01915–0000	508000
Beverly Housing Authority, 100 Magnolia St., Beverly, NJ 08010–1158	775500
Bird City Housing, P.O. Box 46, Bird City, KS 67731–0046	107000
Blair County Housing Authority, P.O. Box 167, Hollidaysburg, PA 16648–0000	222367
Blue Hill Housing Authority, P.O. Box 476, Blue Hill, NE 68930	60000
Bois Forte, P.O. Box 12, Nett Lake, MN 55772	738890
Boonville Housing Authority, 506 Powell Court, Boonville, MO 65233–0000	46900
Borough Of Edgewater Ha, 300 Undercliff Avenue, Edgewater, NJ 07002–0000	383000
Boscobel Housing Authority, 213 Wisconsin Avenue, Boscobel, WI 53805–1043	37800
Boyne City Hsg Cm, 829 South Park Street, Boyne City, MI 49712–0000	364900
Brevard Housing Authority, 69 W. Morgan St., Brevard, NC 28712	200000
Brewer Housing Authority, One Colonial Circle, Brewer, ME 04412–0000	193000
Brillion Housing Authority, P.O. Box 40, Brillion, WI 54110–0040	312465
Broken Bow Housing Authority, P.O. Box 177, Broken Bow, OK 74728–0000	160425
Bronson Housing Commission, P.O. Box 33, Bronson, MI 49028	497700
Bruce Housing Authority, P.O. Box 65, Bruce, WI 54819–0065	38000
Brunswick Housing Authority, P.O. Box A, Brunswick, ME 04011–0000	105000
Burke Housing And Redevelopment Commission, Box 417, Burke, SD 57523	176660
Burrillville Housing Authority, Ashton Court Chapel Street, Harrisville, RI 02830–0000	50000
Burwell Housing Authority, P.O. Box 490, Burwell, NE 68823–0490	50000
Cabool Housing Authority, 301 West, First, Street, Mountain Grove, MO 65711–0000	121132
Calhoun County Housing Authority, 502 Main St., Hardin, IL 62047	9630
Calumet Housing Commission, One Park Avenue, Calumet, MI 49913	429900
Calvert County Housing Authority, 420 West, Dares Beach Road, Prince Frederick, MD 20678–0000	170716
Cambridge Housing Authority, P.O. Box 484, Cambridge, NE 69022	54000
Cambridge Metropolitan Hsg. Auth., P.O. Box 744, Cambridge, OH 43725–0744	197000
Cameron Housing Authority, 902 Cedar Circle Dr., Cameron, MO 64429–1136	450000
Campo, 36206 Church Road, Campo, CA 91906	530000
Canton Housing Authority, 37 Riverside Dr., Canton, NY 13617–1046	1013700
Cape May Housing Authority, 639 Lafayette St., Cape May, NJ 08204–1518	560000
Carbon County Housing Authority, 215 South Third Street, Lehighton, PA 18235–0000	114995
Carrizo Springs Hsg Authority, 207 N 4th Street, Carrizo Springs, TX 78834–0000	450000
Carroll County Housing Authority, 525 3rd St., Savanna, IL 61074	130367
Cascade Inter-Tribal H. A., 2286 Community Plaza, Sedro Woolley, WA 98284–0000	663310
Cass County Housing Authority, P.O. Box 92, Beardstown, IL 62618–0092	299600
Catskill Housing Authority, P.O. Box 362, Hill St., Catskill, NY 12414–0362	843250
Cawker City Housing Authority, 125 Sunrise Dr., Cawker City, KS 67430–9791	56700
Center Housing Authority, 1600 Sweetgum Trail, Center, TX 75935–0000	180158
Central Cal, 5108 E. Clinton Way, Suite 108, Fresno, Ca 93727	130000
Central Iowa Regional Housing Auth, 1111 Ninth Street, Suite 240, Des Moines, IA 50314–0000	132050
Chaffee Housing Authority, 904 S 2nd P.O. Box 215, Chaffee, MO 63740–0000	445830
Chehalis Tribal, P.O. Box 314, Oakville, WA 98568	479541
Chemehuevi, P.O. Box 1889, 1980 Valley Mesa Rd., Chemehuevi Valley, CA 92363	665000
Chetek Housing Authority, 801 Stout Street, Chetek, WI 54728–0566	151848
Chilton Housing Authority, 312 Bonk Street, Chilton, WI 53014–1166	356600
Chipley Housing Authority, P.O. Box 388, Chipley, FL 32428–0388	119000
City Of Alameda Housing Authority, 701 Atlantic Avenue, Alameda, CA 94501	1230000
City Of Beloit, 100 State St., Beloit, WI 53511–0000	480300
City Of Benicia Hsg Auth, 28 Riverhill Drive, P.O. Box 549, Benicia, CA 94510–0000	614000
City Of Berkeley Housing Authority, 3200 Adeline Street, Berkeley, CA 94703–0000	5000
City Of Concord, P.O. Box 308, Concord, NC 28025–0000	294521
City Of Glendale Housing Auth, 6842 North 61St., Avenue, Glendale, AZ 85301–3199	219489
City Of Lennox Housing Commission, 2nd Ave At Highway 17, Lennox, SD 57039–0000	150411
City Of Madera Housing Authority, C/O Janet Kroeger, 205 G Street, Madera, CA 93637–0000	1390245
City Of Mitchell Housing and Redevolpment Commission, 200 E 15th Ave., Mitchell, SD 57301–0000	842970
City Of Mount Holly, Dept. Of Housing, P.O. Box 465, Mount Holly, NC 28120	153100
City Of Muskegon, 933 Terrace Street, P.O. Box 536, Muskegon, MI 49442	15000
City Of Needles Housing Authority, 908 Sycamore Drive, Needles, CA 92363–0000	375460
City Of North Chicago, Attention: Bob Williams, 1850 Lewis Ave., North Chicago, IL 60064–0000	1736475
City Of San Luis Obispo H/A, P.O. Box 638, San Luis Obispo, CA 93406–0000	862620
City Of Shelby, DEpartment Of Housing, P.O. Box 1192, Shelby, NC 28151–1192	99000
City Of Sterling Heights, 40555 Utica Road, Attention: Ms. Janice Blackbur, Sterling Heights, MI 48078–0000	27000

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
City Of Yuma Housing Authority, 1350 W. Colorado Street, Yuma, AZ 85364–0000	91430
Claremont H A, 243 Broad St., Claremont, NH 03743–0000	75000
Clarkson Housing Authority, P.O. Box 377, Clarkson, NE 68629	24500
Clarkton Housing Authority, P.O. Box 339, Bladenboro, NC 28320	100000
Clay Center Housing Authority, 330 W Court, Clay Center, KS 67432	413000
Clay Center Housing Authority, 114 E. Division St., Clay Center, NE 68933–1514	24000
Clementon Ha, 22 Gibbson Rd., Clementon, NJ 08201–0000	360680
Clermont Met.Hsg Auth., P.O. Box 151–65, S. Market Street, Batavia, OH 45103–0000	344378
Clinton Housing Authority, 58 Fitch Road, Clinton, MA 01510	500000
Coeur D'alene, P.O. Box 267, 1005 8th Street, Plummer, ID 83851	230500
Colby Housing Authority, 600 S Mission Ridge Ave., Colby, KS 67701–0980	795600
Coleridge Housing Authority, P.O. Box 96, Coleridge, NE 68727–0096	26200
Columbia County Housing Authority, 37 West, Main Street, Bloomsburg, PA 17815–0000	145510
Conejos County Housing Authority, P.O. Box 366, La Jara, CO 81140	56404
Connellsville, P.O. Box 762, Connellsville, PA 15425–9208	651100
Copper River Basin, P.O. Box 199, Copper Center, AK 99573	319222
Corning Housing Commission, P.O. Box 22, Corning, IA 50841–0022	131680
Corry Housing Authority, 108 South Center Street, Corry, PA 16407–0000	958675
Coventry Housing Authority, 14 Manchester Circle, Coventry, RI 02816–0000	230000
Creighton Housing Authority, R.R. 1, Box A 41, Creighton, Ne 68729	50000
Cumberland County Housing Authority, 114 North Hanover Street, Carlisle, PA 17013–0000	117752
Cumberland Housing Authority, One Mendon Road, Cumberland, RI 02864–0000	205000
Dane County Housing Authority, 2825 University Avenue, Madison, WI 53705–0000	512159
Danvers Housing Authority, 14 Stone Street, Danvers, MA 01923–0000	235000
Davis County Housing Authority, P.O. Box 328, Farmington, UT 84025–0000	364750
De Smet Housing and Redevelopment Commission, R.R. #1, Box 14, De Smet, Sd 57231	137800
Defuniak Springs Housing Authority, 120 Oerting Drive, Defuniak Springs, FL 32433	505300
Deland Housing Authority, 300 Sunflower Circle, Deland, FL 32724–5556	500000
Delaware Tribe Housing Authori, P.O. Box 334, Chelsea, OK 74016–0000	518947
Depere Housing Authority, 850 Morning Glory La., Depere, WI 54115–1300	128970
Deshler Housing Authority, P.O. Box 146, Deshler, NE 68340	25000
Devine Housing Authority, 210 South Upson Street, Devine, TX 78016–0000	75000
Donna Hsg Authortiy, P.O. Box 667, Donna, TX 78537–0000	30000
Douglas County Housing Authority, 5449 North 108th St., Omaha, NE 68164–0000	68000
Dover Ha, 215 East, Blackwell Street, Dover, NJ 07801–0000	200000
Dublin Housing Authority, 22941 Atherton St., Hayward, CA 94541–6613	10000
Duck Valley, P.O. Box 129, Owyhee, NV 89832	450000
Dunedin Housing Authority, 209 South Garden Ave., Clearwater, FL 34616	50000
Dunn Housing Authority, P.O. Box 1028, Dunn, NC 28334	241100
Easley Ha, Post Office Box 1060, Easley, SC 29641–1060	125500
East, Prairie Housing Authority, 529 N Lincoln, East, Prairie, MO 63845–0000	413250
Eastern Iowa Regional Housing Authority, Suite 330, Nesler Centre, P.O. Box 1140, Dubuque, IA 52004–1140	128166
Ecorse Housing Commission, 266 Hyacinth Street, Ecorse, MI 48229–1699	1100000
Edcouch Housing Authority, P.O. Box 92, Edcouch, TX 78538–0000	300000
Edgar Housing Authority, P.O. Box 266, Edgar, NE 68935–0266	53000
Edna Housing Authority, P.O. Box 698, Edna, TX 77957–0698	50000
Edwards County Housing Authority, 125 W Cherry St., Albion, IL 62806	783810
Elgin Housing Authority, P.O. Box 206, Elgin, TX 78621–0000	200000
Elk County Housing Authority, P.O. Box 100, Water Street Exte, Johnsonburg, PA 15845–0000	315138
Ellsworth Housing Authority, Water Street, Ellsworth, ME 04605–0000	30000
Elsa Housing Authority/La Hacienda, P.O. Box 98, Elsa, TX 78543–0000	50000
Englewood Housing Authority, 3460 South Sherman St., Suite 1, Englewood, CO 80110–0000	134772
Erwin Housing Authority, 750 Carolina Ave., Erwin, TN 37650–1062	383124
Evansdale Municipal Housing Auth, 119 Morrell Court, Evansdale, IA 50707–0000	463211
Excelsior Springs Housing Authority, 320 West, Excelsior Street, Excelsior Springs, MO 64024–2173	605000
Exeter Housing Authority, 277 Water Street, Exeter, NH 03833–0000	55000
Fairfield Mha, 1506 Amherst, Pl., Lancaster, OH 43130–0000	246000
Fairmont Housing Authority, P.O. Box 661, Fairmont, NC 28340	225620
Fallon, 2055 Agency Road, Fallon, NV 89406–7142	645000
Falmouth Hsg Authority, 115 Scranton Ave., Falmouth Town, MA 02540–0000	40000
Farmville Housing Authority, P.O. Box 282, Farmville, NC 27828	200000
Ferndale Housing Commission, 415 Withington, Ferndale, MI 48220–0000	672000
Fitchburg Hsg Authority, 50 Day Street, Fitchburg, MA 01420–0000	297000
Forest, City Housing Authority, A204 Spruce St., Forest, City, NC 28043	150000
Forest, County Potawatomi, P.O. Box 346, Crandon, WI 54520	36565
Fort Collins Housing Authority, 1715 W. Mountain Ave., Fort Collins, CO 80521–0000	83870
Fort Dodge Housing Agency, 700 South 17th Street, Fort Dodge, IA 50501–0000	689375
Fort Fairfield Housing Authority, P.O. Box 252, Fort Fairfield, ME 04742–0000	112000
Fort Lee Ha, 1403 Teresa Drive, Fort Lee, NJ 07024–0000	84000
Fort Madison Housing Authority, 1102 48th Street, Fort Madison, IA 52627–4611	300235

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Fort Scott Housing Authority, 315 Scott Ave., P.O. Box 269, Fort Scott, KS 66701–0000	911900
Fort Walton Beach Housing Authority, 27 Robinwood Dr. SW., Fort Walton Beach, FL 32548–0000	410430
Framingham Housing Authority, 1 John J. Brady Drive, Framingham, MA 01701–0000	180000
Franklin City Housing Authority, 1212 Chestnut Street, Franklin, PA 16323–0000	820000
Frederic Housing Authority, 104 Third Avenue Sou Frederic, WI 54837–8901	154512
Freehold Ha, 107 Throckmorton Street, Freehold, NJ 07728–0000	344450
Friend Housing Authority, 1027 Second St., Friend, NE 68359–1145	38100
Fulton Housing Authority, P.O. Box 814, Fulton, MO 65251–0000	227180
Geauga Mha, 385 Center St., Chardon, OH 44024–0000	210763
Geneva Housing Authority, P.O. Box 153, 30 Elm St., Geneva, NY 14456–2319	1991758
Genoa Housing Authority, P.O. Box 401, Genoa, NE 68640–0401	35000
Gibbon Housing Authority, P.O. Box 39, Gibbon, NE 68840	75000
Gilmer Housing Authority, P.O. Box 397, Gilmer, TX 75644–0000	501900
Gladstone Housing Commission, 217 Dakota Avenue, Gladstone, MI 49837	267600
Glastonbury Housing Authority, 25 Risley Road, Glastonbury, CT 06033–0000	385000
Glenarden Housing Authority, 8639 Glenarden Parkway, Glenarden, MD 20801	172534
Goodland Housing Authority, 515 E Fifth St., Goodland, KS 67735–0107	327300
Gothenburg Housing Authority, 810 20th Street, Gothenburg, NE 69138–0035	97557
Grand Junction Housing Authority, 805 Main Street, Grand Junction, CO 81501–0000	441380
Grand Portage, P.O. Box 303, Grand Portage, MN 55605	265826
Grant Housing Authority, P.O. Box 0, RR 1, Grant, Ne 69140	52500
Grant Parish Housing Authority, P.O. Box 10, Georgetown, LA 71432–0000	103000
Grantsburg Housing Authority, 213 West, Burnett Ave., Grantsburg, WI 54840–7809	92750
Grayling Housing Commission, P.O. Box 450, Grayling, MI 49738	421200
Green Bay Housing Authority, 1424 Admiral St., Green Bay, WI 54303–0000	365000
Greenville Housing Commission, 308 East, Oak Street, Greenville, MI 48838	413200
Greetly Housing Authority, 2448 1st, Avenue, Greeley, CO 80631–0000	91916
Gregory Hsg Authority, P.O. Box 206, Gregory, TX 78359–0000	25000
Gresham Housing Authority, P.O. Box 224, Gresham, NE 68367	50000
Groveland Housing Authority, River Pines, Groveland, MA 01834–0000	35000
Grundy County Housing Authority, 1700 Newton Pl, Morris, IL 60450	60000
Grundy Housing Authority, Route 1, Monteagle, TN 37356	754395
H A Oneonta, 1 Hillcrest Circle, Oneonta, AL 35121–0000	176000
H.A. Of Lincoln County, 1039 Nw Nye St., Newport, OR 97365–0000	1393028
H.A. Of Malheur Co., 959 Fortner St., Ontario, OR 97914–0000	628000
H.A. Of Yamhill County, 414 N Evans, Mcminnville, OR 97128–0000	152000
Ha Albemarle, P.O. Drawer 1367, Albemarle, NC 28002	135000
Ha Andalusia, 231 Murphree Drive, Andalusia, AL 36420–0000	120000
Ha Anderson, 1335 E River Street, Anderson, SC 29624–2908	255564
Ha Asheboro, P.O. Box 609, Asheboro, NC 27204–0609	200000
Ha Atmore, P.O. Box 700, Atmore, AL 36504–0000	205825
Ha Bladenboro, P.O. Box 339, Bladenboro, NC 28320	100000
Ha Boca Raton, 201 West, Palmetto Park Road, Boca Raton, FL 33432–0000	242700
Ha Brownsville, P.O. Box 194, Brownsville, TN 38012–0000	969570
Ha Cheraw, Post Office Drawer 969, Florence, SC 29503–0969	121600
Ha Chester, P.O. Box 773, Chester, SC 29706–0773	102592
Ha City Of Kelso, P.O. Box 599, Kelso, WA 98626–0000	195000
Ha City Of Renton, P.O. Box 2316, Renton, WA 98056–0316	214000
Ha City Of Spokane, W. 55th Mission, Suite 104, Spokane, WA 99201	105500
Ha City Of Sunnyside, 1500 Federal Way Sunnyside, WA 98944–0000	877000
Ha City Of Walla Walla, 411 W. Main Street, Walla Walla, WA 99362–0000	246500
Ha City Of Yakima, 412 South Third St., #1, Yakima, WA 98901–0000	981625
Ha Columbiana, P.O. Box 498, Columbiana, AL 35051–0000	228000
Ha Darlington, P.O. Drawer 1440, Darlington, SC 29532–1440	156636
Ha Dickson, M&M Bldg Evans Heights Apts., Dickson, TN 37055–0000	256869
Ha Etowah, 400 Sunset Drive, Etowah, TN 37331–0000	33600
Ha Floyd County, P.O. Box 687, Prestonsburg, KY 41653–0000	275000
Ha Fort Mill, 105 Bozeman Drive, Fort Mill, SC 29715–2527	130072
Ha Frankfort, 590 Walter Todd Drive, Frankfort, KY 40601–0000	250000
Ha Gordo, P.O. Drawer I, Gordo, AL 35466–0000	1015208
Ha Greensburg, 422 Nancy St., Greensburg, KY 42743–0000	200000
Ha Greenwood, Post Office Box 973, Greenwood, SC 29646–0973	204268
Ha Greer, 103 School Street, Greer, SC 29651–0000	105000
Ha Hartsville, Post Office Drawer 1678, Hartsville, SC 29551–1678	91600
Ha Jacksonville, 895 Gardner Drive, Jacksonville, AL 36265–0000	173200
Ha Jonesboro, P.O. Box 458, Jonesboro, GA 30237–0000	104600
Ha Lancaster, Post Office Box 1235, Lancaster, SC 29721–1235	128240
Ha Leeds, P.O. Box 513, Leeds, AL 35094–0000	1067360
Ha Mayfield, P.O. Box 474, Mayfield, KY 42066–0000	636000
Ha Midland City, Route 1 Box 100 Midland City, AL 36350–0000	274610

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Ha Millport, P.O. Box 475, Millport, AL 35576–0000	228597
Ha Monroe, P.O. Box 805, Monroe, NC 28110–0000	132500
Ha New Castle, 274 South 14th St., New Castle, IN 47362–0000	246000
Ha Of Beacon, 1 Forrestal Heights, Beacon, NY 12508–0000	196600
Ha Of Grant County, 1139 Larson Blvd., Moses Lake, WA 98837–0000	400000
Ha Of Greenburgh, 9 Maple Street, White Plains, NY 10603–0000	279431
Ha Of Island County, P.O. Box 156, Coupeville, WA 98239–0000	48500
Ha Of Jamestown, 110 W. Third St., Jamestown, NY 14701–5199	24000
Ha Of Madison, P.O. Box 495, Madison, NJ 07940–0000	280500
Ha Of Monticello, 76 Evergreen Drive, Monticello, NY 12701–0000	230000
Ha Of Mount Kisco, 104 Main Street, Mount Kisco, NY 10549–0150	150000
Ha Of Newburgh, P.O. Box 89, 150 Smith Street, Newburgh, NY 12550–0000	180500
Ha Of North Hempstead, Pond Hill Road, Great Neck, NY 11020–0000	100500
Ha Prestonsburg, P.O. Box 687, Prestonsburg, KY 41653–0000	768610
Ha Randolph County, 214 Opdyke Street, Chester, IL 62233–0000	267500
Ha Rockingham, P.O. Box 160, Rockingham, NC 28379–0000	150000
Ha Samson, P.O. Box 307, Samson, AL 36477–0000	97595
Ha Williamston, P.O. Box 709, Williamston, NC 27892	210424
Ha York, Post Office Box 687, York, SC 29745–0687	141064
Halstead Housing Authority, 815 W 6th St., Halstead, KS 67056–2157	348000
Hamlet Housing Authority, P.O. Box 1188, Hamlet, NC 28345	150000
Hancock County Housing Authority, P.O. Box 472, Dallas City, IL 62330–0472	1311496
Hancock Ha, 1401 Quincy Street, Hancock, MI 49930–0000	492920
Hardin County Housing Authority, P.O. Box 322, Elizabethtown, IL 62931–0322	236284
Harrietstown Housing Authority, 3–5 Riverside Dr., Saranac Lake, NY 12983–2212	1335647
Harrison Mha, P.O. Box 146, Cadiz, OH 43907–0000	253000
Havre De Grace Housing Authority, 101 Stansbury Court, Havre De Grace, MD 21904–0000	87000
Hay Springs Housing Authority, Box 188, Hay Springs, NE 69347	44050
Hays Housing Authority, 1709 Sunset Trail, Hays, KS 67601–0000	206000
Hemingford Housing Authority, P.O. Box 576, Hemingford, NE 69348	64000
Hermansville Housing Commission, W5577 129 W Third., Hermansville, MI 49847–0129	256300
Hertford Housing Authority, 104 White Street, Hertford, NC 27944	150000
Higginsville Housing Authority, 419 Fairground Ave., Higginsville, MO 64037–1760	540000
Highland Park Ha, 242 South Sixth Street, Highland Park, NJ 08904–0000	145200
Highland Park Housing Commission, 13725 John R. Avenue, Highland Park, MI 48203–3121	684960
Highlands Housing Authority, 215 Shore Dr., Highlands, NJ 07732–2122	451000
Ho-Chunk Nation, P.O. Box 546, Tomah, WI 54660	776361
Hocking Met Ha, 50 South High Street, Logan, OH 43138–0000	207600
Hoopa, P.O. Box 1285, Hoopa, CA 95546	400000
Hope Housing Authority, 720 Texas Street, Hope, AR 71801–0000	236288
Hornell Housing Authority, 71 Church Street, Hornell, NY 14843–0000	534777
Housing and Redev. Auth. Of The City of, Blue Earth, 220 East, Seventh St., Blue Earth, MN 56013–2001	557000
Housing and Redevel. Authority Of Thief River Falls 415 Arnold Avenue S., Thief River Falls, MN 56701–0246	750000
Housing and Redevelopment Authority of Alexandria, 805 Fillmore Street, Alexandria, MN 56308–1770	250000
Housing and Redevelopment Authority of Barnesville, P.O. Box 158, Barnesville, MN 56514–0158	500000
Housing and Redevelopment Authority of Baudette, P.O. Box 638, Baudette, MN 56623–0871	637200
Housing and Redevelopment Authority Of Carlton, 950 Fourteenth St., Cloquet, MN 55720	20000
Housing and Redevelopment Authority of Cass Lak, P.O. Box 397, Cass Lake, MN 56633–0397	420000
Housing and Redevelopment Authority of Chisholm, 519 Sixth Street SW., Chisholm, MN 55719	857393
Housing and Redevelopment Authority Of Ely, 114 N. 8th Ave, #111, Ely, Mn 55731	110000
Housing and Redevelopment Authority Of Eveleth, 902 Clay Court, Eveleth, MN 55734–1412	230000
Housing and Redevelopment Authority of Glenwood, 507 Se Fifth Street, Glenwood, MN 56334	700000
Housing and Redevelopment Authority of Montevideo, 501 N. First Street, Montevideo, MN 56265–1426	194000
Housing and Redevelopment Authority Of North Mankato, 615 Nicollet Avenue, North Mankato, MN 56003	232000
Housing and Redevelopment Authority Of Pine City, 905 Seventh St., Pine City, MN 55063–2014	100000
Housing and Redevelopment Authority Of Sleepy Eye, 313 4th Ave Se Sleepy Eye, MN 56085–1775	60000
Housing and Redevelopment Authority Of Staples, 601 Central Avenue, Long Prairie, MN 56347	594000
Housing and Redevelopment Authority Of Warren, 411 North Fourth St., Warren, MN 56762–1315	132000
Housing Auth Of Jefferson County, 801 Vine Street, Louisville, KY 40204–1044	200000
Housing Auth., City Of Washington, 520 S.E. Second Street, Washington, IN 47501–0000	491395
Housing Authority City Of Sullivan, 200 North Court Street, Sullivan, IN 47882	301500
Housing Authority Of Abbeville, 544 Branch St., Abbeville, SC 29620–1947	118164
Housing Authority Of Antonito, P.O. Box 25, Antonito, CO 81120	280201
Housing Authority Of Arcadia, P.O. Box 210, Arcadia, LA 71001–0210	600000
Housing Authority Of Atlantic Beach, Post Office Box 1326, Barnwell, SC 29812–1326	49464
Housing Authority Of Avon Park, P.O. Box 1327, Avon Park, FL 33826–1327	222000
Housing Authority Of Baird, P.O. Box 1028, Baird, TX 79504–1028	768029
Housing Authority Of Bartow, P.O. Box 1413, Bartow, FL 33830–0000	109500
Housing Authority Of Beaver Dam, 3030 James Court, Beaver Dam, KY 42320	100000
Housing Authority Of Bennettsville, 253 Fletcher St., Bennettsville, SC 29512–3777	245780

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Housing Authority Of Benton, 101 Walnut Court, Benton, KY 42025	251000
Housing Authority Of Berwick, P.O. Box 231, Berwick, LA 70342–0231	225000
Housing Authority Of Blooming Grove, P.O. Box 351, Blooming Grove, TX 76626–0351	439870
Housing Authority Of Blossom, P.O. Box 174, Blossom Prairie, TX 75416–0174	402136
Housing Authority Of Boone County, Black Diamond Arbors, Lick Creek Road, Danville, WV 25053–0000	22400
Housing Authority Of Breaux Bridge, P.O. Box 878, Breaux Bridge, LA 70517–0878	375000
Housing Authority Of Bronte, P.O. Box 362, Bronte, TX 76933–0362	639940
Housing Authority Of Cadiz, P.O. Box 830, Cadiz, KY 42211	100000
Housing Authority Of Cambridge, 700 Weaver Ave., Cambridge, MD 21613–2198	182450
Housing Authority Of Carbon County, 251 S 1600 E #2647, Price, UT 84501–0000	77352
Housing Authority Of Catlettsburg, 210 24th St., Catlettsburg, KY 41129	600000
Housing Authority Of Central City, P.O. Box 348, Central City, KY 42330	150000
Housing Authority Of Cisco, 714 E. 10th. St., Cisco, TX 76437	706682
Housing Authority Of Commerce, 500 Tarter Apts., Commerce, TX 75428–3217	670875
Housing Authority Of Cooper, 650 Nw. First St., Cooper, TX 75432–1119	339500
Housing Authority Of Corbin, 1336 Madison Street, Corbin, KY 40702	300000
Housing Authority Of Cumberland, 178 Russell Drive, Cumberland, KY 40823	900000
Housing Authority Of Dawson Springs, 100 Clarkdale Ct. Dawson Springs, KY 42408	834000
Housing Authority Of Delcambre, 218 South Pelloat St., Delcambre, LA 70528	175700
Housing Authority Of Deridder, P.O. Box 387, Deridder, LA 70634–0387	275000
Housing Authority Of Donaldsonville, 1501 St. Patrick Street, Donaldsonville, LA 70346	300000
Housing Authority Of Erath, P.O. Box 315, Erath, LA 70533–0315	475000
Housing Authority Of Eunice, P.O. Box 224, Eunice, LA 70535–0224	385000
Housing Authority Of Ferriday, 3001 Highway 15, Ferriday, LA 71334	375000
Housing Authority Of Flemingsburg, 142 Circle Drive, Flemingsburg, KY 41041	170000
Housing Authority Of Frostburg, Meshach Frost Villag, Frostburg, MD 21532	144000
Housing Authority Of Fulton, 200 N. Highland Dr., Fulton, KY 42041	250000
Housing Authority Of Gibsland, P.O. Box 301, Gibsland, LA 71028–0301	400000
Housing Authority Of Gladewater, P.O. Box 1009, Gladewater, TX 75647–1009	964000
Housing Authority Of Glasgow, Box 1126, Glasgow, MT 59230	315250
Housing Authority Of Grand Saline, P.O. Box 24, Grand Saline, TX 75140–0024	400000
Housing Authority Of Grandfalls, P.O. Box 250, Grandfalls, TX 79742–0250	399198
Housing Authority Of Greene County, AL, P.O. Box 389, Eutaw, AL 35462–0389	518650
Housing Authority Of Greenville, 613 Reynolds Dr., Greenville, KY 42345	61000
Housing Authority Of Gueydan, P.O. Box 440, Gueydan, LA, La 70542–0440	223575
Housing Authority Of Hickman, 50 Holly Ct., Hickman, KY 42050	50000
Housing Authority Of Homer, 329 South Fourth Street, Homer, LA 71040	250000
Housing Authority Of Honey Grove, P.O. Box 548, Bonham, TX 75418–0548	123050
Housing Authority Of Horse Cave, P.O. Box 8, Horse Cave, KY 42749	60000
Housing Authority Of Irvine, 200 Wallace Ct., Irvine, KY 40336	517000
Housing Authority Of Irvington, Box 399/Hillview Hom, Irvington, KY 40146	550000
Housing Authority Of Jackson County, 2231 Table Rock Road, Medford, OR 97501–0000	159000
Housing Authority Of Jena, P.O. Box 36, Jena, LA 71342–0036	89600
Housing Authority Of Jennings, P.O. Box 921, Jennings, LA 70546–0921	375000
Housing Authority Of Kaplan, P.O. Box 246, Kaplan, LA 70548–0246	118631
Housing Authority Of Kittitas County, 107 W 11th, Ellensburg, WA 98926–2568	200000
Housing Authority Of Knott County, P.O. Box 225, Hindman, KY 41822	190000
Housing Authority Of Knox County, Tilly Estates-Office, Bicknell, IN 47512–0000	386970
Housing Authority Of Ladonia, P.O. Box 548, Bonham, TX 75418–0548	70450
Housing Authority Of Lake Providence, 210 Foster Street, Lake Providence, LA 71254	235000
Housing Authority Of Laurens, P.O. Box 326, Laurens, SC 29360–0326	161500
Housing Authority Of Leesville, 213 Blackburn Avenue, Leesville, LA 71446	500000
Housing Authority Of Leonard, P.O. Box 160, Leonard, TX 75452–0160	262225
Housing Authority Of Logansport, P.O. Box 470, Logansport, LA 71049–0470	90000
Housing Authority Of London, 100 Mcfadden Lane, London, KY 40741	525000
Housing Authority Of Lyon County, P.O. Box 190, Eddyville, KY 42038	599000
Housing Authority Of Mansfield, 600 Schley Street, Mansfield, LA 71052	553000
Housing Authority Of Martin, P.O. Box 806, Martin, KY 41649	401000
Housing Authority Of Mccoll, Post Office Box 969, Florence, SC 29503–0969	31144
Housing Authority Of Mckinney, 1200 N. Tennessee, Mckinney, TX 75069–9977	786372
Housing Authority Of Mexia, P.O. Box 752, Mexia, TX 76667–0752	856287
Housing Authority Of Morehead, 200 Heritage Pl., Morehead, KY 40351	275000
Housing Authority Of Morgantown, P.O. Box 628, Morgantown, KY 42261	500000
Housing Authority Of Mount Vernon, P.O. Box 639, Mount Vernon, TX 75457–0639	13850
Housing Authority Of Mullins, Post Office Box 766, Mullins, SC 29574–0766	143700
Housing Authority Of Murray, 716 Nash Dr., Murray, KY 42071	569000
Housing Authority Of Myrtle Beach, Post Office Box 2468, Myrtle Beach, SC 29578–2468	16488
Housing Authority Of New Boston, P.O. Box 806, New Boston, TX 75570–0806	133260
Housing Authority Of Oberlin, P.O. Box 338, Oberlin, LA 70655–0338	174450
Housing Authority Of Olla, 108 Washington Street, Olla, LA 71465	175000

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Housing Authority Of Omaha, P.O. Box 667, Omaha, TX 75571–0667	413000
Housing Authority Of Owenton, 100 Beck St., Owenton, KY 40359	75000
Housing Authority Of Paducah, P.O. Box 698, Paducah, TX 79248–0698	516480
Housing Authority Of Paris, P.O. Box 468, Paris, KY 40361	320000
Housing Authority Of Pecos, P.O. Drawer 1499, Pecos, TX 79772–1499	1289740
Housing Authority Of Pineville, 911 Alabama Ave., Pineville, KY 40977	500000
Housing Authority Of Radcliff, P.O. Box 755, Radcliff, KY 40160–0755	100000
Housing Authority Of Raleigh County, P.O. Box Bd, Beckley, WV 25801–0000	173000
Housing Authority Of Rayne, P.O. Box 164, Rayne, LA 70578–0164	390000
Housing Authority Of Red Bay, P.O. Box 1426, Red Bay, AL 35582	862950
Housing Authority Of Rio Arriba County, P.O. Box 310, Espanola, NM 87532–0000	249000
Housing Authority Of Rotan, P.O. Drawer J, Rotan, TX 79546–0489	1128055
Housing Authority Of Russellville, 940 Hicks St., Russellville, KY 42276	643000
Housing Authority Of South Landry, P.O. Drawer E, Grand Coteau, LA 70541	215000
Housing Authority Of Southwest, Acadia, P.O. Drawer 700, Iowa, LA 70647–0700	250000
Housing Authority Of St. Martinville, P.O. Box 913, St. Martinville, LA 70582–0913	435000
Housing Authority Of Stanton, P.O. Box 866, Stanton, TX 79782–0866	522757
Housing Authority Of Tahoka, P.O. Box 238, Tahoka, TX 79373–0238	831997
Housing Authority Of The City Of Rockville, 14 Moore Drive, Rockville, MD 20850–0000	1059900
Housing Authority Of The City Of Abbeville, P.O. Box 281, Abbeville, AL 36310–0281	95000
Housing Authority Of The City Of Acworth, P.O. Box 347, Acworth, GA 30101–0347	962450
Housing Authority Of The City Of Alamosa, P.O. Box 328, Alamosa, CO 81101–0328	805353
Housing Authority Of The City Of Arcadia, P.O. Box 1248, Arcadia, FL 33821–1248	60000
Housing Authority Of The City Of Augusta, 100 Riverdale, Augusta, AR 72006–2733	228775
Housing Authority Of The City Of Bald Knob, P.O. Box 1299, Bald Knob, AR 72010–1017	448014
Housing Authority Of The City Of Barnesville, P.O. Box 158, Barnesville, GA 30204–1199	422925
Housing Authority Of The City Of Baxley, P.O. Box 56, Baxley, GA 31513–0056	138252
Housing Authority Of The City Of Beckley, P.O. Box 1780, Beckley, WV 25802–1780	199800
Housing Authority Of The City Of Benwood, 2200 Marshall Street, Benwood, WV 26031–0000	70100
Housing Authority Of The City Of Bernie, P.O. Box Drawer 210, Bernie, MO 63822–0210	514474
Housing Authority Of The City Of Blackshear, P.O. Box 1407, Waycross, GA 31502–1407	154900
Housing Authority Of The City Of Blakely, Hwy #200, Blakely, GA 31723–0149	35800
Housing Authority Of The City Of Bloomfield, P.O. Box 6, Bloomfield, MO 63825–0006	187911
Housing Authority Of The City Of Blue Ridge, 30 Ouida Street, Blue Ridge, GA 30513–0088	210000
Housing Authority Of The City Of Bluefield, P.O. Box 1475, Bluefield, WV 24701–0000	168000
Housing Authority Of The City Of Boswell, P.O. Box 483, Boswell, OK 74727–0483	129800
Housing Authority Of The City Of Bremond, P.O. Box A, Bremond, TX 76629	50000
Housing Authority Of The City Of Brinkley, 501 W. Cedar St., Brinkley, AR 72021–2713	775229
Housing Authority Of The City Of Buckhannon, 21 1/2 Hinkle Drive, Buckhannon, WV 26201–0000	136300
Housing Authority Of The City Of Caldwell, P.O. Box 596, Caldwell, TX 77836–0596	250000
Housing Authority Of The City Of Calvert, P.O. Box 475, Calvert, TX 77837–0475	200000
Housing Authority Of The City Of Campbell, 930 Poplar, Campbell, MO 63933–1834	165200
Housing Authority Of The City Of Canton, 1 Shipp Street, Canton, GA 30114–2813	256290
Housing Authority Of The City Of Carbon Hill, P.O. Box 70, Carbon Hill, AL 35549–0070	774618
Housing Authority Of The City Of Carthage, Box 3, Carthage, AR 71725–0003	68340
Housing Authority Of The City Of Casper, 400 East 1st Street, Suite 209 Casper, WY 82604	80913
Housing Authority Of The City Of Cave Spring, B–4 Fincher Street, Cave Springs, GA 30124	508750
Housing Authority Of The City Of Centerville, P.O. Box 746, Centerville, TX 75833–0055	150000
Housing Authority Of The City Of Chatsworth, 1311–19 Old Dawson, Chatsworth, GA 30705–0019	835132
Housing Authority Of The City Of Clanton, P.O. Box 408, Clanton, AL 35045–0408	621764
Housing Authority Of The City Of Clarksville, Box 407, Clarksville, AR 72830–0407	336602
Housing Authority Of The City Of Clarkton, P.O. Box 367, Clarkton, MO 63837–0367	30350
Housing Authority Of The City Of Clayton, P.O. Box 1271, Clayton, GA 30525	580000
Housing Authority Of The City Of Cleveland, P.O. Drawer J, Toccoa, GA 30577–0257	156000
Housing Authority Of The City Of Cleveland, 801 S. Franklin St., Cleveland, TX 77327	395000
Housing Authority Of The City Of Cochran, P.O. Box 32, Cochran, GA 31014–0032	141120
Housing Authority Of The City Of Comer, P.O. Box 157, Comer, GA 30629–0187	108000
Housing Authority Of The City Of Corrigan, 600 S. Home St., Corrigan, TX 75939	50000
Housing Authority Of The City Of Cumming, P.O. Box 36, Cumming, GA 30130	158000
Housing Authority Of The City Of Dallas, P.O. Box 74, Dallas, GA 30132–0074	268500
Housing Authority Of The City Of Dayton, 2502 N. Winfree St., Dayton, TX 77535	335000
Housing Authority Of The City Of Dell, P.O. Box 32, Dell, AR 72426–0032	34675
Housing Authority Of The City Of Dexter, P.O. Box 206, Dexter, MO 63841–0206	250250
Housing Authority Of The City Of Dumas, Box 115, Dumas, AR 71639–0115	300000
Housing Authority Of The City Of Dunbar, 900 Dutch Hollow Road, Dunbar, WV 25064–0000	65391
Housing Authority Of The City Of Eastman, P.O. Box 100, Eastman, GA 31023–0100	187488
Housing Authority Of The City Of Eatonton, P.O. Box 3700, Eatonton, GA 31024–0072	123200
Housing Authority Of The City Of El Campo, 1303 Delta Street, El Campo, TX 77437–0107	95000
Housing Authority Of The City Of Elberton, 12 North Mcintosh St., Elberton, GA 30635–1552	468800
Housing Authority Of The City Of Elk City, P.O. Box 647, Elk City, OK 73648–0647	465282

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Housing Authority Of The City Of Ellijay, P.O. Box 426, Ellijay, GA 30540–0426	257500
Housing Authority Of The City Of England, 102 Benafield, England, AR 72046–0214	189323
Housing Authority Of The City Of Eustis, 1000 Wall Street, Eustis, FL 32726	500000
Housing Authority Of The City Of Fairmont, 517 Fairmont Avenue, Fairmont, WV 26554–0000	298000
Housing Authority Of The City Of Fayette, P.O. Box 266, Fayette, AL 35555–0266	187250
Housing Authority Of The City Of Fernandian Beach, 1300 Hickory St., Fernandina Beach, FL 32034–0000	145000
Housing Authority Of The City Of Fitzgerald, P.O. Drawer 1067, Fitzgerald, GA 31750–0073	111280
Housing Authority Of The City Of Folkston, P.O. Box 397, Folkston, GA 31537–0397	147000
Housing Authority Of The City of Fort Oglethorpe, P.O. Box 2034, Fort Oglethorpe, GA 30742–0034	91828
Housing Authority Of The City Of Fort Valley, P.O. Box 10, Fort Valley, GA 31030–0010	443600
Housing Authority Of The City Of Franklin, P.O. Box 413, Franklin, TX 77856–0413	50000
Housing Authority Of The City Of Fruitvale, P.O. Box 196, Fruitvale, TX 75127–0196	175000
Housing Authority Of The City Of Garrison, P.O. Box 142, Garrison, TX 75946–0142	50000
Housing Authority Of The City Of Georgiana, P.O. Box 279, Georgiana, AL 36033	295000
Housing Authority Of The City Of Gibson, P.O. Box 146, Gibson, GA 30810–0086	71400
Housing Authority Of The City Of Gideon, 135 Haven Street, Gideon, MO 63848–9704	189440
Housing Authority Of The City Of Grafton, 131 East Main Street, Grafton, WV 26345–1365	399000
Housing Authority Of The City Of Grapeland, P.O. Box 568, Grapeland, TX 75844–0568	130000
Housing Authority Of The City Of Greensboro, P.O. Box 217, Greensboro, GA 30642–0217	114048
Housing Authority Of The City Of Greensboro, P.O. Box 506, Greensboro, AL 36744	752000
Housing Authority Of The City Of Greenville, P.O. Box 83, Greenville, GA 30222–0083	187441
Housing Authority Of The City Of Hartselle, P.O. Box 1165, Hartselle, AL 35640–1165	1756481
Housing Authority Of The City Of Hartwell, 500 W. Franklin Pl., Hartwell, GA 30643–0745	395930
Housing Authority Of The City of Hawkinsville, P.O. Box 718, Hawkinsville, GA 31036–0052	102030
Housing Authority Of The City of Hayti Heights, 100 N. Martin Luther King, Hayti Heights, MO 63851–9664	141600
Housing Authority Of The City Of Hazlehurst, P.O. Box 838, Hazelhurst, GA 31539–0838	140426
Housing Authority Of The City Of Hillsdale, P.O. Box 23886, St. Louis, MO 63121–0508	33650
Housing Authority Of The City Of Hogansville, P.O. Box 127, Hogansville, GA 30230	179695
Housing Authority Of The City Of Homer, P.O. Drawer J, Toccoa, GA 30577–0257	120000
Housing Authority Of The City of Hornersville, P.O. Box 337, Hornersville, MO 63855–0337	200800
Housing Authority Of The City Of Imboden, Box 417 Imboden, AR 72434–0417	34740
Housing Authority Of The City Of Jasper, 147 Landrum Circle, Jasper, GA 30143–1209	401250
Housing Authority Of The City Of Jasper, 200 Myrtis, Jasper, TX 75951	60000
Housing Authority Of The City Of Kingsland, P.O. Box 1377, Kingsland, GA 31548–0438	45200
Housing Authority Of The City Of Kirkwood, 385 S. Taylor St., Kirkwood, MO 63122–6128	336627
Housing Authority Of The City Of Konawa, P.O. Box 186, Konawa, OK 74849–0186	67425
Housing Authority Of The City Of Lavonia, P.O. Box 4, Lavonia, GA 30553–0004	1057000
Housing Authority Of The City Of Live Oak, 406 Webb Drive, NE., Live Oak, Fl 32060–2532	341300
Housing Authority Of The City Of Livingston, 1102 N. Pine Ave., Livingston, TX 77351	450000
Housing Authority Of The City Of Loganville, P.O. Box 550, Monroe, GA 30655–0550	266132
Housing Authority Of The City Of Lovington, P.O. Box 785, Lovington, NM 88260–0785	37000
Housing Authority Of The City Of Luxora, Box 70, Luxora, AR 72358–0070	248956
Housing Authority Of The City Of Madill, P.O. Box 326, Madill, OK 73446–0326	342903
Housing Authority Of The City of Madisonville, 601 S. Madison St., Madisonville, TX 77864	150000
Housing Authority Of The City Of Manchester, 850 Warm Springs Rd., Manchester, GA 31816–2113	358950
Housing Authority Of The City Of Manila, Box 590, Manila, AR 72442–0600	165880
Housing Authority Of The City Of Marianna, 337 Albert St., Marianna, FL 32446–0000	175000
Housing Authority Of The City Of Marion, AL, 102 Cahaba Heights, Marion, AL 36756	195640
Housing Authority Of The City of Marshallville, P.O. Box 199, Marshallville, GA 31057–0199	173700
Housing Authority Of The City Of Mcgehee, Box 725, Mcgehee, AR 71654–0725	722382
Housing Authority Of The City Of Mcmechen, 2200 Marshall Street, Benwood, WV 26031	38600
Housing Authority Of The City Of Mcrae, P.O. Box A, Mcrae, AR 72102–0809	59444
Housing Authority Of The City Of Mcrae, P.O. Drawer 430, Mcrae, GA 31055–0430	93094
Housing Authority Of The City Of Melbourne, Box 398, Melbourne, AR 72556–0398	58894
Housing Authority Of The City Of Metter, P.O. Box 207, Metter, GA 30439–0207	408240
Housing Authority Of The City Of Minco, Route 2, BOx 100, Minco, Ok 73059–0000	261330
Housing Authority Of The City Of Monette, Drawer 387, Monette, AR 72447–0387	85874
Housing Authority Of The City Of Monticello, P.O. Box 391, Monticello, GA 31064–0391	122570
Housing Authority Of The City Of Morrilton, Box 229, Morrilton, AR 72110–0229	730097
Housing Authority Of The City Of Mount Ida, Box 96, Mount Ida, AR 71957–0096	36732
Housing Authority Of The City Of Mt. Hope, Mid-Town Terrace, Mt. Hope, WV 25880	275000
Housing Authority Of The City Of New Madrid, 550 Line St., New Madrid, MO 63869–1736	105470
Housing Authority Of The City Of Newton, P.O. Box 626, Newton, TX 75966–0626	80000
Housing Authority Of The City Of Nicholls, P.O. Box 158, Nicholls, GA 31554–0158	52500
Housing Authority Of The City Of Pagedale, P.O. Box 23886, St. Louis, MO 63121–0580	419900
Housing Authority Of The City Of Parkersburg, 1901 Cameron Avenue, Parkersburg, WV 26101–9316	42500
Housing Authority Of The City of Pauls Valley, P.O. Box 874, Pauls Valley, OK 73075–0874	111869
Housing Authority Of The City Of Pineland, P.O. Box 266, Pineland, TX 75968–0266	250000
Housing Authority Of The City Of Prescott, P.O. Box 119, Prescott, AR 71857–0749	211316

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Housing Authority Of The City of Pt. Pleasant, P.O. Box 517, Point Pleasant, WV 25550–0000	221100
Housing Authority Of The City Of Quitman, P.O. Box 229, Quitman, GA 31643–0229	207770
Housing Authority Of The City Of Riverbank, P.O. Box 695, Riverbank, CA 95367	200000
Housing Authority Of The City Of Romney, 100 Valleyview Drive, Romney, WV 26757	195000
Housing Authority Of The City Of Royston, P.O. Box 86, Royston, GA 30662–0066	425000
Housing Authority Of The City of San Augustine, 700 S. Broadway, San Augustine, TX 75972	68000
Housing Authority Of The City Of San Pablo, 2324 College Ln., San Pablo, CA 94806	245000
Housing Authority Of The City Of Sayre, 1310 N. Second St., Sayre, OK 73662–0326	93387
Housing Authority Of The City of Sedro Woolley, 15455 65th Ave. S, Tukwila, WA 98188–2583	207000
Housing Authority Of The City Of Senath, P.O. Box N, Senath, MO 63876–0259	273780
Housing Authority Of The City Of Soledad, 167 Main St., Soledad, CA 93960	10000
Housing Authority Of The City Of Soperton, 700 Eastman Road, Soperton, GA 30457–1431	183456
Housing Authority Of The City, of South Charleston 520 Goshorn Street, South Charleston, WV 25309	134000
Housing Authority Of The City Of Sparkman, P.O. Box 36, Sparkman, AR 71763–0036	160069
Housing Authority Of The City Of Spencer, 601 Market Street, Spencer, WV 25276–1828	553000
Housing Authority Of The City Of St. Albans, 650 Sixth Street, St. Albans, WV 25177	310000
Housing Authority Of The City Of Stephens, Box 276, Stephens, AR 71764–0276	148196
Housing Authority Of The City, of Sulligent, Al, P.O. Box 656, Sulligent, AL 35586–0656	262885
Housing Authority Of The City Of Summerville, 16 Ross Street, Summerville, GA 30747–1496	1123122
Housing Authority Of The City Of Sylvania, P.O. Box 628, Waynesboro, GA 30830–0597	435456
Housing Authority Of The City Of Timpson, P.O. Box 357, Timpson, TX 75975–0357	200000
Housing Authority Of The City Of Unadilla, P.O. Box 407, Unadilla, GA 31091–0407	53000
Housing Authority Of The City Of Vidalia, P.O. Box 508, Vidalia, GA 30474–0508	196000
Housing Authority Of The City Of Vienna, P.O. Box 275, Vienna, GA 31092–0275	53000
Housing Authority Of The City Of Villa Rica, P.O. Box 665, Villa Rica, GA 30180	523400
Housing Authority Of The City Of Waldron, P.O. Box 39, Waldron, AR 72958	604514
Housing Authority Of The City Of Wasco, 750 H St., Wasco, CA 93280–2032	869328
Housing Authority Of The City Of Weirton, 525 Cove Road, Weirton, WV 26062–0000	75750
Housing Authority Of The City Of Wellston, 1584 Ogden Ave., Wellston, MO 63133–2413	311800
Housing Authority Of The City Of Williamson, P.O. Box 1758, Williamson, WV 25661–1758	200000
Housing Authority Of The City Of Williston, P.O. Box 50, Williston, ND 58801–0000	45510
Housing Authority Of The City Of Winter Park, 718 Margaret Square, Winter Park, FL 32789–1952	487200
Housing Authority Of The City Of Woodbine, P.O. Box 1000, Woodbine, GA 31569	14000
Housing Authority Of The City Of Woodville, 1114 Albert Dr., Woodville, TX 75979	270000
Housing Authority Of The City, of Wrightsville, 100 Fulghum Drive, Wrightsville, GA 31096–0111	97048
Housing Authority Of The City Of Wynnewood, 806 E. Colbert St., Wynnewood, OK 73098–0000	47188
Housing Authority Of The County Of Douglas, 8474 Pounds Circle, Douglasville, GA 30134	343130
Housing Authority Of The County Of Flagler, P.O. Box 188, Bunnell, FL 32110–0188	500000
Housing Authority Of The County Of Lee, P.O. Box 485, Albany, GA 31702–1226	120000
Housing Authority Of The Town Of Cache, P.O. Box 582, Cache, OK 73527–0582	171638
Housing Authority Of The Town Of Cement, P.O. Box 479, Cement, OK 73017–0479	631508
Housing Authority Of The Town Of Clayton, 200 Aspen St., Clayton, NM 88415	200000
Housing Authority Of The Town of Collinsville, P.O. Box 733, Boaz, AL 35957	634939
Housing Authority Of The Town Of Cyril, P.O. Box 468, Cyril, OK 73029–0468	253923
Housing Authority Of The Town Of Easton, 900 Doverbrook Easton, MD 21601	144000
Housing Authority Of The Town Of Fort Cobb, P.O. Box 25, Fort Cobb, OK 73038–0025	170688
Housing Authority Of The Town Of Haxtun, P.O. Box 95, Haxtun, CO 80731	27610
Housing Authority Of The Town Of Kennedy, P.O. Box 38, Kennedy, AL 35574	400000
Housing Authority Of The Town Of Lone Wolf, P.O. Box 25, Lone Wolf, OK 73655–0085	275975
Housing Authority Of The Town, of Mountain View, Rt. 2, Unit 1, Box 1, Mountain View, OK 73062–0594	269580
Housing Authority Of The Town Of Ringling, P.O. Box 20, Ringling, OK 73456–0020	578987
Housing Authority Of The Town Of Seymour, Lock Drawer 191, Seymour, CT 06483	138400
Housing Authority Of The Town Of Talihina, P.O. Drawer C, Talihina, OK 74571–0000	159140
Housing Authority Of The Town Of Vincent, AL, P.O. Box 396, Childersburg, AL 35044	92900
Housing Authority Of The Town Of Wister, P.O. Box 190, Wister, OK 74966–0190	284368
Housing Authority Of Todd County, P.O. Box 69, Guthrie, KY 42234	156000
Housing Authority Of Tompkinsville, 1023 Greenhills Tompkinsville, KY 42167	708000
Housing Authority Of Trinidad, P.O. Box 353, Trinidad, TX 75163–0353	369827
Housing Authority Of Vernon, P.O. Box 1780, Vernon, TX 76384–1780	1286110
Housing Authority Of Ville Platte, P.O. Box 249, Ville Platte, LA 70586–0249	724200
Housing Authority Of Whatcom County, 208 Unity St., Bellingham, WA 98225–4420	673000
Housing Authority Of Whitewright, P.O. Box 548, Bonham, TX 75418–0548	247680
Housing Authority Of Woodruff, Post Office Box 715, Woodruff, SC 29388–0715	91600
Housing Programs Of The Town Of Murphy, P.O. Box 357, Murphy, NC 28906	151825
Houston Housing Authority, 200 Chestnut Terrace, Houston, MO 65483–0000	300425
Howard Housing Authority, P.O. Box 386, Howard, KS 67349–0386	17000
Hsg Auth City Of Espanola, P.O. Drawer Pp, Espanola, NM 87532–0000	1087000
Hsg Auth City Of Marble Falls, P.O. Box 668, Marble Falls, TX 78654–0000	70000
Hsg Auth City Of Mt.Pleasant, P.O. Box 1051, Mt. Pleasant, TX 75455–0000	595000
Hsg Auth City Of Wynne, P.O. Box 552, Wynne, AR 72396–0000	148974

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Hsg Auth Of Orange County, 119 Memphis St., Orange, TX 77630–0000	350400
Hsg Auth Of Pittsburg, P.O. Box 435, Pittsburg, TX 75686–0000	401000
Hsg Auth Parish Of East, Carroll, P.O. Drawer 352, Lake Providence, LA 71254–0000	235000
Hsg Auth Town Of Colfax, P.O. Box 179, Colfax, LA 71417–0000	540250
Hudson Housing Authority, 8 Brigham Circle, Hudson, MA 01749–0000	382000
Hudson Housing Authority, 1015 Second Street, Hudson, WI 54016–1265	192585
Humboldt Housing Authority, P.O. Box 642, Humboldt, NE 68376	80900
Idaho Housing Agency, P.O. Box 7899, Boise, ID 83702	193000
Indianola Housing Authority, P.O. Box K, Indianola, NE 69034	68000
Ingleside Housing Authority, P.O. Drawer Z, Ingleside, TX 78362	400000
Iola Housing Authority, 217 N Washington, Iola, KS 66749–2802	169100
Iowa City Housing Authority, 410 E. Washington Street, Civic Center, Iowa City, IA 52240–0000	182385
Iron County Housing Commission, 210 N. Third St., Crystal Falls, MI 49920	907200
Iron Mountain Housing Commission, 401 East D St., Iron Mountain, MI 49801	922800
Ishpeming Housing Commission, 111 Bluff St., Ishpeming, MI 49849	393340
Itasca County Hra, P.O. Box 355, Calumet, MN 55716–0355	48000
Jackson County Ha, P.O. Box #619, Wellston, OH 45692–0000	207741
Jackson Housing Authority, Whispering Way ,Tanglewood Villa, Ripley, WV 25271–0000	553000
Jefferson Housing Authority, 610 N Cass Street, Jefferson, TX 75657–0000	114455
Johnston Housing Authority, 8 Forand Circle, Johnston, RI 02919–0000	190000
Kaibab, Hc 65, Box 122, Fredonia, Az 86022	82000
Karnes City Housing Authority, P.O. Box 276, Karnes City, TX 78118–0276	28876
Karuk Tribe Housing Authority, 1320 Yellow Hammer, Yreka, CA 96097–0000	400000
Kaukauna Ha, 125 West, 10th Street, Kaukauna, WI 54130–0000	61700
Kaw, P.O. Box 371, Newkirk, OK 74647	590783
Keansburg Ha, 25 Hancock Street, Keansburg, NJ 07734–0000	715700
Keene Housing Authority, 105 Castle Street, Keene, NH 03431–0000	194000
Kendallville Ha, 240 Angling Road, Kendallville, IN 46755	341695
Kenedy Housing Authority, P.O. Box 627, Kenedy, TX 78119–0000	400000
Keokuk Housing Authority, 111 South 2nd Street, Keokuk, IA 52632–0000	313730
Kickapoo, Rt. 1, BOx 800a Horton, Ks 66439	740340
Kingston Housing Authority, 132 Rondout Dr. Kingston, NY 12401–2630	140000
Kingsville Hsg. Authority, 1000 W Corral, Kingsville, TX 78363–0000	250000
Kirksville Housing Authority, P.O. Box 730, Kirksville, MO 63501–0000	409072
Kitsap County Consolidated H. A., 9265 Bayshore Dr Nw, Silverdale, WA 98383–9106	190000
Knoxville Low Rent Housing Agency, 305 S Third Street, Knoxville, IA 50118–0000	97410
L'anse Housing Commission, 110 S Sixth St., L'anse, MI 49946	288000
La Junta Housing Authority, P.O. Box 376, La Junta, CO 81050–0000	442670
Laconia Housing and Redevelopmnt Auth, 25 Union Ave., Laconia, NH 03246–0000	82000
Ladysmith Housing Authority, 705 East, Fourth Street, Ladysmith, WI 54848–2225	353130
Lafayette Co. Hsg Auth, Lafayette County Hsg Auth, Court House 626 Main St., Darlington, WI 53530–0000	74835
Lafayette Housing Authority, P.O. Box 116, Lafayette, TN 37083–0116	156128
Lake Linden Housing Commission, 210 Calumet St., Lake Linden, MI 49945	566900
Lake Mha, 200 W Jackson St., Painesville, OH 44077–0000	442760
Lakewood Housing Authority, 445 S. Allison Parkway, Lakewood, CO 80226–0000	138700
Lancaster Housing Authority, R. R. # 1, Box 157, Lancaster, MO 63548–9998	39750
Lawrence County Housing Authority, 1109 12th St., Lawrenceville, IL 62439	432356
Lebanon Housing Authority, 31 Riverside Circle, West, Lebanon, NH 03784–0000	100000
Lebanon Housing Authority, P.O. Box 1660, Lebanon, MO 65536–3062	675000
Lee County Ha, 1000 Washington Ave., Dixon, IL 61021–0000	12500
Lee County Housing Authority, P.O. Box 665, Jonesville, VA 24263–0000	17031
Lees Summit Housing Authority, 111 South Grand, Lees Summit, MO 64063–2699	75000
Lenoir City Housing Authority, 101 Oakwood Drive, Lenoir City, TN 37771	65900
Lenoir Housing Authority, P.O. Box 1526, Lenoir, NC 28645	201350
Lexington Housing Authority, 1 Countryside Village, Lexington, MA 02173–0000	350000
Lexington Housing Authority, 609 East, Third Street, Lexington, NE 68850–0000	100000
Lexington Housing Authority, P.O. Box 559, Lexington, TN 38351	71756
Liberal Housing Authority, 1401 N New York Ave., Liberal, KS 67901	22000
Licking Metro Ha, P.O.Box 1029, Mansfield, OH 44901–0000	103800
Linden Housing Authority, 1601 Dill Ave., Linden, NJ 07036–1723	431000
Little River County Hsg Auth, P.O. Drawer A, Foreman, AR 71836–0000	503098
Lockhart Housing Authority, P.O. Box 446, Lockhart, TX 78644–0446	400000
Lodi, 50 Brookside Avenue, Lodi, NJ 07644	86350
Logan County Mha, 105w High St., Bellefontaine, OH 43311–0000	203045
Logan Cty Ha, 1028 N. College Street, Lincoln, IL 62656–0000	762000
Lomita Housing Authority, P.O. Box 339, Lomita, CA 90717–0000	418480
London Metropolitan Housing Authority, 179 S. Main Street, London, OH 43140	191300
Longmont Housing Authority, 900 Coffman, Suite C, Longmont, CO 80501	32600
Loudon Housing Authority, P.O. Box 397, Loudon, TN 37774–0397	1320775
Loup City Housing Authority, P.O. Box 153, Loup City, NE 68853	28550

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Low Rent Housing Agency Of Bancroft, P.O. Box 189, Bancroft, IA 50517	99500
Low Rent Housing Agency Of Clarinda, 402 W. Willow St., Clarinda, IA 51632–2552	140682
Low Rent Housing Agency Of Hamburg, P.O. Box 129, Hamburg, IA 51640	35000
Low Rent Housing Agency Of Manning, 421 Center St., Manning, IA 51455	34300
Low Rent Housing Agency Of Mount Ayr, 306 East, Monroe, Mount Ayr, IA 50854–0468	27764
Low Rent Housing Agency Of Onawa, 1017 Eleventh St., Onawa, IA 51040–1555	20800
Low Rent Housing Agency Of Red Oak, 1805 N. Eighth St., Red Oak, IA 51566–1656	66940
Low Rent Housing Agency Of Waverly, 320 Fifteenth St. Nw, Waverly, IA 50677–2122	121100
Low Rent Housing Agency Of Winterset, 415 N. Second St., Winterset, IA 50273	68382
Lower Brule, P.O. Box 183, Lower Brule, SD 57548	705000
Luck Housing Authority, 416 First Street, Luck, WI 54853	64380
Luling Housing Authority, P.O. Box 229, Luling, TX 78648–0229	250000
Lummi, 2616 Kwina Road, Bellingham, WA 98226–8698	839102
Lyons Housing Authority, Rr 2 Box 20a, Lyons, NE 68038	24400
Macclenny Housing Authority, P.O. Box 977, Macclenny, FL 32063–0977	500000
Macon Housing Authority, Lakeview Towers 218, Macon, MO 63552–0000	181654
Madison Housing And Redevelopment Commission, 111 S. Washington Ave., Madison, SD 57042–0000	830981
Madison Housing Authority, P.O. Box 9, Madison, NC 27025	115000
Makah, P.O. Box 88, Neah Bay, WA 98357–0088	629625
Malden Housing Authority, P.O. Box 395, 109 Watson Dr., Malden, MO 63863–0000	325933
Malvern Housing Authority, P.O. Box 550, Malvern, AR 72104–0000	244625
Mamou Housing Authority, 1016 Maple Avenue, Mamou, LA 70554–0000	375000
Manchester Housing Authority, 710 Butler Circle, Manchester, TN 37355	143178
Manistee Housing Commission, 237 Sixth Avenue, Manistee, MI 49660	15000
Manitowoc Housing Authority, 1433 North Sixth Street, Manitowoc, WI 54220–2066	67710
Mankato Housing Authority, P.O. Box 242, Mankato, KS 66956–2607	200600
Marion County Housing Authority, 4660 Portland Rd. Ne, Salem, OR 97305–0000	135000
Marlboro Co. Housing And Redevelopment, Authority, Post Office Drawer 969, Florence, SC 29503–0969	50380
Mars Hill Housing Authority, P.O. Box 186, Mars Hill, NC 28754	150000
Marshall Housing Authority, P.O. Box 176, Marshall, NC 28753	100000
Marshall Housing Authority, P.O. Box 98, 275 South Redman, Marshall, MO 65340–2264	300600
Marshfield Ha, 601 S. Cedar, Marshfield, WI 54449–0000	404600
Marysville Housing Commission, 1100 New York Avenue, Marysville, MI 48040–1477	246000
Maryville Housing Authority, Davison Square, Maryville, MO 64468–0000	433000
Mason County Housing Authority, 200 East Hurst Avenue, Havana, IL 62644–0000	1160000
Massac County Housing Authority, P.O.Box 528, Metropolis, IL 62960–0528	649112
Massena Housing Authority, P.O. Box 518, 20 Robinson Rd., Massena, NY 13662–0518	33630
Mathis Housing Authority, 300 W Fulton, Mathis, TX 78368–0000	700000
Maxton Housing Authority, P.O. Box 126, Maxton, NC 28364	108600
Maynard Housing Authority, Powder Mill Circle, Maynard, MA 01754	220000
Mc Allen Housing Authority, 2301 Jasmine Ave., Mc Allen, TX 78501–0000	300000
Medina Mha, 860 Walter Rd. Medina, OH 44256–0000	135000
Medway Housing Authority, Mahan Circle, Medway, MA 02053–2010	92000
Melvindale Housing Commission, 3100 Oakwood Blvd, Melvindale, MI 48122–0000	74400
Memphis Housing Authority, P.O. Box 246, Memphis, MO 63555–0000	167341
Menard Cty Ha, 100 East, Sheridan Road, Petersburg, IL 62675–0000	42800
Mendocino County, Community Development Commission, 1076 North State Street, Ukiah, CA 95482	255000
Menomonie Housing Authority, P.O. Box 296, Menomonie, WI 54751–0296	233100
Mercer County Housing Authority, P.O. Box 517, Mandan, ND 58554–0000	639900
Mesa Grande, P.O. Box 267, Santa Ysabel, CA 92070	40000
Metlakatla, P.O. Box 59, Metlakatla, AK 99926	403190
Miami Met. Ha, 1695 Troy-Sidney Road, Troy, OH 45373–0000	338870
Mille Lacs, Hcr 67, BOx 194, Onamia, Mn 56359	147500
Milton Housing Authority, 1498b Byrom St., Milton, FL 32570–3827	470300
Missoula Housing Authority, 1319 E. Broadway, Missoula, MT 59802–0000	436636
Modoc-Lassen, P.O. Box 2028, Susanville, CA 96130	623263
Mohican, N8618 Oak Street, Bowler, WI 54416	251157
Montour County Housing Authority, One Beaver Place, Danville, PA 17821–0000	142900
Mooresville Housing Authority, P.O. Box 1087, Mooresville, NC 28115	58000
Morgan Met Ha, 4512 North State Route #376 Nw, Mcconnelsville, OH 43756–0000	257998
Mound City Housing Authority, R.R. 2, Box 54, Mound City, MO 64470–0201	224000
Mount Desert Housing Authority, 15 Eagle Lake Road, Bar Harbor, ME 04609–0000	80000
Mount Gilead Housing Authority, P.O. Box 158, Mount Gilead, NC 27306	123000
Mount Olive Housing Authority, 108 West, Main Street, Mount Olive, NC 28365	160000
Mountain Grove Housing Authority, 301 West, First Street, Mountain Grove, MO 65711–0000	197100
Mt. Vernon Ha, 1500 Jefferson Drive, Mt. Vernon, IN 47620	423000
Muckleshoot, 38037–158th Ave Se, Auburn, WA 98002	228543
Naugatuck Housing Authority, 16 Ida Street, Naugatuck, CT 06770–0000	250000
Ne Oregon H.A., 2602 May St., La Grande, OR 97850–0000	488000
Nebraska City Housing Authority, 200 N 3rd Street, Nebraska City, NE 68410–0111	100000

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Needham Housing Authority, 28 Captain Robert Cook Drive, Needham, MA 02194–0000	290000
Negaunee Housing Commission, 98 Croix Street, Negaunee, MI 49866	281200
Neligh Housing Authority, 500 P St., Neligh, NE 68756–1455	206400
Nelson Housing Authority, P.O. Box 288, Nelson, NE 68961–0288	35000
New London Housing Authority, 186 Colman Street, P.O. Box 119, New London, CT 06320–0000	355359
New Richmond Ha, 370 Odanah Ave., New Richmond, WI 54017–0000	84915
Newburyport Housing Authority, 25 Temple Street, Newburyport, MA 01950–0000	200000
Newmarket Housing Authority, 34 Great Hill Terrace, Newmarket, NH 03857–0000	320000
Newton Housing Authority, 82 Lincoln Street, Newton Highlands, MA 02161–0000	115000
Niceville Housing Authority, 500 Boyd Circle, Niceville, FL 32578	219650
Nixon Housing Authority, P.O. Box 447, Nixon, TX 78140–0000	75000
Noble Metropolitan Ha, P.O. Box 744, Cambridge, OH 43725–0000	64000
Nogales Housing Authority, P.O. Box 777, 951 N. Kitchen Street, Nogales, AZ 85628–0777	185891
Nooksack Indian, 3891 Uluquance, P.O. Box 122, Deming, WA 98244	568675
North Andover Housing Authority, P.O. Box 373, North Andover, MA 01845–0000	220000
North Bend City Housing Authority, 1700 Monroe St., North Bend, OR 97459	181000
North Pacific Rim, 4201 Tudor Ctr Dr #205 Anchorage, AK 99508–5915	501019
North Providence Housing Authority, 945 Charles Street, North Providence, RI 02904–0000	679194
North Tarrytown Housing Authority, 126 Valley St., North Tarrytown, NY 10591–2826	80000
North Wilkesboro Dept. Of Housing and Comm. Dev., P.O. Box 1373, North Wilkesboro, NC 28659	200000
Northampton County Housing Auth., P.O. Box 252, Nazareth, PA 18064–0000	234504
Northern Circle, 694 Pinoleville Drive, Ukiah, CA 95482	400000
Northumberland County Housing Auth., 50 Mahoning Street, Milton, PA 17847–0000	332962
Norwich Housing Authority, 10 Westwood Park, Norwich, CT 06360–0000	200000
Nw Regional Hsg Authority, P.O. Box 699, Harrison, AR 72601–0699	147623
Oak Park Ha, 112 S Humphrey, Oak Park, IL 60302–0000	908951
Oakland Housing Authority, 100 N. Aurora Ave., Oakland, NE 68045–1510	89500
Ocean City Housing Authority, 204 Fourth St., Ocean City, NJ 08226–3906	542800
Oconto Housing Authority, 407 Arbutus Avenue, Oconto, WI 54153–1600	66500
Olathe Housing Authority, 100 W Santa Fe, P.O. Box 768, Olathe, KS 66061–0000	82000
Old Town Housing Authority, P.O. Box 404, Old Town, ME 04468–0000	275000
Ord Housing Authority, Parkview Village, Ord, NE 68862	60500
Ormond Beach Housing Authority, 100 New Britain Ave., P.O. Box 998, Ormond Beach, FL 32175–0998	20000
Oshkosh Housing Authority, Route 1 Mesa Vue #21, Oshkosh, NE 69154	82000
Otter Tail County Hra, 225 West, Washington Street, Fergus Falls, MN 56537–0000	250000
Oxford Housing Authority, P.O. Box 616, Oxford, NC 27565	118894
Palacios Housing Authority, 45 Seashell, Palacios, TX 77465–0000	380996
Paragould Housing Authority, P.O. Box 137, Paragould, AR 72450–0000	729335
Parma Pha, 6901 West, Ridgewood Drive, Parma, OH 44129	117000
Parsons-Decaturville Housing Authority, 301 Rose Avenue, Parsons, TN 38363	1097982
Pasco County Housing Authority, 14517 7th Street, Dade City, FL 33523–2703	81227
Pearsall Housing Authority, 501 West, Medina St., Pearsall, TX 78061–0000	664267
Pekin Housing Authority, 1901 Broadway, Pekin, IL 61554	73830
Pembroke Housing Authority, P.P. Drawer 910, Pembroke, NC 28372	233725
Pembroke Housing Authority, Kilcommons Drive, Pembroke, MA 02359–0000	220000
Penns Grove Ha, Penns Towers South, Penns Grove, NJ 08069–0000	712356
Penobscot, Indian Island, P.O. Box 498, Old Town, ME 04468	65007
Perry County Metro. Hsg. Authority, Senior Citizens Building, Crooksville, OH 43731–0000	222583
Phillipsburg Ha, 115 South Main Street, Phillipsburg, NJ 08865–0000	394972
Pickaway Metropolitan Housing Auth., 176 Rustic Drive, Circleville, OH 43113–0000	192700
Pike County Housing Authority, 838 Mason, Barry, IL 62312	432932
Pike County Housing Authority, Box 241, Murfreesboro, AR 71958–0000	34630
Pike Metroplitan Ha, 2626 Shyville Road, Piketon, OH 45661–0000	255000
Pinal County Housing Authority, 970 N 11 Mile Corner Rd., Casa Grande, AZ 85222–0000	1747064
Pineville Housing Authority, P.O. Box 307, Pineville, MO 64856	107600
Pittsfield Housing Authority, 65 Columbus Ave., Pittsfield, MA 01201–0000	381000
Plant City Housing Authority, 1306 Larrick Lane, Plant City, FL 33566–0000	555520
Plattsmouth Housing Authority, 801 Washington Ave., Plattsmouth, NE 68048–1255	73500
Pleasant Pt Passamaquoddy, P.O. Box 339, Perry, ME 04667	8500
Pleasantville Housing Authority, 156 N. Main St., Pleasantville, NJ 08232–2564	210000
Plymouth Housing Authority, 306 W. Water St., Plymouth, NC 27962	100000
Poarch Band Of Creek, Hcr 69a, BOx 85b, Atmore, Al 36502	216625
Port Gamble S'klallam, 31912 Little Boston Road N.E., Kingston, WA 98346	361623
Port Hueneme Housing Auth, 250 No Ventura Rd., Port Hueneme, CA 93041–0000	706000
Port Isabel Housing Authority, 506 Port Road, P.O. Box 1196, Port Isabel, TX 78578–0000	400000
Port Jervis Housing Authority, 39 Pennsylvania Ave., Port Jervis, NY 12771–2132	200000
Portland Housing Authority, 9 Chatham Court Riverside Street, Portland, CT 06480–0000	200000
Portsmouth Housing Authority, 2368 East, Main Road, P.O.Box 118 Portsmouth, RI 02871–0000	57000
Poteet Housing Authority, P.O. Box 226, Poteet, TX 78065–0000	50000
Poth Housing Authority, P.O. Box 219, Poth, TX 78147–0000	40000

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Presque Isle Housing Authority, 58 Birch Street, Presque Isle, ME 04769–0000	290000
Princeton Housing Authority, 801 Hickland, Princeton, MO 64673–1227	132000
Princeville Housing Authority, 51 Pioneer Court, Tarboro, NC 27886	185300
Pulaski County Housing Authority, P.O. Box 246, Mounds, IL 62964–0246	295481
Punta Gorda Housing Authority, P.O. Box 1146, Punta Gorda, FL 33951–1146	47000
Putnam Housing Authority, 123 Laconia Avenue, Putnam, CT 06260–0000	210000
Queen Anne's Cty Housing Authority, P.O. Box 327, Centreville, MD 21617–0000	26000
Quileute, P.O. Box 159, La Push, WA 98350	520800
Ragland Housing Authority, P.O. Box 69, Ragland, AL 35131–0069	93120
Rainsville Housing Authority, P.O. Box 733, Boaz, AL 35957	588925
Rapides Parish Housing Authority, 119 Boyce Gardens, Boyce, LA 71409–0000	600000
Ravenna Housing Authority, 1011 Grand Ave., Ravenna, NE 68869–1015	57800
Red Bank Ha, P.O. Box 2158, Evergreen Terrace, Red Bank, NJ 07701–0000	586525
Red Cliff, Rural Route 1 Box 941, Bayfield, WI 54814	503625
Reno-Sparks, 1050 Eagle Canyon Drive, Sparks, NV 89436	265000
Revere Housing Authority, 70 Cooledge St., Revere, MA 02151–0000	575000
Rhinelander Housing Authority, 411 W.Phillip St., Rhinelander, WI 54501–0000	181500
Rice Lake Ha, 132 West, Marshall St., Rice Lake, WI 54868–0000	91841
Richland Center Housing Authority, 701 West, Seminary St., Richland Center, WI 53581–2169	49375
Richland Housing Authority, 215 S. Walnut, Richland, MO 65556–0037	520100
Richmond Housing Authority, 302 N Camden, Richmond, MO 64085–1654	300000
Riviera Beach Housing Authority, 2014 West 17th Court, Riviera Beach, FL 33404–5002	230000
Rochester Housing Authority, Wellsweep Acres, Rochester, NH 03867–0000	331253
Rockville Centre Housing Authority, 160 North Centre Ave., Rockville Centre, NY 11570–3979	61925
Rockville Housing Authority, 114 Franklin Park West, P.O. Box, Rockville, CT 06066–0000	350000
Rolla Housing Authority, 1440 Forum Drive, Rolla, MO 65401–0000	136950
Roma Housing Authority, P.O. Box 1002, Roma, TX 78584–0000	300000
Rome City Ha, P.O. Box 415, Rome City, IN 46784–0000	20000
Round Valley, P.O. Box 682, Covelo, CA 95428	600000
Round Valley, P.O. Box 682, Covelo, CA 95428	560000
Roxboro Housing Authority, P.O. Box 996, Roxboro, NC 27573	225400
Royal Oak Township Housing Commission, 21312 Wyoming Ave., Ferndale, MI 48220–2125	509000
Russell Housing Authority, 330 W 4th, Russell, KS 67665–2648	98000
Sac and Fox Of Mo, Rt 1, BOx 97, Unit 12, Reserve, Ks 66434	2800
Salem Housing Authority, 27 Charter Street, Salem, MA 01970–0000	23000
Sandusky Mha, 600 West, State St., Fremont, OH 43420–0000	208000
Sanford Hsg Authority, 29 Yale Street, P.O. Box 1008, Sanford Town, ME 04073–0000	215200
Santa Cruz County Hsg Auth, 2160–41 St., Ave., Capitola, CA 95010–0000	300000
Santa Fe County Hsg Authority, 52 Camino De Jacobo, Santa Fe, NM 87505–0000	1017355
Santee Sioux, Route 2 Box 164, Niobrara, NE 68760	700000
Saugus Hsg Authority, 19 Talbot St., Saugus, MA 01906–0000	50000
Sauk County Housing Authority, 708 Elizabeth Street, P.O. Box 147, Baraboo, WI 53913–0000	270400
Schertz Housing Authority, 204 Schertz Parkway, Schertz, TX 78154–0000	300000
Schuyler Housing Authority, 712 F St., Schuyler, NE 68661–2348	51100
Scott County Housing Authority, 143 S Walnut, Winchester, IL 62694	29425
Scott County Redevelopment and H/A, P.O. Box 266, Duffield, VA 24244–0000	211801
Selma Housing Authority, 711 Lizzie St., Selma, NC 27576	200000
Seminole County Housing Authority, 662 Academy Place, Oviedo, FL 32765	235980
Seminole Nation Housing Author, P.O. Box 1493, Wewoka, OK 74884–0000	1300
Seneca Housing Authority, 504 Edwards Street, Seneca, KS 66538–2251	126000
Shamokin Housing Authority, 1 Independent Street, Shamokin, PA 17872–0000	341150
Shelby County Housing Authority, 715 Rouge Bluff Ave., Memphis, TN 38103	1590071
Shelby Met Ha, 706 North Wagner Avenue, Sidney, OH 45365–0000	215000
Shell Lake Housing Authority, Route L, 2–A Shell Lake, Wi 54871–0302	34000
Shelton Housing Authority, P.O. Box 427, Shelton, NE 68876	45000
Shenandoah Low Rent Housing Agency, 707 W. Summit Ave., Shenandoah, IA 51601–2238	76700
Shoshone Joint, P.O. Box 1199, Ely, NV 89301	300000
Sinton Housing Authority, P.O. Box 1302, Sinton, TX 78387–0000	450000
Sioux Falls Housing And, Redevelopment Commission, 224 N. Phillips Avenue, Sioux Falls, SD 57102–0000	400700
Sisseton Housing and Redevelopment Commission, P.O. Box 196, Sisseton, SD 57262	165070
Slater Housing Authority, 275 South Redman, Slater, MO 65349–1622	194300
Slaton Ha, P.O. Box 317, Slaton, TX 79364–0000	160000
Slinger Housing Authority, 205 Slinger Road, Slinger, WI 53086–9406	83805
Smithfield Housing Authority, P.O. Box 1058, Smithfield, NC 27577	500000
Smithfield Housing Authority, 7 Church Street, Greenville, RI 02828–0000	78000
Smithville Housing Authority, P.O. Box 120, Smithville, TX 78957–0000	80000
Snohomish County Ha, 12625 4th Ave W. Suite 200, Everett, WA 98204–0000	185500
Sokaogon, P.O. Box 186, Crandon, WI 54520	119000
Solomon Housing Authority, 105 W 6th, Solomon, KS 67480	120000
Somersworth Housing Authority, 9 Bartlett Avenue, P.O. Box 31, Somersworth, NH 03878–0000	175000

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
South Amboy Ha, Bayshore Drive, South Amboy, NJ 08879–0000	45980
South Carthage Housing Authority, P.O. Box 197, Carthage, TN 37030–0197	438589
South Hutchinson Housing Authority, 441 N Washington, South Hutchinson, KS 67505–1113	167000
South Kingston Housin Authority, P.O.Box 6, Peace Dale, RI 02883–0000	217000
South Milwaukee Housing Authority, P.O. Box 265, South Milwaukee, WI 53172–0265	480018
South Pittsburg Housing Authority, P.O. Box 231, South Pittsburg, TN 37380–0231	65960
South Tucson City Housing Auth, 1713 S Third Ave., South Tucson, AZ 85713–0000	580680
Southeast Mn Multi-County Hra, 134 East Second Street, Wabasha, MN 55981–0000	500000
Southern Iowa Reg Hsg Authority, 219 N Pine, Creston, IA 50801–2413	269100
Southern Pines Housing Authority, 801 S. Mechanic St., Southern Pines, NC 28387	92500
Southwest, City Housing Authority, P.O. Box 304, Southwest City, MO 64863–0304	20000
Southwest, Harbor Housing Authority, Box 4, Southwest Harbor, ME 04609–0000	82000
Sparta Housing Authority, 307 North Court Stre, Sparta, WI 54656–1710	55944
Spooner Housing Authority, 713 Summit Street, Spooner, WI 54801–1343	381620
Springfield Housing Authority, 3806 East 8th Street, Springfield, FL 32401–0000	331540
Spruce Pine Housing Authority, P.O. Box 645, Spruce Pine, NC 28777	375943
St. Joseph Housing Authority, 502 S 10th St., Box 1153 St. Joseph, MO 64502–0000	360000
St. George Housing Authority, 975 N. 1725 W. St. George, UT 84770–0000	25350
St. Michaels Housing Authority, P.O. Box 296, St. Michaels, MD 21663–0000	95000
Stanton Housing Authority, P.O. Box 658, Stanton, NE 68779–0658	75000
Stillaguamish Tribal H.A., 3439 Stolluckquamish Lane Arlington, WA 98223–0277	145000
Stockdale Housing Authority, P.O. Box 65, Stockdale, TX 78160–0065	50000
Stoughton Housing Authority, 4 Capen Street, Stoughton, MA 02072–0000	33000
Stromsburg Housing Authority, 517 East 7th, Stromsburg, NE 68666–0000	15000
Susquehanna County Housing Authority, 61 Church Street, Montrose, PA 18801–0000	210500
Sutherland Housing Authority, P.O. Box 247, Sutherland, NE 69165–0247	94500
Suwanee County Housing Authority, P.O. Box 837, Branford, FL 32008	209460
Sw Idaho Cooperative Housing Authority, 1108 West, Finch Drive, Nampa, ID 83651–0000	72000
Swinomish, P.O. Box 677, La Conner, WA 98257	220800
Syracuse Housing Authority, P.O. Box 388, Syracuse, NE 68446	70000
Taft Housing Authority, 223 Avenue C, Taft, TX 78390	250000
Taos County Hsg Authority, Box 4239, Taos, NM 87571–0000	556000
Tarrytown Municipal Housing Authority, 50 White St., Tarrytown, NY 10591–3621	100000
Tecumseh Housing Authority, Eighth And Broadway, Tecumseh, NE 68450	33550
Tecumseh Housing Authority, 601 Leisure, Tecumseh, OK 74873–0000	61998
Tewksbury Housing Authority, Saunders Circle, Tewksbury, MA 01876–0000	365000
Texas City Hsg Authority, 817 Second Avenue North Texas City, TX 77590–0000	95000
The Housing Authority Of The City Of Canton, P.O. Box 367, Canton, MS 39046	1154900
The Housing Authority Of The City Of Hazelhurst, P.O. Box 572, Hazlehurst, MS 39083	1099275
The Housing Authority Of The City Of Iuka, P.O. Box 267, Iuka, MS 38852	385780
The Housing Authority Of The City Of Senatobia 100 Scotsdale Street, Senatobia, MS 38668	192500
The Housing Authority Of The City Of Shelby, P.O. Box 247, Shelby, MS 38774	158980
The Housing Authority Of The City Of, Water Valley P.O. Box 604, Water Valley, MS 38965–0604	217250
The Housing Authority Of The City Of West Point P.O. Box 158, West, Point, MS 39773	900000
The Housing Authority Of The Town Of Sardis, P.O. Box 395, Sardis, MS 38666	478200
The New Randleman Housing Authority, 606 South Main St., Randleman, NC 27317	145600
Tilden Housing Authority, Route 1, BOx 500, Tilden, Ne 68781	61400
Titusville Housing Authority, 107 Central Towers, Titusville, PA 16354–0000	187196
Tiverton Housing Authority, 99 Hancock Street, Tiverton, RI 02878–0000	60000
Town Of Ayden, Department Of Housing, P.O. Box 482, Ayden, NC 28513	100000
Town Of Bristol H A, P.O. Box 535, Benjamin Church Manor, Bristol, RI 02809–0000	208000
Town Of Ramapo Housing Authority, Pondview Drive, Suffern, NY 10901–0000	220000
Township of Clinton, 34947 Village Road, Attention: Angelo Palmer Clinton Township, MI 48035–0000	1000000
Trail County Housing Authority, P.O. Box 369, Hillsboro, ND 58045–0000	432169
Tremont Housing Authority, Tremont Housing Authority Tremont, ME 04653–0000	110000
Trempealeau Cy Ha, Courthouse, Whitehall, WI 54773–0000	128475
Trenton, P.O. Box 155, Trenton, ND 58853	635000
Trinidad Housing Authority, P.O. Box 36, Trinidad, CO 81082–0000	688484
Troy Housing Authority, 201 Stanley St., Troy, NC 27371	229600
Tuckahoe Housing Authority, 4 Union Pl., Tuckahoe, NY 10707–4236	644000
Tucumcari Housing Authority, P.O. Box 1026, Tucumcari, NM 88401–0000	460000
Umatilla Reservation, P.O. Box 1658, Pendleton, OR 97801–0510	995000
Union County Housing Authority, 715 W. Main Street, Lake Butler, FL 32054	75400
Utah County Housing Authority, 240 East Center, Provo, UT 84606	385962
Utah Paiute Housing Authority, 600 North 100 East, Cedar City, UT 84720–0000	685000
Uvalde Housing Authority, 1700 Garner Field Rd., Uvalde, TX 78801–0000	300000
Valdese Housing Authority, P.O. Box 310, Valdese, NC 28690	200000
Van Buren Housing Authority, 16 Champlain Street, Van Buren Town, ME 04785–0000	44000
Vance County Housing Authority, P.O. Box M, Henderson, NC 27536	232400
Venice Housing Authority, P.O. Box 835, Venice, FL 34284–0835	213500

APPENDIX A—FISCAL YEAR 1996, COMPREHENSIVE IMPROVEMENT ASSISTANCE PROGRAM—Continued

[Recipients of Funding Decisions]

Funding recipient (Name and Address)	Amount approved
Verdigre Housing Authority, P.O. Box 10, Verdigre, NE 68783	110000
Village Of Ellenville Housing Authority, 10 Eastwood Avenue, Ellenville, NY 12428–0000	180000
Village Of Great Neck Housing Authority, 700 Middle Neck Rd., Great Neck, NY 11023–1242	60000
Village Of Spring Valley Housing Authority, 76 Gesner Dr., Spring Valley, NY 10977–3998	180000
Vinton Housing Authority, P.O. Box 687, Vinton, LA 70668–0000	104675
Wakefield H A, 26 Crescent St., Wakefield, MA 01880–0000	112000
Wakefield Housing Commission, 200 Pierce St., Wakefield, MI 49968	391150
Walker River, P.O. Box 238, Schurz, NV 89427	492000
Wamego Housing Authority, 1201 Chrysler Dr., Wamego, KS 66547–0086	10537
Warren County Housing Authority, 108 Oak Street, Warren, PA 16365–0000	75000
Warren Met.Ha, P.O. Box 63, Lebanon, OH 45036–0000	192235
Washburn Ha, 420 East Third Street, Washburn, WI 54891–0000	174710
Washington County Housing Authority, 33 West, Washington Street, Hagerstown, MD 21740–0000	58500
Washoe, 1588 Watasheamu Dr., Gardnerville, NV 89410	117000
Watertown Housing Authority, 55 Waverley Avenue, Watertown, MA 02172–0000	568946
Watertown Housing Authority, 201 North Water Stre, Watertown, WI 53094–7683	633810
Waterville Housing Authority, 60 Elm Street, Waterville, ME 04901–0000	110000
Waverly Housing Authority, P.O. Box 766, Waverly, TN 37185	60469
Wayne Housing Authority, P.O. Box 183, Wayne, NE 68787–0183	50000
Waynesboro Redevelopment and H/A, 1700 New Hope Road, Waynesboro, VA 22980–2566	998491
Webster Housing Authority, Golden Heights, Webster, MA 01570–0000	280000
Weeping Water Housing Authority, 309 W. River St., Weeping Water, NE 68463	75000
Weslaco Housing Authority, P.O. Box 95, Weslaco, TX 78596–0000	80000
West Hartford Housing Authority, 759 Farmington Ave., West, Hartford, CT 06119–0000	165000
Westbrook Housing Authority, P.O. Box 349, Westbrook, ME 04092–0000	230000
Wewoka Housing Authority, P.O. Box 877, Wewoka, OK 74884–0000	643203
Whitefish Housing Authority, 100 Fourth St., Whitefish, MT 59937	634250
Whiteville Housing Authority, 504 Burkhead St., Whiteville, NC 28472	145700
Wilber Housing Authority, P.O. Box 577, Wilber, NE 68465	31350
Williamsport Housing Authority, 505 Center Street, Williamsport, PA 17701–0000	787300
Winchendon Housing Authority, 108 Ipswich Drive, Winchendon, MA 01475–0000	300000
Winchester Housing Authority, 80 Chestnut Street, Winsted, CT 06098–0000	230000
Winchester Housing Authority, P.O. Box 502, Winchester, TN 37398–0502	97023
Winfield Housing Authority, 1417 Pine Terr, Winfield, KS 67156–1428	288000
Winnebago, P.O. Box G, Winnebago, NE 68071	474269
Winooski Housing Authority, 83 Barlow Street, Winooski, VT 05404–0000	165000
Winslow Housing Authority, 900 W. Henderson Sq., Winslow, AZ 86047–0000	161435
Winter Haven Housing Authority, 2670 Avenue C Sw, Winter Haven, FL 33880–0000	387750
Wisconsin Rapids Housing Authority, 2521 Tenth Street South, Wisconsin Rapids, WI 54494–0000	219780
Woburn Housing Authority, 59 Campbell Street, Woburn, MA 01801–0000	330000
Woodbury Housing Authority, 401 Mcferrin Street, Woodbury, TN 37190	114832
Woodridge Housing Authority, P.O. Box 322, Woodridge, NY 12789–0322	100000
Worthington Hra, 819 Tenth Street, Worthington, MN 56187–2758	500000
Wymore Housing Authority, 300 N. Seventh St., Wymore, NE 68466–1763	83200
Wyoming County Housing Authority, Route 309, P.O. Box J, Tunkhannock, PA 18657–0000	200000
Wytheville Redev. and Housing Authority, P.O. Box 62, Wytheville, VA 24382–0062	315577
Yavapai Apache, Post Office Box 3897, Camp Verde, AZ 86322	200000
Yerington, 31 West Loop Rd., Yerington, NV 89447	220000
Yoakum Housing Authority, P.O. Box 250, Yoakum, TX 77995–0250	75000
Ypsilanti Housing Commission, 601 Armstrong Dr, Ypsilanti, MI 48197–0000	495000
Ysleta Del Sur, 332 Alton Griffin, P.O. Box 17579, El Paso, TX 79917	70000
Yuma County Housing Department, 8450 W Highway 95 Suite 88, Somerton, AZ 85350–2534	400565

[FR Doc. 96–31984 Filed 12–16–96; 8:45 am]

BILLING CODE 4210–33–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Animal Trapping Within the National Wildlife Refuge System

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The Fish and Wildlife Service (Service) is seeking information regarding the use of animal traps within the National Wildlife Refuge System. Interested parties that wish to provide information on any aspect of this subject should send the information to the address listed below no later than February 15, 1997. All information received will be forwarded to the House and Senate Appropriations Committees by March 1, 1997 as required by the Omnibus Fiscal Year 1997 Appropriations Bill.

DATES: For written comments to be considered, they must be received by February 15, 1997.

ADDRESSES: U.S. Fish and Wildlife Service, Division of Refuges, Attention: Trapping Project, 4401 N. Fairfax Drive, Room 670, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Ken McDermond, Refuge Program Specialist, 703/358–2422; 703/358–1826 (fax);

kenneth__mcdermond@mail.fws.gov (email).

SUPPLEMENTARY INFORMATION: The conference report accompanying the Fiscal Year 1997 Appropriations Act, Public Law 104–208, 110 STAT. 3009 contained the following language:

''While there is no specific prohibition on the use of steel jaw leghold traps, the Service should establish a task force to study the use of animal traps in the National Wildlife Refuge System. The task force should consider the humaneness of various trapping methods, as well as the cost, the impact on the protection of endangered species, the impact on Fish and Wildlife Service facilities, and other relevant issues. The task force should include interested outside parties and report its findings to the House and Senate Committees on Appropriations by March 1, 1997.''

The Committee's instructions to the Service provided that the Service ''should establish a task force to study the use of animal traps'' and the ''task force should include interested outside parties and report its findings to the House and Senate Committees on Appropriations by March 1, 1997.'' These instructions presented a difficult legal challenge. After consultation with the Service's representatives in the Solicitor's Office, it was clear that given the time available to meet these instructions that it would be virtually impossible to achieve a balanced but limited representation of interests on the task force and prepare a report that represented the task force's findings while being consistent with legally required procedures. The Solicitor's Office suggested, however, that a general solicitation from all interested outside parties, encouraging a broadly-based task force approach that would not serve to exclude interested participants, and the transmittal of all information received thereby to the Committees without editorial change or policy alteration would be consistent with the general intent of the Committee's instructions and achievable within the existing procedural laws by March 1, 1997. The Service has, accordingly, adopted this suggestion and requests all interested parties to submit information on the use of traps in the National Wildlife Refuge System, in particular those issues identified in the conference report.

Dated: December 11, 1996.

John G. Rogers,

Acting Director.

[FR Doc. 96–31875 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–55–P

Fish and Wildlife Service.

Notice of Receipt of Application for Permit

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.):

PRT–822897

Applicant: Dr. Joe Edmisten, Pensacola, FL

The applicant requests a permit to take (capture, mark, identify, and release) the Alabama beach mouse, *Peromyscus polionotus ammobates*, Choctawahatchee beach mouse, *P. p. allophrys*, and Perdido Key beach mouse, *P. p. trissyllepsis*, throughout the species' ranges in Alabama and Florida for the purpose of enhancement of survival of these species.

Written data or comments on these applications should be submitted to: Regional Permit Biologist, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345. All data and comments must be received within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: David Dell, Permit Biologist). Telephone: 404/679–7313; Fax: 404/679–7081.

Dated: December 9, 1996.

C. Monty Halcomb,

Acting Regional Director.

[FR Doc. 96–31951 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–55–P

Geological Survey

Federal Geographic Data Committee (FGDC); Public Review of Soil Geographic Data Standard

ACTION: Notice; Request for comments.

SUMMARY: The FGDC is sponsoring a public review of the draft ''FGDC Soil Geographic Data Standard'' to be considered for adoption as an FGDC standard. if adopted, the standard must be followed by all Federal agencies for data collected directly or indirectly (through grants, partnerships, or contracts).

In its assigned leadership role for developing the National Spatial Data Infrastructure (NSDI), the FGDC recognizes that the standards must also meet the needs and recognize the views of State and local governments, academia, industry, and the public. The purpose of this notice is to solicit such views. The FGDC invites the community to review, test, and evaluate the proposed data contest standard. Comments are encouraged about the content, completeness, and usability of the proposed standard.

The FGDC anticipates that the proposed standard, after updating or revision, will be adopted as a Federal Geographic Data Committee standard. The standard may be forwarded to other standard organizations for adoption if interest warrants such actions.

DATES: Comments must be received on or before April 1, 1997.

CONTACT AND ADDRESSES: Requests for written copies of the ''FGDC Soil Geographic Data Standard'' should be sent by mail to: Soils Standards Review, FGDC Secretariat (attn: Jennifer Fox), U.S. Geological Survey, 590 National Center, 12201 Sunrise Valley Drive, Reston, Virginia, 20192; telephone 703–648–5514; facsimile 703–648–5755; or Internet ''gdc@usgs.gov''. The proposed standard is also available for viewing on the Internet on the Soil Data Subcommittee Home Page; the URL is: http://www.nhq.nrcs.usda.gov/SDS/hmpage.htm. The standard may be downloaded from the FGDC Home Page at the following URL: www.fgdc.gov (select Public Documents) or directly from the FGDC anonymous ftp site by using the address: www.fgdc.gov/pub/standards.

Reviewer comments should be sent to the FGDC Secretariat at the above address. Please send one hardcopy version of the comments and a soft copy version, preferably on a 3.5x3.5 diskette in WordPerfect 5.0 format.

SUPPLEMENTARY INFORMATION: The overall objective of the Soil Geographic Data Standard is to standardize the names, definitions, ranges of values, and other characteristics of soil survey map attribute data developed by the National Cooperative Soil Survey (NCSS). The NCSS is the body composed of the various federal, state, and local units of government who work cooperatively to develop the soil survey of all lands in the United States.

The soil attribute data associated with soil maps include the physical and chemical properties of the various soils being described, interpretative information, the arrangement of these soils into the soil map units identified

on the soil maps, and information about the soil map units themselves. The attribute data have no spatial relationship until they are linked to the maps via the map unit symbol and other unique identifiers. However, there is information included linking the soil data to geographical areas such as counties, states, major land resource areas, and soil survey areas.

This document proposes a set of data standards to be used by Federal agencies in their activities for inventory, mapping, and reporting on the soil resources of the United States. It includes a description of the proposed data elements to be used when reporting and transfering data used to describe soil map units and their components. These map units are associated with soil maps developed by the National Cooperative Soil Survey.

This document does not detail data elements used to describe soils at a specific point/site on the landscape, the field methods used to collect the data, or the various classification systems used to classify soils. A future standard will likely be developed to deal with point/site data. Documents containing the various classification systems are listed as references at the end of this standard.

Input is sought on the draft standard regarding how well it will meet user needs.

Dated: December 9, 1996.

Richard E. Witmer,

Acting Chief, National Mapping Division.

[FR Doc. 96–31908 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–31–M

Federal Geographic Data Committee (FGDC); Public Review of Spatial Data Transfer Standard, Point Profile

ACTION: Notice; Request for comments.

SUMMARY: The FGDC is sponsoring a public review of the draft ''Spatial Data Transfer Standard, FIPS 173, Part 6: The Point Profile'' to be considered for adoption as an FGDC standard. If adopted, the standard must be followed by all Federal agencies for data collected directly or indirectly (through grants, partnerships, or contracts).

In its assigned leadership role for developing the National Spatial Data Infrastructure (NSDI), the FGDC recognizes that the standards must also meet the needs and recognize the views of State and local governments, academia, industry, and the public. The purpose of this notice is to solicit such views. The FGDC invites the community to review, test, and evaluate the proposed SDTS Point Profile. Comments about the content, completeness, and usability of the proposed SDTS Point Profile are encouraged.

The FGDC anticipates that the proposed SDTS Point Profile will provide consistency in the conveyance of geographic point data among FGDC members and will support related standards to collect, process, and/or transfer geographic point data. The standard may be forwarded to other standard organizations for adoption if interest warrants such actions.

DATES: Comments must be received on or before April 1, 1997.

CONTACT AND ADDRESSES: Requests for written copies of the SDTS Point Profile should be sent to mail to Standards Working Group, FGDC Secretariat (attn: Jennifer Fox), U.S. Geological Survey, 590 National Center, 12201 Sunrise Valley Drive, Reston, Virginia, 20192; telephone 703–648–5514; facsimile 703–648–5755; or Internet ''gdc@usgs.gov''. The proposed standard is also available for viewing on the Internet on the Federal Geodetic Control Subcommittee Home Page; the URL is: http://www.ngs.noaa.gov/FGCS/fgcs.html. The standard may be downloaded from the FGDC Home Page at the following URL: www.fgdc.gov (select Public Documents).

Reviewer comments should be sent to the FGDC Secretariat at the above address. Please send one hardcopy version of the comments and a soft copy version, preferably on a 3.5″ diskette in WordPerfect 5.0 format.

SUPPLEMENTARY INFORMATION:

Objectives: This profile shall provide for the transfer of higher precision geographic point data in compliance with SDTS, FIPS 173.

Scope: Part 6, the Point Profile, contains specifications for a SDTS profile for use with geographic point data only, with the option to carry high precision coordinates (by increasing the number of decimal places or significant figures) such as those required for geodetic network control points. (This profile is a modification of Part 4, the Topological Vector Profile, and follows many of the conventions of that profile.) Geographic point data herein describes real-world features, rather than a symbolized map graphic. The data may be derived from a cartographic product (map), but the scope of the Point Profile is to convey high precision point data, such as data derived from high precision geodetic network control surveys, rather than information about geographic features displayed on maps. The profile does not include the transfer of topological structures.

Maintenance Authority: The FGCS, as the lead subcommittee, will suggest and/or provide changes to the SDTS maintenance authority, when received from other FGDC subcommittees and working groups in order to maintain this Point Profile for the FGDC user communities.

Dated: December 9, 1996.

Richard E. Witmer,

Acting Chief, National Mapping Division.

[FR Doc. 96–31909 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–31–M

Minerals Management Service

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of workshop.

SUMMARY: The Minerals Management Service (MMS) is reviewing blowout preventer (BOP) testing and maintenance requirements for operations in the Outer Continental Shelf (OCS). This notice announces a workshop to discuss the results of the recently completed study on BOP performance. MMS will also discuss potential changes to the current BOP testing and maintenance requirements.

DATES: January 15, 1997, from 9:00 a.m. to 4:00 p.m.

ADDRESSES: The workshop will be held at the Minerals Management Service's Gulf of Mexico regional office, 1201 Elmwood Park Boulevard, Room 115, New Orleans, Louisiana.

FOR FURTHER INFORMATION CONTACT: William S. Hauser, Engineering and Technology Division, MS 4700, Minerals Management Service, 381 Elden Street, Herndon, Virginia 20170–4817, telephone (703) 787–1600.

SUPPLEMENTARY INFORMATION: MMS will hold a workshop on January 15, 1997, to discuss the results of the recently completed study on BOP performance. This study, commissioned by MMS and five oil and gas trade organizations, examined BOP test data from wells drilled on the OCS during the last 6 months. The primary purpose for the study was to examine the performance of BOP equipment over varying test intervals.

Under the current regulations, a lessee must test BOP equipment and systems at least once a week but not to exceed 7 days between tests. However, the offshore oil and gas industry has asked MMS to revise the regulations to allow a lessee to test BOP equipment and systems on a 14-day interval. MMS will

use this study in determining if the longer BOP testing interval will afford an equal or better degree of protection, safety, or performance than the current requirement.

MMS will also discuss potential changes to the current BOP testing and maintenance requirements. MMS plans to issue these new BOP requirements in mid-February 1997.

MMS encourages all interested parties to attend the workshop and participate in the discussions. Persons or organizations that want to make a presentation at the workshop must contact William S. Hauser prior to the workshop.

Preliminary Agenda

- Welcome and Introduction
- Tetrahedron, contractor for the study, will discuss the study and present the findings
- Questions and comments on the study
- MMS discussion of potential new BOP testing and maintenance requirements
- Questions and comments on requirements
- Additional presentations, as appropriate.

Registration: There is no registration fee for this workshop. However, to assess the probable number of participants, MMS requests participants to register with William S. Hauser by calling (703) 787–1613 or FAX (703) 787–1093 prior to the meeting. Seating is limited and will be on a first-come-first-seated basis.

Dated: December 11, 1996.

Robert E. Brown,

Acting Associate Director for Offshore Management.

[FR Doc. 96–31990 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–MR–M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 7, 1996.Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127. Written comments should be submitted by January 2, 1997.

Patrick Andrus,

Acting Keeper of the National Register.

CALIFORNIA

Napa County

Saint Helena Southern Pacific Railroad Depot, Railroad Ave., NE of jct. of Main St. and Madrona Ave., Saint Helena, 96001535

Orange County

Bixby—Bryant Ranch House, 5700 Susanna Bryant Dr., Yorba Linda, 96001537

Yolo County

Main Street Historic District—Winters, 1—48 Main St., Winters, 96001536

INDIANA

Clinton County

Condon, Charles H. and Emma, House, 603 S. Jackson St., Frankfort, 96001545

Jackson County

Picnic Area—Jackson State Forest (New Deal Resources on Indiana State Lands MPS) Approximately 1 mi. N of IN 250, Jackson—Washington State Forest, Brownstown vicinity, 96001554

Kosciusko County

Chinworth Bridge, Jct. of old US 30 and Co. Rt. 350 W., across the Tippecanoe River, Warsaw vicinity, 96001546

Madison County

Fall Creek Meeting House,IN 38, approximately 1.5 mi. SE of jct. with US 36, Pendleton vicinity, 96001544

Morgan County

Blackstone House and Martinsville Telephone Company Building,127 S. Main St., Martinsville, 96001540

Jones Schholhouse, 4151 Townsend Rd.,Martinsville vicinity, 96001542

Martinsville Northside Historic District, Roughly bounded Cunningham, Mulberry, Pike, and Graham Sts., Martinsville, 96001541

St. Joseph County

North Pumping Station, 830 N. Michigan Ave., South Bend, 96001538

St. Casimir Parish Historic District, Roughly bounded by Arnold and W. Sample Sts. and Conrail tracks, South Bend, 96001543

Steuben County

Fawn River State Fish Hatchery (New Deal Resources on Indiana State Lands MPS) 6889 North IN 327, Orland vicinity, 96001553

Switzerland County

Venoge Farmstead, 111 IN 129, Vevay vicinity, 96001539

NEW JERSEY

Mercer County

Bellevue Avenue Colored School, 81 Bellevue Ave., Trenton, 96001547

Salem County

Nicholson, Abel, House, Jct. of Hancocks Br. and Ft. Elfsborg Rd., Elfinsboro Township, Salem vicinity, 96001548

NEW YORK

Jefferson County

Strough, Byron J., House (Orleans MPS) S side of Clayton St., W of jct. with NY 411, Hamlet of La Fargeville, Orleans, 96001549

NORTH CAROLINA

Duplin County

Faison Historic District, Roughly bounded by College, Hill, Solomon, and Ellis Sts., Faison, 96001550

PENNSYLVANIA

Erie County

Lovell Manufacturing Company, 1301 French St., Erie, 96001551

York County

Hanover Historic District, Roughly bounded by Elm Ave., Broadway, Eisenhower Dr., Hollywood Ave., and Hanover borough boundary line, Hanover, 96001552

[FR Doc. 96–31974 Filed 12–16–96; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Petroleum Environmental Research Forum (''PERF'') Project 95–01

Notice is hereby given that, on October 31, 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''), Petroleum Environmental Research Forum (''PERF'') Project 95–01, titled ''Advanced NDE for Piping Inspection,'' 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: Exxon Research and Engineering Company, Florham Park, NJ; Amoco Corp., Houston, TX; ARAMCO Services Company, Houston, TX; ARCO Products Company, Anaheim, CA; BP International PLC, Middlesex, UNITED KINGDOM; Chevron Research & Technology Company, Richmond, CA; Mobil Technology Company, Paulsboro,

NJ; Phillips Petroleum Company, Bartlesville, OK; and Sun Company, Inc., Linwood, PA. The nature and objective of the venture is to deliver piping inspection technology which is capable of inspecting, detecting and measuring corrosion on above ground piping and pipe supporters.

Participation in this venture will remain open to all interested persons and organizations until the final Project Completion Date which is presently anticipated to occur approximately twenty-eight (28) months after the Project commences. The participants intend to file additional written notifications disclosing all changes in its membership. Information regarding participation in the project may be obtained from Emery B. Lendvai-Lintner, Exxon Research and Engineering Company, P.O. Box 181, Florham, Park, NJ 07932–0101.

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 96–31924 Filed 12–16–96; 8:45 am]

BILLING CODE 4410–11–M

Drug Enforcement Administration

Manufacturer of Controlled Substances Notice of Registration

By Notice dated June 18, 1996, and published in the Federal Register on June 26, 1996, (61 FR 33140), Arenol Chemical Corporation, 189 Meister Avenue, Somerville, New Jersey 08876, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
2,5-Dimethoxyamphetamine (7396) ..	I
3,4-Methylenedioxyamphetamine (7400)	I
Difenoxin (9168)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II

No comments or objections have been received. However, by letter dated October 29, 1996, Arenol has requested that methylphenidate (1724) be deleted from its application for registration as a bulk manufacturer. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of Arenol Chemical Corporation to manufacture the listed controlled substances is consistent with the public interest at this time. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted, with the exception of methylphenidate.

Dated: December 2, 1996.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 96–31888 Filed 12–16–96; 8:45 am]

BILLING CODE 4410–09–M

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated September 4, 1996, and published in the Federal Register on September 19, 1996 (61 FR 49351), Eli Lilly Industries, Inc., Chemical Plant, Kilometer 146.7, State Road 2, Mayaguez, Puerto Rico 00680, made application for renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of dextropropoxyphene, bulk (non-dosage forms) (9273) a basic class of controlled substance listed in Schedule II.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of Eli Lilly Industries, Inc. to manufacture the listed controlled substance is consistent with the public interest at this time. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: December 2, 1996.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 96–31887 Filed 12–16–96; 8:45 am]

BILLING CODE 4410–09–M

[DEA #153F]

Controlled Substances: Established Initial 1997 Aggregate Production Quotas

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of aggregate production quotas for 1997.

SUMMARY: This notice establishes initial 1997 aggregate production quotas for controlled substances in Schedule I and II of the Controlled Substances Act (CSA).

EFFECTIVE DATE: This order is effective upon December 17, 1996.

FOR FURTHER INFORMATION CONTACT: Frank L. Sapienza, Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537; Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the Controlled Substances Act (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas for each basic class of controlled substance listed in Schedule I and II. This responsibility has been delegated to the Administrator of the DEA pursuant to Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations.

On October 17, 1996, a notice of the proposed initial 1997 aggregate production quotas for certain controlled substances in Schedule I and II was published in the Federal Register (61 FR 54222). All interested person were invited to comment on or before November 18, 1996. The following comments were received.

A company commented that the proposed 1997 initial aggregate production quota for fentanyl is insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the maintenance of reserve stocks. Based on current 1996 sales and inventories, and 1997 export requirements, the DEA increased the 1997 initial aggregate production quota for fentanyl.

A company commented that the proposed initial 1997 aggregate production quota for methylphenidate is insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States and for the establishment of reserve stocks. After a review of current 1996 manufacturing quotas and 1997 customer requirements, the DEA has determined that no adjustment is necessary at this time.

One company commented that the proposed 1997 initial aggregate production quota for oxymorphone is insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States. Based on a review of 1997 product development requirements, the DEA adjusted the initial 1997 aggregate

production quota for oxymorphone accordingly.

Another company commented that the proposed initial 1997 aggregate production quotas for alfentanil, diphenoxylate, noroxymorphone, and oxycodone (for sale) are insufficient to meet the estimated medical, scientific, research and industrial needs of the United States. After a review of 1996 manufacturing quotas, current 1996 sales and inventories, 1997 export requirements and research and product development requirements, the DEA agrees that increases are necessary for diphenoxylate, noroxymorphone and oxycodone. Regarding alfentanil, DEA determined that the proposed initial 1997 aggregate production quota is sufficient to meet 1997 requirements.

The DEA received updated information from a manufacturer regarding levo-alpha-acetylmethadol and methadone intermediate (for conversion) and from two manufacturers concerning methadone (for sale), which necessitates adjustments of the initial 1997 aggregate production quotas for these substances. The adjustments are increases which will provide for the estimated medical, scientific, research and industrial needs of the United States and for the establishment and maintenance of reserve stocks. Therefore, DEA adjusted the 1997 initial aggregate production quotas for levo-alpha-acetylmethadol, methadone (for sale) and methadone intermediate (for conversion) accordingly.

Concerning lysergic acid diethylamide and N,N-dimethylamphetamine, the DEA increased the 1997 initial aggregate production quotas for these substances since applications made by several companies for these substances were not taken into consideration in the proposal.

A company commented that the proposed initial 1997 aggregate production quota for N-ethylamphetamine is insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States, and for export requirements. Since the commenter is not registered with DEA to manufacture this substance, DEA will consider this request at a later time when the proper registration is obtained.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this meter does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Deputy Administrator hereby certifies that this action will have no significant economic impact upon small entities whose interest must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The establishment of annual aggregate production quotas for Schedule I and II controlled substances is mandated by law and by international treaty obligations. Aggregate production quotas apply to approximately 200 DEA registered bulk and dosage from manufacturers of Schedule I and II controlled substances. The quotas are necessary to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the establishment and maintenance of reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

Therefore, under the authority vested in the Attorney General by Section 306 of the Controlled Substances Act of 1970 (21 U.S.C. 826), delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator, by Section 0.104 of Title 28 of the Code of Federal Regulations, the Deputy Administrator hereby orders that the 1997 initial aggregate production quotas, expressed in grams of anhydrous acid or base, be established as follows:

2,5-Dimethoxy-4-ethylamphetamine (DOET)	2
3-Methylfentanyl	14
3-Methylthiofentanyl	2
3,4-Methylenedioxyamphetamine (MDA)	22
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	27
3,4-Methylenedioxymethamphetamine (MDMA)	7
3,4,5-Trimethoxyamphetamine	2
4-Bromo-2,5-Dimethoxyamphetamine	2
4-Bromo-2,5-Dimethoxyphenethylamine (2–CB)	2
4-Methoxyamphetamine	17
4-Methylaminorex	2
4-Methyl-2,5-Dimethoxyamphetamine (DOM)	2
5-Methoxy-3,4-Methylenedioxyamphetamine	2
Acetyl-alpha-methylfentanyl	2
Acetylmethadol	7
Alpha-acetylmethadol	7
Alpha-ethyltryptamine	2
Alpha-methadol	2
Alpha-methylfentanyl	2
Alpha-methylthiofentanyl	2
Aminorex	7
Beta-acetylmethadol	2
Beta-hydroxyfentanyl	2
Beta-hydroxy-3-methylfentanyl	2
Beta-methadol	2
Bufotenine	2
Cathinone	9
Codeine-N-oxide	2
Difenoxin	14,000
Dihydromorphine	7
Ethylamine Analog of PCP	5
Heroin	2
Lysergic acid diethylamide (LSD)	32

Mescaline	7
Methaqualone	17
Methcathinone	11
Morphine-N-oxide	2
N-Ethylamphetamine	7
N-Hydroxy-3,4-Methylenedioxyamphetamine	2
N,N-Dimethylamphetamine	7
N,N-Dimethyltryptamine	7
Norlevorphanol	2
Normethadone	7
Normorphine	7
Para-fluorofentanyl	2
Pholcodine	2
Psilocin	2
Psilocybin	2
Tetrahydrocannibinols	25,100
Thiofentanyl	2
Thiophene Analog of Phencyclidine	5
Psilocin	2
Psilocybin	2
Tetrahydrocannibinols	25,100
Thiofentanyl	2
Thiophene Analog of Phencyclidine	5

Schedule II

1-Phenylcyclohexylamine	10
1-Piperidinocyclohexanecarbonitrile (PCC)	12
Alfentanil	9,300
Amobarbital	15
Amphetamine	2,968,000
Carfentanil	500
Cocaine	550,100
Codeine (for sale)	49,103,000
Codeine (for conversion)	19,679,000
Desoxyephedrine	1,422,000
1,361,000 grams of levodesoxyephedrine for use in a noncontrolled, nonprescription product and 61,000 grams for methamphetamine.	
Dextropropoxyphene	116,469,000
Dihydrocodeine	255,100
Diphenoxylate	1,572,000
Ecgonine (for conversion)	651,000
Ethylmorphine	12
Fentanyl	193,000
Glutethimide	2
Hydrocodone (for sale)	13,891,000
Hydrocodone (for conversion)	1,769,000
Hydromorphone	563,000
Isomethadone	12
Levo-alpha-acetylmethadol (LAAM)	356,000
Levomethorphan	2
Levorphanol	16,400
Meperidine	9,843,000
Methadone (for sale)	3,977,000
Methadone (for conversion)	364,000
Methadone Intermediate (for conversion)	5,275,000
Methamphetamine (for conversion)	723,000
Methylphenidate	13,824,000
Morphine (for sale)	11,126,000
Morphine (for conversion)	68,165,000
Noroxymorphone (for sale)	30,000
Noroxymorphone (for conversion)	2,000,000
Opium	937,000
Oxycodone (for sale)	6,634,000
Oxycodone (for conversion)	1,200
Oxymorphone	56,000

Dated: December 10, 1996.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 96–31889 Filed 12–16–96; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10227 and 10232, et al.]

Proposed Exemptions; Real Estate Equity Trust No. 1 (the Trust)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Real Estate Equity Trust No. 1 (the Trust), et al. Located in Cincinnati, OH

[Exemption Application Nos. D–10227 and D–10232]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the purchase of units in the Trust by certain multiemployer pension plans (the Plans) that will enable State Street Global Advisors, Inc. (SSGA), the independent fiduciary for the Plans investing in the Trust, to make initial and subsequent equity investments on behalf of the Trust, in the Cincinnati Development Group Limited Partnership (the Partnership), which may result in a benefit inuring to Fifth Third Bank (Fifth Third), the trustee of the Trust and a party in interest with respect to the Plans.

This proposed exemption is subject to the following conditions:

(a) Each Plan investing in the Trust has total assets that are in excess of $50 million.

(b) No Plan that purchases units in the Trust that will permit the Partnership investment has, immediately following the acquisition of such units, more than 5 percent of its assets invested therein.

(c) The decision to purchase units in the Trust that will allow SSGA to make the initial and any subsequent equity contributions to the Partnership is made by a Plan fiduciary (the Second Fiduciary) which is independent of Fifth Third and its affiliates and which is not SSGA.

(d) As independent fiduciary for the Trust, SSGA determines whether—

(1) It is in the best interests of the Trust and the Plans participating therein to make the initial and subsequent investments in the Partnership;

(2) It is appropriate for the Trust to assign, transfer, pledge or otherwise encumber its interest in the Partnership provided the Trust obtains written consent from Cincinnati Development Group, LLC (CDG);

(3) It is appropriate for the Trust to withdraw as a limited partner from the Partnership or to withdraw its capital from such Partnership provided the Trust obtains the written consent of CDG;

(4) It is appropriate for the Trust to consent to the sale by CDG of substantially all of the assets of the Partnership or the transfer by CDG of its interest in the Partnership to a third party;

(5) It is appropriate for the Trust to contribute to the Partnership the amount necessary to complete construction of the Fountain Square West Project and to require that CDG release control of the Partnership to an entity designated by the Trust, if CDG fails to provide for construction cost overruns;

(6) It is appropriate for the Trust to elect to continue the Partnership by appointing a successor general partner.

(7) An entity designated by the Trust to serve as general partner is appropriate upon the occurrence of (d)(5) or (d)(6).

(e) At the time the Partnership investment is made, the terms of the transaction are at least as favorable to each Plan participating in the Trust as

those obtainable in an arm's length transaction with an unrelated party.

(f) Prior to investing in the Partnership, Fifth Third provides SSGA and the Second Fiduciary of each Plan participating in the Trust with offering materials disclosing all material facts concerning the purpose, structure and operation of the Partnership.

(g) Subsequent to investing in the Partnership, the Trust and SSGA receive the following ongoing information from CDG:

(1) Within 120 days after the end of the Partnership's fiscal year, an unaudited annual report containing—

(A) A balance sheet and statements of income, Partners' equity, changes in financial position and cash flow for the year then ended;

(B) A report of the activities of the Partnership during the period covered by the report; and

(C) An itemization of any fees or payments made to CDG or any related party or affiliate.

(2) Within 60 days of the end of each year, an appraisal report, prepared by a qualified, independent appraiser, of each property held in the Partnership.

(3) Periodically (but not less frequently than quarterly), operating and development budgets of the Partnership as well as unaudited operations and financial reports. (Information with respect to the Partnership is disseminated by Fifth Third to the Second Fiduciaries of Plans investing in the Trust through annual audited financial statements of the Trust, prepared by independent, certified public accountants and in quarterly communications setting forth Partnership financial data. SSGA will also be given copies of this information.)

(h) As to each Plan participating in the Trust, the total fees paid to Fifth Third will constitute no more than ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(i) Fifth Third maintains, for a period of six years, the records necessary to enable the persons described in paragraph (j) to determine whether the conditions of this exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Fifth Third and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than Fifth Third shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required below by paragraph (j).

(j)(1) Except as provided in section (i)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (i) are unconditionally available at their customary location during normal business hours by:

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(j)(2) None of the persons described above in paragraphs (j)(1)(B)–(j)(1)(D) of this paragraph (j) are authorized to examine the trade secrets of Fifth Third or commercial or financial information which is privileged or confidential.

Summary of Facts and Representations

1. The Trust was originally established on December 1, 1987 by a trust agreement between Fifth Third, as trustee, and the International Brotherhood of Electrical Workers Local 212 Pension Fund (the IBEW Pension Plan), as beneficiary. The purpose of the Trust is to make equity investments in real estate development projects that are located within a 100 mile radius of Greater Cincinnati. As a condition precedent to any investment by the Trust, all project work must be performed by union labor.[1]

The Trust is a group trust, exempt from taxation under section 501(a) of the Code pursuant to the principles of Revenue Ruling 81–100, 1981–1 C.B. 326. Under the terms of the Trust, the initial investment by a Plan must be at least $500,000.[2]

Thereafter, a Plan may make additional contributions in increments of $100,000. Although there are no minimum or maximum limits imposed by the Trust on the portion of the total assets of any Plan that may be invested therein, such investment must be approved initially by a Second Fiduciary.

The Trust has been established for an indefinite duration. However, it may be terminated upon (a) the resignation or termination of Fifth Third, (b) the adoption by the Board of Directors (or the Executive Committee) of Fifth Third of a resolution directing the termination and liquidation of the Trust or (c) a vote of 75 percent of the beneficial interests in the Trust to remove Fifth Third.

2. Fifth Third, the trustee of the Trust, is a regional bank headquartered in Cincinnati, Ohio. As of August 3, 1995, Fifth Third had over $14 billion in assets and its trust department had over $7 billion in assets under management. Fifth Third has legal title and sole investment discretion over all of the assets of the Trust and is permitted under the terms of the Trust Agreement to acquire new equity real estate investments, distribute income received to investing Plans and to maintain Trust records. Fifth Third represents that before investing Trust assets in a specific equity investment, it must determine whether the investment is expected to have a rate of return at least equal to or greater than comparable investments which do not use union labor.

For services rendered to the Trust, Fifth Third will receive the following annual compensation: $15 per $1,000 on the first $5 million invested; $10 per $1,000 on the next $10 million invested; $5 per $1,000 on the next $15 million invested; and $3 per million on the next $25 million invested. According to the applicant, as to each Plan investing in the Trust, the total fees paid to Fifth Third will constitute no more than reasonable compensation within the meaning of section 408(b)(2) of the Act.[3]

3. There are currently five Plans participating in the Trust, none of which are sponsored by Fifth Third or any of its affiliates. These Plans are the IBEW Pension Plan, the Pipefitters and Mechanical Equipment Service Union Local 392 Pension Fund (the Pipefitters Pension Plan), the Ironworkers District Council for Southern Ohio and Vicinity Pension Fund (the Ironworkers Pension Plan), the Southwest Ohio District Council of Carpenters' Pension Fund (the Carpenters Pension Plan) and the Laborers International Union of North America Local 265 Pension Fund (the Laborers Pension Plan).

As the following table shows, each Plan investing in the Trust has total assets that are in excess of $50 million.

[1] This proposed exemption provides no relief with respect to any violations of section 404 of the Act.

[2] It is represented that the purchase or redemption of units in the Trust by the investing Plans would be statutorily exempt under section 408(b)(8) of the Act. In this regard, the Department expresses no opinion herein on whether such transactions would satisfy the terms and conditions of section 408(b)(8) of the Act.

[3] The Department expresses no opinion herein on whether such fees will satisfy the terms and conditions of section 408(b)(2) of the Act.

Plan	Total assets	Valuation date
IBEW Pension Plan.	$115,500,000	Mar. 31, 1996.
Pipefitters Pension Plan.	172,654,000	Mar. 31, 1996.
Ironworkers Pension Plan.	395,000,000	Jan. 31, 1996.
Carpenters Pension Plan.	132,696,000	Mar. 31, 1996.
Laborers Pension Plan.	64,496,000	Mar. 31, 1996.

In addition, as of March 31, 1996, each Plan's investment in the Trust was reported as follows:

Plan	Value of trust investments	Percentage of trust assets	Percentage of plan assets
IBEW Pension Plan	$3,588,796	28	3.1
Pipefitters Pension Plan	3,097,902	24	2.0
Ironworkers Pension Plan	2,686,711	21	0.7
Carpenters Pension Plan	2,441,064	19	1.8
Laborers Pension Plan	908,672	8	1.4
Total Assetts	12,723,145	.....	.....

4. The Plans are not parties in interest with respect to each other within the meaning of section 3(14) of the Act nor do they share common participants. Investment decisions for the Plans are made by separate boards of trustees. The geographic jurisdictions for the Plans cover various counties that are primarily located in the States of Ohio, Indiana and Kentucky. Participants in the Plans are engaged in diverse trades ranging from electrical work to general construction labor. As of December 5, 1996, there were approximately 14,349 participants in all of the Plans investing in the Trust with the participant level ranging from 1,500 participants for the IBEW Pension Plan to 6,243 participants for the Ironworkers Pension Plan.

Plan	Number of participants
IBEW Pension Plan	1,500
Pipefitters Pension Plan	1,400
Ironworkers Pension Plan	6,243
Carpenters Pension Plan	3,655
Laborers Pension Plan	1,551
Total	14,349

5. CDG is a limited liability company maintaining its principal offices in Cincinnati, Ohio. CDG's members are Belvedere Corp., The Madison Realty Partnership, Towne/Center City LLC and Duke Realty Limited Partnership. These entities are commercial real estate developers from the Greater Cincinnati area. CDG was formed on March 24, 1995 for the purpose of developing a 210,000 square foot retail complex in downtown Cincinnati known as ''Fountain Square West.'' Once developed, the Fountain Square West Project will include a three-story anchor retail store (the Lazarus Department Store), a two-story specialty retail center, an office tower and an underground parking garage. As discussed below, the Lazarus Department Store, the retail stores and the parking garage will be held by the Partnership. A portion of the ground comprising the Fountain Square West site, the related air rights, a building pad for the future development of an office building (including the office building) and the exclusive rights to 20 spaces in the underground parking garage will be held by Fifth Third.

6. The Partnership will be a limited partnership organized under the laws of the State of Ohio and it will maintain its principal office at 500 Carew Tower, Cincinnati, Ohio. The primary purposes of the Partnership are to develop, improve, own, manage and lease real estate. It is intended that the Partnership will constitute a real estate operating company.[4] CDG will serve as the general partner of the Partnership and the Trust will serve as the sole limited partner.

To raise equity capital for the Partnership, CDG will make a capital contribution of approximately $1.5 million. As for the Trust, Second Fiduciaries of the IBEW Pension Plan, the Pipefitters Pension Plan, the Carpenters Pension Plan and the Laborers Pension Plan have agreed to make an aggregate capital contribution to the Partnership of up to $7 million by purchasing additional units in the Trust.[5] The Plans will contribute to the Partnership as follows:

[4] According to the Partnership Agreement, the Partnership will function as a ''real estate operating company'' within the meaning of regulation section 29 CFR 2510.3–101(e). Accordingly, it is represented that transactions involving assets of the Partnership will not be deemed to involve plan assets and will not be subject to the prohibited transaction provisions of the Act. The Department expresses no opinion in this proposed exemption on whether the Partnership will qualify as a real estate operating company.

[5] It is represented that the Trust currently has approximately $500,000 in liquid assets which is available for investment in the Partnership. As a result, if less than $6.5 million in units are subscribed for by the Plans, the Trust will combine those proceeds with its existing liquid assets to make the $7 million investment in the Partnership.

Plan	Allocation percentages	Amount invested	Percentage of plan assets
IBEW Pension Plan	30.8	$2,156,000	1.8
Pipefitters Pension Plan	30.8	2,156,000	1.2
Carpenters Pension Plan	30.8	2,156,000	1.6
Laborers Pension Plan	07.6	532,000	0.8
Total	.....	7,000,000	.....

Although the Second Fiduciaries of the Ironworkers Pension Plan have declined to purchase additional units in the Trust at this time, it is represented that this Plan will have a *pro rata* interest in the Trust that will include a portion of the Partnership interest.[6] After the units are acquired, no Plan, including the Ironworkers Pension Plan, will have more than 5 percent of its assets invested in the Trust. In addition, the Trust will not be required to pay any unrelated business income tax in connection with the Partnership investment.

7. Aside from the capital contributions made by CDG and the Trust to the Partnership, the city of Cincinnati (the City) will grant financial incentives to the development of the Fountain Square West Project of up to $22 million. These financial incentives consist of—

(a) *The City's Purchase of the Downtown Lazarus Department Store.* On October 19, 1995, the City agreed to purchase the downtown Lazarus Store location from Federated Department Stores, Inc. (Federated) for $11,775,000. (The property was eventually transferred to the City on January 4, 1996.) This acquisition provided funding which enabled Federated to enter into another lease agreement (the Anchor Tenant Lease) with CDG that would make a new Lazarus Department Store the anchor tenant for the Fountain Square West Project. Under the terms of the Anchor Tenant Lease, Federated must pay CDG $9,675,000 for tenant improvements to the portion of the Fountain Square West Project leased by Federated. In addition, Federated must pay CDG an initial rental payment of $2,100,000. Following CDG's assignment of the Anchor Tenant Lease to the Partnership, Federated will make the aforementioned rental payments to the Partnership.

(b) *The City's Issuance of Bonds (the City Bonds).* On May 15, 1996, the City issued bonds in the face amount of $10,225,000. The proceeds of the City Bond issue were transferred by the City to CDG on May 16, 1996. Such proceeds will be given by CDG to the Partnership after CDG assigns its long-term ground lease with the City (the City Lease)[7] to the Partnership. The City Bonds will be used as a funding source for the Fountain Square West Project and they must be repaid to the City with interest over a period of twenty years. To repay the City, CDG has negotiated a property tax abatement on the Fountain Square West Project during the period that the City Bonds are outstanding. It is intended that the abatement will reduce the Partnership's cash outflows that would be required to pay the property taxes.

8. Thus, based upon the foregoing, the Plans and CDG will make a total investment in the Partnership of $8.5 million. As additional sources of capital, the Partnership will receive the $10,225,000 in proceeds from the City Bonds that have been issued by the City and the $5.5 million in proceeds from the Partnership's air rights lease (the Air Rights Lease)[8] with Fifth Third (see also Representation 13). As a result, the total amount available to the Partnership for construction will be $24,225,000. It is represented that these construction funds will be greater than the budgeted construction costs of $24,045,000, which include a ''contingency cushion'' of $3.5 million.

9. If, however, construction costs exceed the budgeted funds available to CDG for the construction of the Fountain Square West Project, it is represented that there are several safeguards in place which may obviate

[6] The Department notes that section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan must act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries. In order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, riskiness and potential return of alternative investments for the plan. Investing the Trust's assets in the Partnership would not satisfy section 404(a)(1) of the Act if such investment provided the Trust with less return in comparison to risk than comparable investments available to the Trust, or if investment in the Partnership involved a greater risk to the security of the Trust's assets than other investments offering a similar return.

The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Thus, in deciding whether and to what extent to invest in the Partnership, SSGA must consider only factors relating to the interests of the Trust. A decision to invest in the Partnership may not be influenced by a desire to stimulate the real estate industry and generate employment by union labor unless the investment, when judged solely on the basis of its economic value to the Trust would be equal or superior to alternative investments available to the Trust.

[7] On October 19, 1995, the City and CDG entered into a written lease of the property comprising the Fountain Square West Project, including the air rights, for a basic term minimum total rental amount of $10,225,000 plus certain ''percentage rent.'' The City Lease provides that while the City Bonds are outstanding, the annual base rent will be equal to the City's annual repayment obligation obligation on the City Bonds. That amount is $827,567 (interest only) through 1998 and approximately $1,115,000 per year until the City Bonds are repaid. All interest and principal due on the City Bonds are to be paid off in 2016, which is 20 years from the date of their issuance. After the City Bonds are repaid, the base rent under the City Lease will be $1 per year.

In addition, during the period before the City Bonds are fully repaid (i.e., before 2016) the City Lease provides for additional annual rent of 3 percent of the gross rents received during the year by the Partnership in excess of $3 million. Although no gross rents are projected during the initial 10 years of the Fountain Square West Project, after the City Bonds are fully paid, the City Lease will provide for annual rent of 3 percent of gross rents received by the Parnership during the year.

The term of the City Lease has not yet commenced but it is contingent upon whether an office building, to be located on the Fountain Square West site, is ever constructed. If there is no office building constructed within 45 years, the City Lease will expire, provided, however, that CDG will have two additional 10 year options to extend such lease, thereby making the maximum term of the City Lease 65 years. Assuming the office building is constructed within 45 years, the City Lease will expire after a term of 65 years, provided, however, that CDG has three, additional 10 year options to extend the lease, thereby making the maximum term of the City Lease 95 years. Aside from paying rent, CDG is required under the City Lease to pay all utilities and real estate taxes with respect to the property.

[8] The Air Rights Lease was entered into by and between CDG and Fifth Third on September 7, 1995. It permits CDG to sublease a portion of the ground comprising the Fountain Square West site, related air rights and exclusive rights to 20 underground parking spaces to Fifth Third for a lump sum rental of $3.5 million. Although the initial term of the Air Rights Lease is 45 years, the lease has not yet commenced, it will coincide with the term of the City Lease and is similarly contingent on whether Fifth Third ever has an office building constructed on the subject property. Assuming the office building is constructed, the initial term of the Air Rights Lease will be automatically extended to 65 years. Afterwards, the Air Rights Lease may be extended by the parties for three successive 10 year periods, thereby making the maximum lease term 95 years.

the Trust's responsibility for any cost overruns. In this regard, CDG has posted a letter of credit with the City in the amount of $500,000 to assure the City that CDG will perform its obligations under the City Lease including the Partnership's obligation to construct the Fountain Square West Project. In addition, Warm Brothers Construction Company (Warm) and Duke Realty Investments, Inc. (Duke) have provided the City with guarantees with respect to the completion of the Fountain Square West Project.[9] Further, the Partnership Agreement requires CDG to provide additional capital in excess of $24,045,000. CDG may exercise this option by contributing additional capital or by selling subordinate equity in the Partnership to a third party. Such equity will not affect the Trust's preferred return or percentage of cash flow distributions made to the Trust described in Representation 10. Only if the foregoing safeguards fail to provide sufficient financing, will the Trust ever be confronted with the decision on whether to make additional contributions to the Partnership or to remove CDG as the general partner.

After construction of the Fountain Square West Project is completed, if CDG determines that additional capital is needed for its operations, both it and the Trust may make additional contributions in accordance with their respective cash flow allocations as set forth below in Representation 10. If the Trust declines to make its share of the contribution, CDG may lend the amount requested to the Partnership.

10. The Partnership Agreement states that cash flow participation [10] will be as follows and will be paid to the extent available in the following order of priority:

o *First Tier:* Payment of interest and principal on any loan from CDG.

o *Second Tier:* Payment of a 9 percent preferred return to the Trust.

o *Third Tier:* Payment of a 9 percent preferred return to the CDG.[11]

o *Fourth Tier:* Any remaining cash flow is distributed 42.5 percent to the Trust and 57.5 percent to CDG.[12]

The applicant represents that the cash flow participations by the Trust and CDG were determined on the basis of arm's length negotiations between the parties over a period of several months. The applicant also represents that the percentages reflect many factors, including (a) the efforts by CDG to negotiate the City Lease (along with financial incentives from the City), (b) the efforts of CDG to negotiate the Anchor Tenant Lease and the assignment of that lease to the Partnership, (c) the efforts by CDG to negotiate the Air Rights Lease with Fifth Third and the assignment of that lease to the Partnership, (d) the responsibility of CDG for cost overruns during construction and for any losses of the Partnership, (e) the capital contribution of CDG, and (f) the preferred return provided to the Trust.

11. With respect to investments in the Partnership, it is represented that the Trust and SSGA will receive the following information from CDG:

(a) Within 120 days after the end of the Partnership's fiscal year, an unaudited annual report containing (1) a balance sheet and statements of income, Partners' equity, changes in financial position and cash flow for the year then ended; (2) a report of the activities of the Partnership during the period covered by the report; and (3) an itemization of any payments or fees made to CDG or any related party or affiliate.

(b) Within 60 days of the end of each year, an appraisal report prepared by a qualified, independent appraiser, of each property held by the Partnership.

(c) Periodically (but not less frequently than quarterly), operating and development budgets of the Partnership as well as unaudited operations and financial reports.

In addition, Fifth Third will furnish information with respect to the Partnership to the Second Fiduciaries of Plans investing in the Trust through annual audited financial statements of the Trust, prepared by independent, certified public accountants and in quarterly communications setting forth Partnership financial data. SSGA will also receive copies of this information.

12. The Partnership may be dissolved upon the earlier of any of the following events: (a) The disposition of all or substantially all of the assets of the Partnership, as determined by CDG in its sole discretion, and the receipt of the final payment of the purchase price for the retail improvements comprising the Fountain Square West Project that are owned by the Partnership; (b) the unanimous agreement of CDG and the Trust to terminate and dissolve the Partnership; (c) the withdrawal, expulsion, adjudication of bankruptcy, insolvency, dissolution or other cessation of CDG to exist as a legal entity unless a substitute general partner and limited partner elect to continue the business of the Partnership; or (d) December 31, 2095 which is the expiration of the Partnership.

Upon liquidation, the Partnership Agreement provides for the making of distributions as follows:

o *First:* An amount necessary to satisfy any reserve for contingent liabilities.

o *Second:* Payment of interest and principal on any loan from CDG.

o *Third:* Payment to the Trust for any unpaid cumulative preferred return.

o *Fourth:* Payment to CDG for any unpaid cumulative paid return.

o *Fifth:* Payment to the Trust and CDG in the ratio of their respective capital contributions up to the amount of their respective capital contributions.

o *Sixth:* Balance to be distributed 42.5 percent to the Trust and 57.5 percent to CDG.

The procedure for making the liquidating distributions is reflected in a report of the Fountain Square West Project that was prepared by Carey Leggett Realty Advisors (CLRA) of Columbus, Ohio on January 15, 1996. At the time of liquidation, CLRA assumes that that the sales price for the Fountain Square West Project will be $16,989,000 in the year 2008. Of that amount, the Trust will receive $10,607,825 (or 62 percent of the sale proceeds). This amount consists of $7 million of returned capital stemming from the Trust's initial investment and 42.5 percent of the balance after CDG receives its return of capital.

13. As stated above, under the proposed development plan for the Fountain Square West Project, CDG will assign the Anchor Tenant Lease, the City Lease and the Air Rights Lease to the Partnership. The Partnership will construct and own the improvements on that portion of the property that will house the Lazarus Department Store, the specialty retail center and the underground parking garage. After construction, the Partnership will manage the retail portion of the Fountain Square West Project.

The proposed development plan will permit Fifth Third to build and then own the office tower that is

[9] Although financial information for Warm is not available, it is represented that as of November 1996, Duke had gross revenues of over $150 million, net operating income of over $110 million, net income of over $42 million, free and clear cash flow in excess of $10 million, a stock capitalization of over $1 billion and a total market value in excess of $1.4 billion.

[10] The Partnership Agreement defines cash flow for any fiscal year as all revenues relating to such fiscal year received by the Partnership from the operation of the Fountain Square West Project less all Partnership cash expenditures of any kind with respect to such fiscal year.

[11] The Partnership Agreement states that the 9 percent preferred return for both the Trust and CDG is calculated on the basis of capital contributions, less extraordinary cash flow distributions and liquidating distributions.

[12] Remaining cash flow will be calculated twice a year as of June 30 and September 30 and will be distributed no later than 90 days after such dates.

contemplated for construction on the Fountain Square West site. As stated previously, in accordance with the provisions of the Air Rights Lease, Fifth Third will make a lump sum payment to the Partnership of $3.5 million to sublease a portion of the ground and related air rights which will be leased by the Partnership from the City as well as for exclusive rights to 20 parking spaces at Fountain Square West. In addition, Fifth Third will pay the Partnership $2 million in order that the Partnership may hire a construction company (possibly, an affiliate of CDG) for the design and construction of the building pad to support the office tower. The total $5.5 million cost for the air rights, building pad and parking spaces will be paid from Fifth Third's corporate assets and none of the cost or the future cost of constructing the office tower will come from the Trust.[13]

14. The applicant has requested an administrative exemption from the Department because it believes the use of the assets of the Trust in a manner which benefits Fifth Third constitutes a violation of the Act. Specifically, the applicant represents that the investment by the Trust in the Partnership will not only enable the Partnership to develop the retail portion of the Fountain Square West Project, but it will also allow Fifth Third to cause the office tower portion of the Project to be constructed, thereby enhancing the value of that portion of the Project.

15. Fifth Third has appointed SSGA of Boston, Massachusetts to serve as the independent fiduciary for the Trust with respect to the initial, and possibly, future equity investments made by the Trust to the Partnership. In this regard, SSGA will monitor and protect the rights of the Trust and the Plans investing therein to the extent that any actions of Fifth Third may impact adversely on the Partnership. Specifically, SSGA will determine whether it is in the best interest of the Trust and the Plans participating therein to make the initial and subsequent investments in the Partnership. Also included among its duties, SSGA will determine whether it is appropriate for the Trust (a) to assign, transfer, pledge or otherwise encumber its interest in the Partnership provided the Trust obtains written consent from CDG; (b) to withdraw as a limited partner from the Partnership or to withdraw its capital from such Partnership provided the Trust obtains the written consent of CDG; (c) to consent to the sale by CDG of substantially all of the assets of the Partnership or the transfer by CDG of its interest in the Partnership; (d) to contribute to the Partnership the amount necessary to complete construction of the Fountain Square West Project and to require that CDG release control of the Partnership to an entity designated by the Trust, if CDG fails to provide for construction cost overruns; (e) to elect to continue the Partnership by appointing a successor general partner; and whether (f) the entity designated by the Trust to serve as general partner is appropriate upon the occurrence of (d) or (e).

16. Mr. H. Peter Norstrand, Vice President of SSGA, has agreed to undertake the duties of the independent fiduciary. Mr. Norstrand represents that he has over 25 years of experience in commercial real estate as well as considerable experience as a fiduciary under the Act. Both SSGA and Mr. Norstrand represent that they understand their fiduciary obligations and acknowledge that they are acting as a fiduciary with respect to the Trust. Further, neither Mr. Norstrand nor SSGA are related in any way to Fifth Third, CDG or any of their principals. Although SSGA is compensated by Fifth Third, it has derived approximately 0.00005 percent of its gross revenues from Fifth Third for services rendered to date. It is anticipated that for any year that SSGA is retained as the independent fiduciary for the Trust its compensation for these services will be substantially below one percent of its gross revenues.

17. SSGA represents that it has—

(a) Reviewed all relevant documents concerning the Fountain Square West Project, including but not limited to, the lease and sublease agreements, service agreements, guaranties, the Partnership Agreement and the exemption application.

(b) Obtained and reviewed independent economic and market reports on the Cincinnati economy and real estate markets. Among its findings, SSGA observes that forecasts for the City are uniformly consistent and call for slow but steady growth.

(c) Performed a financial analysis of the Fountain Square West Project by reviewing the January 1996 investment summary prepared for Fifth Third by CLRA. SSGA states that it has independently replicated CLRA's spreadsheets and tested the performance of the investment under various alternative assumptions as well as returns for the City Lease. SSGA has concluded that the assumptions used by CLRA are reasonable and in some cases, conservative.

(d) Reviewed the most recent quarterly and annual reports for Federated whose Lazarus Department Store is expected to anchor the Fountain Square West Project, as well as investment commentary on Federated as published by Bloomberg. SSGA notes that Federated has a headquarters operation in the City and states that the annual rental obligation on the Lazarus Department Store will represent a small fraction of Federated's annual gross income.

(e) Conducted, through Mr. Norstrand, personal interviews with representatives of Fifth Third, CLRA and the principals of CDG and toured the development site and environs. SSGA has concluded that CDG is well-suited to develop and manage the Fountain Square West Project.

18. In addition, SSGA has analyzed the risk of the Fountain Square West Project in the context of ''macro'' and ''micro'' levels. On the ''macro'' level, SSGA has examined the development team who will construct, lease and manage the Fountain Square West Project. Further, SSGA has examined the site on which the Fountain Square West Project will be located and states that the property is perfectly suited for its intended use. Finally, SSGA has considered pricing. In this regard, SSGA has examined ''internal rates of return'' [14] and has forecasted returns ranging between 11 percent and 14 percent for the Trust's proposed investment. These projected returns reflect the present value of future streams of income which have been based upon such factors as actual market rents negotiated and assumptions of what future market rents will be. In contrast, SSGA notes that the returns forecasted for the Trust by CLRA range from 9 percent to 14 percent.[15]

[13] Under the Partnership Agreement, the $3.5 million received pursuant to the Air Rights Lease is to be treated as extraordinary cash flow and allocated between CDG and the Trust in accordance with their respective cash flow allocations. However, to the extent that the proceeds are needed for construction purposes, such funds will not be distributed as extraordinary cash flow. As for the $2 million payment for the building pad, it is represented that such amount was specifically earmarked and used for construction purposes and that there is no provision in the Partnership Agreement that would permit the distribution of any portion of that payment to the Trust and CDG.

[14] The internal rate of return is the rate of return on invested capital that is generated or capable of being generated within an investment during the period of ownership. The internal rate of return is the rate of profit (or loss) or a measure of performance. It is calculated by finding the discount rate that equates the present value of future cash flows to the cost of the investment. The calculation of the internal rate of return takes into account the amount of the initial investment, cash flows during the life of the investment and the proceeds from the disposition of the investment.

[15] More specifically, SSGA states that it used a three-step process to analyze the potential return on

Continued

Overall, SSGA believes that the range of expected returns for the investment are comparable to the range of returns that other investors might expect for a similar transaction. Moreover, because much of the risk has been taken out of the proposed Trust investment (e.g., the City has made a $22 million financial commitment to the Project and the Anchor Tenant Lease has been closed), SSGA believes that any investor would find these returns appropriate regardless of the collateral benefits (e.g., the creation of jobs).[16]

SSGA does not view the disproportionate allocation of cash flow between CDG and the Trust as problematic. SSGA states that because CDG is not only committing to contribute capital and to bear the responsibility for cost overruns, it has also mitigated much of the risks of the investment by negotiating the Anchor Tenant Lease as well as entering into arrangements with the City. These actions, SSGA believes, would seem to justify the allocation of the cash flow.

On the micro-level, SSGA states that the major risk factors it has examined include (a) the creditworthiness of Federated and (b) the ability of the Partnership to lease certain ''speculative'' space. On the issue of creditworthiness, SSGA believes that Federated will perform under its lease in accordance with its terms. According to SSGA, the Fountain Square West Project will be highly visible involving substantial community involvement. With a headquarters operation within sight of the Fountain Square West Project, SSGA represents that Federated will have the necessary resources to ensure the success of its operation. SSGA also notes that since Federated has emerged from its reorganization as a dominant retailer, its rental obligations at Fountain Square West will represent a small fraction of Federated's gross revenues.

19. With respect to the ability of the Partnership to lease 45,000 square feet of speculative space, SSGA represents that several factors suggest that Fountain Square West will be leased substantially as forecast. In this regard, SSGA states that the speculative space will represent less than 3 percent of the downtown inventory and that forecasted rents will be comparable to rents currently being achieved in the market. In addition, SSGA asserts that the space will afford a retailer the opportunity to be in a new facility that is in close proximity to a popular anchor store having the latest features in storefront design. Further, SSGA notes that the possibility of an existing store presently on the complex moving to an adjacent parcel and the likelihood that Fifth Third will develop and occupy the office tower will strengthen the site as a retail core and provide an additional inducement to a prospective retailer.

20. SSGA has evaluated how the terms of the proposed transaction will compare with the terms of similar transactions between unrelated parties. SSGA notes that the Fountain Square West Project is extremely unique in the following respects: (a) In terms of City commitment, SSGA explains that the City will be making a major financial commitment to the downtown retail core at a time when most American municipalities are cutting back; (b) in terms of location, SSGA observes that few American cities have such an appropriate site available for development; (c) in terms of risk, SSGA believes that the rate of return to the Trust relative to investment risk is appropriate; and (d) in terms of the development team, SSGA represents that the team is of high caliber. In conclusion, SSGA states that the terms of the Fountain Square West Project are comparable to the terms that other investors would accept if they were unrelated parties.

21. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Each Plan investing in the Trust will have total assets that are in excess of $50 million.

(b) No Plan that purchases units in the Trust for purposes of allowing the Trust to invest in the Partnership will have, immediately after the purchase of such units, more than 5 percent of its assets invested in the Trust.

(c) The decision to purchase additional units in the Trust that will allow SSGA to make the initial and any subsequent equity contributions to the Partnership, will be made by a Second Fiduciary which is independent of Fifth Third and its affiliates and which is not SSGA.

(d) As independent fiduciary for the Trust, SSGA will approve and monitor the Trust's investment in the Partnership.

(e) At the time the Partnership investment is made, the terms of the transaction will be at least as favorable to each Plan participating in the Trust as those obtainable in an arm's length transaction with an unrelated party.

(f) SSGA and the Second Fiduciary of each Plan participating in the Trust will receive initial and ongoing disclosures concerning the Partnership.

(g) As to each Plan participating in the Trust, the total fees paid to Fifth Third will constitute no more than ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

Notice to Interested Persons

Notice of the proposed exemption will be given to the SSGA as well as the Second Fiduciaries of Plans investing in the Trust within 10 days of the publication of the notice of proposed exemption in the Federal Register. Notice will be provided to SSGA and each Second Fiduciary by first class mail. Notice will be provided to active participants in the Plans by posting at local union halls at the locations designated for member notifications. The notice will include a copy of the notice of proposed exemption as published in the Federal Register as well as a supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing. Retirees in the Plans will be mailed a statement which will include a toll-free telephone number such participants may call if they wish to obtain a copy of the proposed exemption. Comments and requests for a public hearing are due within 40 days of the publication of the notice of proposed exemption in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

United States Trust Company of New York and Certain of Its Affiliates Located in New York, NY

[Application Nos. D–10234 and D–10235]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act

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investment. First, SSGA replicated the ten year cash flow forecasts prepared by CLRA. Second, SSGA tested the returns under various alternative assumptions (e.g., an assumption of lower market rents or higher tenant improvement costs). Third, SSGA calculated the internal rate of return for the Trust based on the Partnership distribution protocol during the entire term of the investment. This calculation, according to SSGA, includes an assumption of a sale of the Fountain Square West Project within ten years based on an ''exit valuation.'' The exit valuation is determined by applying a capitalization rate to the eleventh year forecasted net operating income (less assumed selling costs).

[16] Since a major portion of the income derived by the Limited Partner is generated by the Anchor Tenant Lease, SSGA states that the rate of return is dependent on such factors as the division of partnership cash flow, the timing of the initial investment, market rent, lease-up assumptions regarding the balance of the retail space and exit capitalization assumptions. Thus, in SSGA's view, the generation of employment stemming from the Fountain Square West Project will not impact on the Trust's internal rate of return.

and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Proposed Exemption for In-Kind Transfers of Assets

If the exemption is granted, the restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply, effective as of May 31, 1996, to the in-kind transfer to any diversified open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 (the ICA) to which the United States Trust Company of New York or any of its affiliates (collectively, US Trust) serves as investment adviser and may provide other services (i.e. ''Secondary Services'' as defined in Section III(h) below), of the assets of various employee benefit plans (the Plan or Plans) that are either held in certain collective investment funds (the CIF or CIFs) maintained by US Trust or otherwise held by US Trust as trustee, investment manager, or in any other capacity as fiduciary on behalf of the Plans, in exchange for shares of such Funds; provided that the following conditions are met:

(a) A fiduciary (the Second Fiduciary) who is acting on behalf of each affected Plan and who is independent of and unrelated to US Trust, as defined in Section III(g) below, receives advance written notice of the in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Fund and the disclosures described in Section II(f) below.

(b) On the basis of the information described in Section II(f) below, the Second Fiduciary authorizes in writing the in-kind transfer of CIF or Plan assets in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, and the fees received by US Trust in connection with its services to the Fund. Such authorization by the Second Fiduciary is to be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(c) No sales commissions are paid by the Plans in connection with the in-kind transfers of CIF or Plan assets in exchange for shares of the Funds.

(d) All or a pro rata portion of the assets of the Plans held in the CIFs or all or a pro rata portion of the assets of the Plans held by US Trust in any capacities as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds. Notwithstanding the foregoing, solely for purposes of this paragraph (d), assets of the 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies (the UST DC Plan) held by US Trust as trustee and allocated to the U.S. Government Short/Intermediate Term Investment Fund shall be treated as assets held in a CIF.

(e) The Plans or the CIFs receive shares of the Funds that have a total net asset value equal in value to the assets of the Plans or the CIFs exchanged for such shares on the date of transfer.

(f) With respect to any in-kind transfer of CIF assets to a Fund, each Plan receives shares of a Fund which have a total net asset value that is equal to the value of the Plan's pro rata share of the assets of the corresponding CIF on the date of the transfer, based on the current market value of the CIF's assets, as determined in a single valuation performed in the same manner as of the close of the same business day with respect to all such Plans participating in the transaction on such day, using independent sources in accordance with the procedures set forth in Rule 17a–7(b) under the ICA (Rule 17a–7) for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day prior to the in-kind transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of US Trust.

(g) (1) Not later than thirty (30) days after completion of each in-kind transfer of CIF or Plan assets in exchange for shares of the Funds (except for certain transactions described in paragraph (g)(2) below), US Trust sends by regular mail to the Second Fiduciary, a written confirmation containing:

(i) the identity of each of the assets that was valued for purposes of the transaction in accordance with Rule 17a–7(b)(4) under the ICA;

(ii) the price of each of the assets involved in the transaction; and

(iii) the identity of each pricing service or market maker consulted in determining the value of such assets;

(2) For the in-kind transfer of CIF assets to the Funds which occurred on June 28 and July 31, 1996, the written confirmations described above in paragraph (g)(1) were made by US Trust to all Second Fiduciaries of the appropriate Plans by October 15, 1996.

(h) For all in-kind transfers of CIF assets, US Trust sends by regular mail to the Second Fiduciary, no later than ninety (90) days after completion of the asset transfer made in exchange for shares of the Funds, a written confirmation containing:

(1) the number of CIF units held by each affected Plan immediately before the in-kind transfer, the related per unit value, and the aggregate dollar value of the units transferred; and

(2) the number of shares in the Funds that are held by each affected Plan following the in-kind transfer, the related per share net asset value, and the aggregate dollar value of the shares received.

(i) The conditions set forth in paragraphs (d), (e), (f), (o), (p), and (q) of Section II below are satisfied.

Section II—Proposed Exemption for Receipt of Fees From Funds

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code shall not apply, effective as of June 30, 1996, to the receipt of fees by US Trust from the Funds for acting as the investment adviser for the Funds as well as for acting as the custodian, transfer agent, sub-administrator or for providing other ''Secondary Services'' (as defined in Section III(h) below) to the Funds in connection with the investment in the Funds by Plans for which US Trust acts as a fiduciary (Client Plans), other than Plans established and maintained by US Trust for the benefit of its employees and their beneficiaries (Bank Plans), provided that the following conditions are met:

(a) No sales commissions are paid by the Client Plans in connection with purchases or sales of shares of the Funds and no redemption fees are paid in connection with the sale of such shares by the Plans to the Funds.

(b) The price paid or received by the Client Plans for shares in the Funds is the net asset value per share, as defined in Section III(e), at the time of the transaction and is the same price which would have been paid or received for the shares by any other investor at that time.

(c) Neither US Trust nor any affiliate (including officers, directors and other persons, as defined in Section III(b) below) purchases from or sells to the Client Plans any shares of the Funds.

(d) For each Client Plan, the combined total of all fees received by US Trust for the provision of services to the Client Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, are not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(e) US Trust or an affiliate does not receive any fees payable, pursuant to Rule 12b–1 under the ICA (the 12b–1 Fees) in connection with the transactions.

(f) The Second Fiduciary who is acting on behalf of a Client Plan receives in advance of the investment by a Plan in any of the Funds a full and detailed written disclosure of information concerning such Fund including, but not limited to:

(1) a current prospectus for each portfolio of each of the Funds in which such Client Plan is considering investing;

(2) a statement describing the fees for investment management, investment advisory, or other similar services, any fees for Secondary Services, as defined in Section III(h) below, and all other fees to be charged to or paid by the Client Plan and by such Funds to US Trust, including the nature and extent of any differential between the rates of such fees;

(3) the reasons why US Trust may consider such investment to be appropriate for the Client Plan;

(4) a statement describing whether there are any limitations applicable to US Trust with respect to which assets of a Client Plan may be invested in the Funds, and, if so, the nature of such limitations; and

(5) upon request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption.

(g) On the basis of the information described in Section II(f) above, the Second Fiduciary authorizes in writing the investment of assets of the Client Plan in shares of the Fund and the fees to be paid to US Trust in connection with its services to the Funds. The authorization made by the Second Fiduciary must be consistent with the duties, responsibilities and obligations imposed on fiduciaries by Part 4 of Title I of the Act.

(h) The authorization described above in Section II(g) is terminable at will by the Second Fiduciary of a Client Plan, without penalty to such Plan, upon receipt by US Trust of written notice of termination. Such termination will be effected by US Trust selling the shares of the Fund held by the affected Client Plan within one business day following receipt by US Trust of the termination form (the Termination Form), as defined in Section III(i) below, or any other written notice of termination; provided that if, due to circumstances beyond the control of US Trust, the sale cannot be executed within one business day, US Trust shall have one additional business day to complete such sale.

(i) Each Client Plan receives a credit, either through cash or, if applicable, the purchase of additional shares of the Funds, pursuant to an annual election, which may be revoked at any time, made by the Client Plan, of such Plan's proportionate share of all investment advisory fees charged to the Funds by US Trust, including any investment advisory fees paid by US Trust to third party sub-advisers, within not more than one business day after the receipt of such fees by US Trust. The crediting of all such fees to the Client Plans by US Trust is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Client Plan.

(j) In the event of an increase in the rate of any fees paid by the Funds to US Trust regarding any investment management services, investment advisory services, or fees for similar services that US Trust provides to the Funds over an existing rate for such services that had been authorized by a Second Fiduciary, in accordance with Section II(g), US Trust will, at least thirty (30) days in advance of the implementation of such increase, provide a written notice (separate from the Fund prospectus) to the Second Fiduciary of each of the Client Plans invested in a Fund which is increasing such fees.

(k) In the event of an addition of a Secondary Service, as defined in Section III(h) below, provided by US Trust to the Fund for which a fee is charged or an increase in the rate of any fee paid by the Funds to US Trust for any Secondary Service that results either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by US Trust for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Client Plan, in accordance with Section II(g), US Trust will at least thirty (30) days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (separate from the Fund prospectus) to the Second Fiduciary of each of the Client Plans invested in a Fund which is adding a service or increasing fees. Such notice shall be accompanied by the Termination Form, as defined in Section III(i) below.

(l) The Second Fiduciary is supplied with a Termination Form at the times specified in paragraphs (k), (l), and (m) of this Section II, which expressly provides an election to terminate the authorization, described above in Section II(g), with instructions regarding the use of such Termination Form including statements that:

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Plans. Such termination will be effected by US Trust selling the shares of the Fund held by the Client Plans requesting termination within one business day following receipt by US Trust, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination; provided that if, due to circumstances beyond the control of US Trust, the sale of shares of such Client Plans cannot be executed within one business day, US Trust shall have one additional business day to complete such sale; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Client Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or increase in the rate of any fees, if such Termination Form is supplied pursuant to paragraphs (k) and (l) of this section II, and will result in the continuation of the authorization, as described in Section II(g), of US Trust to engage in the transactions on behalf of such Client Plan.

(m) The Second Fiduciary is supplied with a Termination Form, annually during the first quarter of each calendar year, beginning with the first quarter of the calendar year that begins after the date the grant of this proposed exemption is published in the Federal Register and continuing for each calendar year thereafter; provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to this paragraph (m), sooner than six months after a Termination Form is supplied pursuant to Section II(k) and (l), except to the extent required by such paragraphs to disclose an additional Secondary Service for which a fee is charged or an increase in fees.

(n)(1) With respect to each of the Funds in which a Client Plan invests, US Trust will provide the Second Fiduciary of such Plan:

(A) at least annually with a copy of an updated prospectus of such Fund;

(B) upon the request of such Second Fiduciary, with a report or statement

(which may take the form of the most recent financial report, the current statement of additional information, or some other written statement) which contains a description of all fees paid by the Fund to US Trust; and

(2) With respect to each of the Funds in which a Client Plan invests, in the event such Fund places brokerage transactions with US Trust, US Trust will provide the Second Fiduciary of such Plan at least annually with a statement specifying:

(A) the total, expressed in dollars, brokerage commissions of each Fund's investment portfolio that are paid to US Trust by such Fund;

(B) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to US Trust;

(C) the average brokerage commissions per share, expressed as cents per share, paid to US Trust by each portfolio of a Fund; and

(D) the average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to US Trust.

(o) All dealings between the Client Plans and any of the Funds are on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Plans.

(p) US Trust maintains for a period of six (6) years the records necessary to enable the persons, as described in Section II(q) below, to determine whether the conditions of the exemption have been met, except that:

(1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of US Trust, the records are lost or destroyed prior to the end of the six (6) year period, and

(2) no party in interest, other than US Trust, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by Section II(q) below.

(q)(1) Except as provided in Section II(q)(2) and notwithstanding any provisions of Section 504(a)(2) and (b) of the Act, the records referred to in Section II(p) above are unconditionally available at their customary location for examination during normal business hours by——

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of each of the Plans who has authority to acquire or dispose of shares of any of the Funds owned by such a Plan, or any duly authorized employee or representative of such fiduciary; and

(iii) Any participant or beneficiary of the Plans or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraph (q)(1)(ii) and (q)(1)(iii) of Section II shall be authorized to examine trade secrets of US Trust, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For purposes of this proposed exemption,

(a) The term ''US Trust'' means the United States Trust Company of New York and an affiliate, as defined in Section III(b)(1).

(b) An ''affiliate'' of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term ''Fund or Funds'' means any diversified open-end investment company or companies registered under the ICA for which US Trust serves as investment adviser, and may also provide custodial or other services as approved by such Funds.

(e) The term, ''net asset value'' means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and statement of additional information, and other assets belonging to each of the portfolios in such Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

(f) The term, ''relative,'' means a ''relative'' as that term is defined in section 3(15) of the Act (or a ''member of the family'' as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) The term, ''Second Fiduciary,'' means a fiduciary of a plan who is independent of and unrelated to US Trust. For purposes of this proposed exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to US Trust if:

(1) Such Second Fiduciary directly or indirectly controls, is controlled by, or is under common control with US Trust;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary is an officer, director, partner, or employee of US Trust (or is a relative of such persons);

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this proposed exemption; provided, however, that with respect to the Bank Plans, the Second Fiduciary may receive compensation from US Trust in connection with the transactions contemplated herein, but the amount or payment of such compensation may not be contingent upon or be in any way affected by the Second Fiduciary's ultimate decision regarding whether the Bank Plans participate in the transactions.

With the exception of the Bank Plans, if an officer, director, partner, or employee of US Trust (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Plan's investment manager/advisor, (ii) the approval of any purchase or sale by the Plan of shares of the Funds, and (iii) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in sections I and II above, then Section III(g)(2) above shall not apply.

(h) The term, ''Secondary Service,'' means a service, other than an investment management, investment advisory, or similar service, which is provided by US Trust to the Funds, including but not limited to custodial, accounting, administrative, or any other service. However, for purposes of Section II(k), the term ''Secondary Service'' does not include any brokerage services provided by US Trust to the Funds.

(i) The term ''Termination Form,'' means the form supplied to the Second Fiduciary, at the times specified in paragraphs (k), (l), and (m) of Section II above, which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in Section II(g). Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plans and to notify US Trust in writing to effect such

termination by selling the shares of the Fund held by the Plans requesting termination within one business day following receipt by US Trust, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of written notice of such request for termination; provided that if, due to circumstances beyond the control of US Trust, the sale cannot be executed within one business day, US Trust shall have one additional business day to complete such sale.

(j) The term ''UST DB Plan'' means the Employees' Retirement Plan of United States Trust Company of New York and Affiliated Companies.

(k) The term ''UST DC Plan'' means the 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies.

(l) The term ''Bank Plan'' means the UST DB Plan and the UST DC Plan.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of May 31, 1996, for transactions described in Section I, and June 30, 1996, for transactions described in Section II.

Summary of Facts and Representations

1. US Trust. UST New York, a wholly-owned subsidiary of U.S. Trust Corporation, is a New York-chartered bank and trust company. UST New York provides trust and banking services to individuals, corporation, and institutions both nationally and internationally. UST New York serves as trustee, investment manager, and/or custodian to the Plans described below and as investment adviser to certain of the Funds. As of December 31, 1995, UST New York had total assets under management of approximately $40 billion.

United States Trust Company of the Pacific Northwest (UST Pacific) is a limited purpose non-depository trust company chartered in Oregon and is also a subsidiary of U.S. Trust Corporation. UST Pacific serves as investment adviser to certain of the Funds.

Other Affiliates of UST New York that may offer shares of the Funds to their fiduciary customers, but which did not have customer assets invested in the converting CIFs, are included herein solely with respect to the fee rebate and ''negative consent'' procedure described below for future fee changes. These entities include certain national banks, such as U.S. Trust Company of California, N.A., and U.S. Trust Company of Texas, N.A., as well as certain state-chartered banks, such as U.S. Trust Company of Connecticut, U.S. Trust Company of Florida Savings Bank, and U.S. Trust Company of New Jersey.

2. The Plans. The Plans (i.e. the Client Plans and the Bank Plans) presently consist of retirement plans qualified under section 401(a) of the Code for which US Trust serves as a trustee or investment fiduciary. These Plans are considered ''pension plans'' under section 3(2) of the Act. However, US Trust requests that the proposed exemption apply to any ''employee benefit plan'', within the meaning of section 3(3) of the Act, and to any ''plan'' within the meaning of section 4975(e)(1) of the Code (including IRAs), and not solely to qualified plans under Code section 401(a). Currently, UST New York serves as trustee, investment manager, and/or custodian of approximately 250 Plans. As of September 30, 1995, UST New York had approximately $800 million in Plan assets under management, of which approximately $675 million represented assets invested in the CIFs.

The Plans include two qualified retirement plans sponsored by US Trust (collectively, the Bank Plans), which are:

(i) The Employees' Retirement Plan of United States Trust Company of New York and Affiliated Companies (the UST DB Plan); and

(ii) The 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies (the UST DC Plan).

Assets of the Bank Plans represent approximately half of the assets of the CIFs described herein.

The applicant states that Actuarial Sciences Associates, Inc., a fiduciary that is independent of US Trust, was appointed to act as the Second Fiduciary for the Bank Plans in connection with the determination made by such Plans to participate in the conversion of the CIFs to the Funds (as discussed below).

In addition, the applicant states that the Client Plans participated in the conversion of the CIFs to the Funds based solely upon decisions made in each case by a Plan fiduciary independent of US Trust (collectively, the Second Fiduciaries). The applicant represents that, following the initial CIF conversions, decisions to participate in any future CIF conversions will also be made on behalf of each Client Plan by a Second Fiduciary (as discussed more fully below), although the specific Client Plans that may be involved have not been identified at the present time.

3. The CIFs. The CIFs comprised the individual portfolios of the United States Trust Company of New York Pooled Pension and Profit Sharing Trust. However, for purposes of the proposed exemption, the CIFs are deemed to have included a short-term investment fund (identified below as ''the Government Fund'') that was not structured as a commingled fund but as a separate fund that formed a part of, and was offered as an investment option under, the UST DC Plan.

Specifically, the CIFs were as follows: (i) the Equity Portfolio; (ii) the Fixed Income Portfolio; (iii) the International Portfolio; (iv) the Short-term Fixed Income Portfolio; and (v) the U.S. Government Short/Intermediate Term Fund (i.e. the Government Fund).

As a result of the conversions, each of these CIFs now correspond to one of the Funds described below. However, prior to the initial CIF conversions on May 31, 1996, UST New York determined that approximately 50 percent of the UST DB Plan's assets allocated to the Equity Portfolio CIF would be reallocated to three different domestic equity Funds with certain narrower investment objectives. These Funds, and the percentage of the UST DB Plan's assets that were allocated to each Fund, were: (i) The Early Life Cycle (or ''Small Cap'') Portfolio (10 percent); (ii) the Optimum Growth Portfolio (20 percent); and (iii) the Equity Value Portfolio (20 percent).

In order to accomplish this result, the applicant states that prior to the conversions US Trust created three new domestic equity CIFs with investment objectives corresponding directly to the objectives of the three proposed Equity Funds. US Trust then transferred to the new CIFs the relevant percentage of the UST DB Plan's assets that were formerly invested in the Equity Portfolio CIF. The new CIFs were: (i) the Early Life Cycle CIF; (ii) the Optimum Growth CIF; and (iii) the Equity Value CIF (collectively, the New CIFs). The applicant states that a pro rata share of each of the underlying securities held by the Equity Portfolio CIF were reallocated to the New CIFs by UST New York in accord with its authority as trustee of the CIFs. No assets were reallocated selectively or disproportionately. The creation of the New CIFs allowed US Trust to accomplish the conversions by a direct, one-to-one exchange of assets between each CIF and a Fund with corresponding investment objectives.

4. The Funds. The Funds are certain portfolios of the following three similarly named but separately registered investment companies: (i) The Excelsior Institutional Trust; (ii) the Excelsior Funds, Inc.; and (iii) the Excelsior Funds. All of the Funds are described further below. However, US Trust requests that the exemption apply prospectively to any similar Fund in

which a Plan invests where US Trust provides investment advisory services and certain Secondary Services. In this regard, US Trust states that all future Funds to which US Trust serves as an investment adviser will assume similar structures and that Plan investments therein will meet all of the terms and conditions of the exemption.

The Excelsior Institutional Trust (the Institutional Funds) is an open-end, diversified management investment company registered under the ICA. Currently, the Institutional Funds comprise the following portfolios: (i) The Equity Fund; (ii) the Income Fund; (iii) the Total Return Bond Fund; (iv) the Bond Index Fund; (v) the Balanced Fund; (vi) the Equity Growth Fund; and (vii) the International Equity Fund.

UST New York serves as investment adviser to the first three of the foregoing Institutional Funds and as sub-adviser to the fourth. UST Pacific serves as investment adviser to the remaining three Institutional Funds. Various parties unrelated to US Trust also provide custodial, transfer agent, recordkeeping, and other non-advisory services (i.e. Secondary Services) to the Institutional Funds. US Trust also performs certain Secondary Services for the Institutional Funds, including co-administration and shareholder services, for which it receives fees.

The Excelsior Funds, Inc. (formerly known as the UST Master Funds, Inc.; hereafter, the UST Funds) is an open-end, diversified management investment company registered under the ICA. Currently, the UST Funds comprise the following portfolios: (i) The Equity Fund; (ii) the Income and Growth Fund; (iii) the Long-Term Supply of Energy Fund; (iv) the Productivity Enhancers Fund; (v) the Environmentally-Related Products and Services Fund; (vi) the Aging of America Fund; (vii) the Communication and Entertainment Fund; (viii) the Business and Industrial Restructuring Fund; (ix) the Global Competitors Fund; (x) the Early Life Cycle Fund; (xi) the International Fund; (xii) the Emerging Americas Fund; (xiii) the Pacific/Asia Fund; (xiv) the Pan European Fund; (xv) the Short-Term Government Securities Fund; (xvi) the Intermediate-Term Managed Income Fund; (xvii) the Managed Income Fund; (xviii) the Money Fund; (xix) the Government Money Fund; and (xx) the Treasury Money Fund.

UST New York serves as investment adviser to each of the UST Funds. Various parties unrelated to US Trust provide custodial, transfer agent, recordkeeping, and other Secondary Services to the UST Funds. US Trust also performs certain Secondary Services for the UST Funds, including transfer agent and shareholder services, for which it receives fees.

The Excelsior Funds is a separate open-end, diversified management investment company registered under the ICA, the only currently relevant portfolio of which is the Institutional Money Fund (the Money Fund Option).

UST New York serves as supplemental investment manager to the Money Fund Option pursuant to an investment advisory agreement. Various parties unrelated to US Trust provide investment advisory services to the Excelsior Funds, as well as recordkeeping and other Secondary Services. US Trust also performs certain Secondary Services for the Excelsior Funds, including co-administration, custodial, and transfer agent services, for which it receives fees.

5. Actuarial Sciences Associates, Inc. (ASA). ASA is an employee benefits consulting firm established in July 1985 which is located in Somerset, New Jersey. ASA was retained by US Trust to serve as the Second Fiduciary for the UST DB Plan and the UST DC Plan (i.e. the Bank Plans) in connection with the investments made in the Funds. ASA is an affiliate of AT&T Investment Management Corporation (ATTIMCO). ATTIMCO is a wholly-owned subsidiary of AT&T and is a registered investment adviser under the ICA. As of December 31, 1995, ATTIMCO exercised discretionary investment authority over approximately $75 billion of fiduciary assets. ASA, ATTIMCO and their affiliates are independent of, and unrelated to, US Trust.

Description of the Transactions

6. US Trust represents that the CIFs in which the Plans invested were maintained in accordance with the requirements under New York law that apply to collective investment trusts. US Trust decided to terminate the CIFs and offer to the Plans participating therein appropriate interests in corresponding Funds as alternative investments. Because interests in a CIF generally must be liquidated or withdrawn to effect distributions, US Trust believed that the interests of the Plans invested in the CIFs would be better served by investment in shares of the Funds which could be distributed in-kind. US Trust also believed that the Funds offered the Plans advantages over the CIFs as pooled investment vehicles. For instance, as shareholders of the Funds, the Plans have opportunities to exercise voting and other shareholder rights.

The Plans, as Fund shareholders, periodically receive certain disclosures concerning the Funds. Such information includes: (i) A copy of the Fund prospectus, which is updated at least annually; (ii) an annual report containing audited financial statements of the Funds and information regarding such Funds' investment performance; and (iii) a semi-annual report containing unaudited financial statements. With respect to the Plans, US Trust reports all transactions in shares of the Funds in periodic account statements provided to each of the Plans. Further, US Trust maintains that the net asset value of the portfolios of the Funds can be monitored daily from information available in newspapers of general circulation.

7. With respect to the requested exemption, US Trust proposes that when from time-to-time a CIF is terminated its assets would be transferred in-kind to a corresponding Fund in exchange for shares of such Fund in order to avoid the potentially large brokerage expenses that would otherwise be incurred in having the CIF sell such assets and having the Fund acquire such assets. In addition, US Trust also proposes that from time-to-time it may be appropriate for an individual Plan for which US Trust serves as fiduciary to transfer all or a pro rata share of its assets in-kind to any of the Funds in exchange for shares of such Funds. For example, in the case of an in-kind exchange between an individual Plan whose portfolio consists of common stock, money market securities, and real estate, and a Fund that (under its investment policy) invests only in common stock and money market securities, the exchange would involve all or a pro rata share of the common stock and money market securities held by the Plan, if such stock and securities are eligible for purchase by the Fund, and would not involve the transfer or exchange of the real estate holdings of such Plan. In this regard, a particular Fund's eligible investments will be set forth in its prospectus. No brokerage commissions, fees or expenses (other than customary transfer charges paid to parties other than US Trust) will be charged to the Plans or the CIFs in connection with the in-kind transfers of assets to the Funds for shares of the Funds.

Thus, in addition to the retroactive exemptive relief requested herein for the initial in-kind transfer of CIF assets to the Funds in exchange for Fund shares (as discussed in Item 8 below), US Trust also requests prospective relief for transactions involving: (i) The future in-kind transfer by other CIFs of all or a pro rata portion of the assets of any of the Plans held in such CIFs to the Funds

in exchange for shares of the Funds; or (ii) the in-kind transfer of all or a pro rata portion of the assets of any of the Plans held by US Trust, in any capacity as fiduciary on behalf of such Plans, to the Funds in exchange for shares of such Funds.

US Trust states that the transfers in-kind of assets in exchange for Fund shares are ministerial transactions performed in accordance with pre-established objective procedures which are approved by the Board of Trustees of each Fund. Such procedures require that assets transferred to a Fund: (i) Are consistent with the investment objectives, policies, and restrictions of the Fund; (ii) satisfy the applicable requirements of the ICA and the Code; and (iii) have a readily ascertainable market value. In addition, any assets that are transferred will be marketable and will not be subject to restrictions on resale. Assets which do not meet these requirements will be sold in the open market through an unaffiliated brokerage firm prior to any transfer in-kind. Further, prior to entering into an in-kind transfer, a Second Fiduciary of each affected Plan will receive certain disclosures from US Trust and approve the transaction in writing.

8. The Conversion Transactions. US Trust specifically requests a retroactive exemption for the in-kind transfers of CIF assets to certain corresponding Funds which have already occurred. The initial in-kind transfers of CIF assets to the Funds occurred on May 31, 1996, and was a partial conversion of various CIFs involving assets of the Bank Plans. Another in-kind transfer of CIF assets occurred on June 30, 1996, and was a partial conversion of such CIFs involving assets of Client Plans that elected to participate in the CIF conversions.

With respect to the in-kind transfers of CIF assets involving the Bank Plans, US Trust states that a proportionate share of each CIF's assets representing the interests of the Bank Plans therein was transferred to the corresponding UST Fund, except for the UST DB Plan's interests in the new Optimum Growth and Equity Value CIFs, which were transferred to the corresponding new Institutional Funds. The following table shows which CIF assets were transferred to particular Funds.

CIF portfolio	Corresponding fund portfolio
Short-Term Fixed Income.	UST Funds/Money Fund.
Fixed Income	UST Funds/Managed Income Fund.
U.S. Government Short/Intermediate Term Fund.	UST Funds/Short-Term Government Securities Fund.
International	UST Funds/International Fund.
Equity Portfolio	UST Funds/Equity Fund.
Early Life Cycle	UST Funds/Early Life Cycle Fund.
Optimum Growth	Institutional Optimum Growth Fund.
Equity Value	Institutional Equity Value Fund.

As noted above, the Government Fund was a separate fund forming part of the UST DC Plan, rather than a commingled CIF. However, for purposes of the transactions for which US Trust requests an exemption, this fund was treated in the same manner as a CIF in that all of its assets were transferred to a corresponding Fund.

As of June 30, 1996, US Trust states that certain Client Plan assets invested in the Short-Term Fixed Income CIF were transferred either to the UST Funds/Money Fund or the Excelsior Funds/Money Fund Option at the direction of the Second Fiduciary approving the particular in-kind transfer. Otherwise, a proportionate share of each CIF's assets representing the interests of the Client Plans (whose Second Fiduciaries approved the transaction) were transferred on such date to the corresponding Institutional Funds, as follows:

CIF portfolio	Corresponding fund portfolio
Short-Term Fixed Income.	Excelsior Money Fund Option or UST Funds/Money Fund
Fixed Income	Institutional Total Return Bond Fund.
International	Institutional International Equity Fund.
Equity	Institutional Equity Fund.

Thus, for example, if at the time of the conversion the Bank Plans held 45 percent of the interests in the Equity CIF, 45 percent of those assets were transferred to the Equity Fund portfolio of the UST Funds and the remaining 65 percent of the CIF's assets (representing the interests of Client Plans) were transferred to the Equity Fund portfolio of the Institutional Funds.

Each in-kind transfer of CIF assets was completed in a single transaction on a single day. In each case, the in-kind transfer transactions were accomplished by transferring from the converting CIF a proportionate share of the Plans' assets then held by the CIF to the corresponding Fund in exchange for an appropriate number of Fund shares. Once all of a CIF's assets were transferred to a Fund, the CIF was terminated and its assets, then consisting of Fund shares, were distributed in-kind to the Plans participating in the CIFs based on each Plan's pro rata share of the assets of the CIFs on the date of the transaction.

Prior to each in-kind transfer transaction, the assets of a transferring CIF were reviewed by US Trust to confirm that they were appropriate investments for the receiving Fund. If any of the assets of a CIF were not appropriate for its corresponding Fund, US Trust sold such assets in the open market through an unaffiliated brokerage firm prior to the in-kind transfer.

9. Advance Disclosure/Approval and Appointment of the Second Fiduciary for the Bank Plans. US Trust provided to each affected Plan disclosures that announced the termination of the particular CIF, summarized the transaction, and otherwise complied with provisions of Section I of this proposed exemption. Based on these disclosures, the Second Fiduciary for each affected Plan approved in writing the Plan's participation in the conversion transaction, including the fees that were to be paid by the Funds to US Trust.

In the case of the initial in-kind transfer transactions involving the Bank Plans which occurred on May 31, 1996, ASA was required to make an independent determination in its fiduciary capacity that participation in the conversion transaction on the terms proposed was in the best interest of each Bank Plan. In this regard, as noted earlier, US Trust appointed ASA to serve as the Second Fiduciary to oversee the conversions of the CIFs to the Funds as they related to the interests of the Bank Plans, including the decision whether to participate therein. As part of its written report setting out the conclusions discussed in Item 11 below, ASA was required to confirm both its independence from US Trust and its qualifications to serve as the Second Fiduciary for the Bank Plans.

10. Valuation Procedures. The assets transferred by a CIF to its corresponding Fund consisted entirely of cash and marketable securities. For purposes of a transfer in-kind, the value of the securities in the CIF was determined based on market value as of the close of business on the last business date prior to the transfer (the CIF Valuation Date). The values on the CIF Valuation Date

were determined using the valuation procedures described in Rule 17a–7 under the ICA. In this regard, the ''current market price'' for specific types of CIF securities involved in the transaction was determined as follows:

a. If the security was a ''reported security'' as the term is defined in Rule 11Aa3–1 under the Securities Exchange Act of 1934 (the '34 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System) for the CIF Valuation Date; or, if there were no reported transactions in the Consolidated System that day, the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1–1 under the '34 Act), as of the close of business on the CIF Valuation Date.

b. If the security was not a reported security, and the principal market for such security was an exchange, then the last sale on such exchange on the CIF Valuation Date or, if there were no reported transactions on such exchange that day, the average of the highest current independent bid and lowest current independent offer on the exchange as of the close of business on the CIF Valuation Date.

c. If the security was not a reported security and was quoted in the NASDAQ system, then the average of the highest current independent bid and lowest current independent offer reported on NASDAQ as of the close of business on the CIF Valuation Date.

d. For all other securities, the average of the highest current independent bid and lowest current independent offer, as of the close of business on the CIF valuation date, determined on the basis of reasonable inquiry. For securities in this category, US Trust obtained quotations from at least three sources that were either broker-dealers or pricing services independent of and unrelated to US Trust and, when more than one valid quotation was available, used the average of the quotations to value the securities, in conformance with interpretations by the SEC and practices under Rule 17a–7.

The securities received by a transferee Fund portfolio were valued by such portfolio for purposes of the transfer in the same manner and as of the same day as such securities were valued by the corresponding transferor CIF. The per share value of the shares of each Fund portfolio issued to the CIFs was based on the corresponding portfolio's then-current net asset value. US Trust states that the value of a Plan's investment in shares of each Fund as of the opening of business on the date of the conversion transaction was equal to the value of such Plan's investment in the CIFs as of the close of business on the last business day prior to the conversion transaction.

Not later than thirty (30) business days after completion of the in-kind transfer transaction (except as otherwise noted),[17] US Trust sent by regular mail a written statement to each affected Plan that included a confirmation of the transaction. Such confirmation contained: (i) The identity of each security that was valued in accordance with Rule 17a–7(b)(4), as described above; (ii) the price of each such security for purposes of the transaction; and (iii) the identity of each pricing service or market-maker consulted in determining the value of such securities.

Not later than ninety (90) days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, US Trust mailed to the Plans a written confirmation of the number of CIF units held by each affected Plan immediately before the conversion (and the related per unit value or the aggregate dollar value of the units transferred), and the number of shares in the Funds that were held by each affected Plan following the conversion (and the related per share net asset value or the aggregate dollar value of the shares received).

In accordance with the conditions of Section I of this proposed exemption, similar procedures will occur upon any future in-kind exchanges between CIFs maintained by US Trust or Plans, and the Funds.

Representations of the Independent Fiduciary for the Bank Plans Regarding the In-Kind Transfers

11. As stated above, US Trust retained ASA as the Second Fiduciary to oversee the in-kind transfers of CIF assets to the Funds as such transactions affected the Bank Plans. In such capacity, ASA represented that it understood and would accept the duties, responsibilities and liabilities in acting as a fiduciary under the Act for the Bank Plans.

In a written report dated May 30, 1996, ASA stated that it considered the effect of the in-kind transfer transactions on the Bank Plans and the implications of such transactions for Plans invested in the CIFs. ASA noted that this investment opportunity was being offered to the Client Plans on the same terms and conditions as was being offered to the Bank Plans. Based on all available data, ASA concluded that the terms of the in-kind transfers were fair to participants of the Bank Plans. ASA states that such terms were comparable to, and no less favorable than, the terms that would have been reached among unrelated third parties.

Therefore, ASA specifically authorized the in-kind transfers of the CIF assets on May 31, 1996 as the Second Fiduciary for the Bank Plans. In this regard, ASA represented in its written report dated May 30, 1996, that the in-kind transfer transactions were in the best interests of the Bank Plans and their participants and beneficiaries for the following reasons:

(a) the impact of the in-kind transfers on the Bank Plans would be de minimis because the Funds would substantially replicate the CIFs in terms of the investment policies and objectives;

(b) the Funds would probably continue to experience relative performance similar in nature to the CIFs given the continuity of investment objectives and policies, management oversight and portfolio management personnel;

(c) the in-kind transfers would not adversely affect the cash flows, liquidity or investment diversification of the Bank Plans; and

(d) the benefits to be derived by the Bank Plans and their participants by investing in the Funds (e.g., larger investor based permitted by the Funds, cost savings to participants over time through economies of scale, more choices for participants exercising investment control, and ability to obtain investment information through readily available sources) would more than offset the impact of minimum additional expenses that may be borne by the Bank Plans.

In forming an opinion as to the appropriateness of the in-kind transfers, ASA conducted an overall review of the Bank Plans, including the Plan documents. ASA stated that it examined the total investment portfolios of the Bank Plans to ascertain whether the Plans were in compliance with their investment objectives and policies. Further, ASA stated that it examined the liquidity requirements of the Bank Plans and reviewed the concentration of the Bank Plans' assets invested in the CIFs as well as the portion of the CIFs comprised of the assets of the Bank Plans. Finally, ASA stated that it reviewed the diversification provided

[17] US Trust states that the written confirmations regarding the identity and pricing of securities described under Rule 17a–7(b)(4) that were involved in the in-kind transfers of CIF assets which occurred on June 28 and July 31, 1996 were not made within 30 days of the completion of the transactions due to clerical errors made by certain US Trust personnel. US Trust represents that upon discovery of this error, all of the confirmations were mailed as soon as possible and were received by the Second Fiduciaries of the appropriate Client Plans by October 15, 1996.

by the investment portfolios of the Bank Plans. Based on its review and analysis of the foregoing, ASA represented that the in-kind transfer transactions would not adversely affect the total investment portfolios of the Bank Plans, compliance by such Plans with their stated investment objectives and policies, or the cash flow, liquidity or diversification requirements of the Plans.

As the Second Fiduciary for the Bank Plans, ASA represented that following the in-kind transfer transactions, it was provided by US Trust with the confirmation statements described herein. In addition, ASA stated that it supplemented its findings following review of the post-transfer account information to confirm whether the in-kind transfers had resulted in the Bank Plans' receipt of shares in the Funds equal in value to the Plans' pro rata share of assets of the CIFs on the conversion date (i.e. May 31, 1996). ASA further represented that it would take such action as it deemed necessary to safeguard the interests of the Bank Plans in the event the confirmation statements did not confirm the foregoing.

Other Opportunities Available for Plans To Invest in the Funds

12. Besides the in-kind transfer of assets from a CIF or a Plan to a comparable Fund, in accordance with the conditions of this proposed exemption, a Plan's assets may be invested in the Funds in three other ways. First, a Plan may purchase shares in the Funds for cash directly through US Trust. Second, US Trust may transfer a Plan's assets from one Fund to another Fund. Third, US Trust may effect a daily automated sweep of uninvested cash of a Plan into one or more Funds designated by US Trust. However, all investments for Plans in the Funds must be made pursuant to the Second Fiduciary's written authorization.

With respect to sweep services for the Client Plans where US Trust has investment discretion for the Plan, US Trust does not charge separately for the provision of sweep services for uninvested cash balances. Instead, US Trust charges a single, Plan-level fee, which covers both the sweep service and the management of assets in the sweep vehicle (generally, a short-term investment fund). Such single fee is determined as a percentage of the assets so invested. If US Trust does not have investment discretion with respect to the Client Plan's assets invested in the Funds, it may charge a separate fee for sweep services.[18]

Receipt of Fees by US Trust From the Funds

13. Under certain conditions, Prohibited Transaction Exemption (PTE) 77–4, 42 FR 18732 (April 8, 1977) [19] would permit US Trust to receive fees from the Funds for any investments made by the Client Plans under either of two circumstances: (i) where the Client Plan does not pay any investment management, investment advisory, or similar fees for the assets of such Plan invested in shares of a Fund for the entire period of such investment; or (ii) where the Client Plan pays investment management, investment advisory, or similar fees to US Trust based on the total assets of such Plans from which a credit has been subtracted representing such Plan's pro rata share of such investment advisory fees paid to US Trust by the Fund. As such, with respect to the Client Plans, there may be two levels of fees: (i) Those fees which US Trust charges to the Client Plans for serving as trustee, investment manager, or custodian for such Plans (the Plan-level Fees); and (ii) those fees which US Trust charges to the Fund (the Fund-level Fees) for serving as an investment adviser for the Fund as well as for being custodian of the Fund or for providing other Secondary Services to the Fund.

In its capacity as Plan fiduciary, except for the Bank Plans, US Trust charges each Client Plan a fee for its investment management/trustee services based upon its standard fee schedules and the terms of the specific agreement negotiated between each Plan and US Trust.[20] Generally, its standard fees are expressed as a varying percentage of plan assets invested with US Trust.

For their investment advisory services to the Institutional Funds, UST Pacific and UST New York are entitled to receive certain advisory fees from the Institutional Funds, as set out in the prospectuses, currently ranging from approximately 0.12 percent to 0.60 percent of the Fund's daily average assets under management.

For its services as investment adviser to the UST Funds, UST New York is entitled to receive certain advisory fees from the UST Funds, as set out in the prospectuses, currently ranging from approximately 0.25 percent to 1.0 percent of the Funds' daily average assets under management, prior to certain voluntary fee waivers. In addition, UST New York may receive from the UST Funds fees for certain Secondary Services. No such fees are paid to UST New York pursuant to a 12b-1 plan (i.e. distribution expenses payable under Rule 12b-1 of the ICA).

The Funds accrue daily as an expense payable to US Trust a ratable portion of US Trust's investment advisory fees and fees for Secondary Services based upon the average daily net asset value of the Funds. Such fees are paid by the Funds

[18] The Department in a letter, dated August 1, 1986, to Robert S. Plotkin, Assistant Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, addressed the application of section 408(b)(2) of the Act to arrangements involving ''sweep services.'' In that letter, the Department set forth several examples to illustrate various circumstances under which violations of section 406(b) of the Act would arise with respect to such arrangements. Conversely, the letter provided that, if a bank provides ''sweep'' services without the receipt of additional compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services), then the provision of ''sweep'' services by the bank would not, in itself, constitute a violation of section 406(b) of the Act. Moreover, including ''sweep'' services under a single fee arrangement for investment management services which is calculated as a percentage of the market value of the total assets under management would not, in itself, constitute an act described in section 406(b)(1), because the bank would not be exercising its fiduciary authority or control to cause a plan to pay an additional fee.

In addition, the letter also discusses the applicability of the statutory exemptions under section 408(b)(6) of the Act (fees for ''ancillary services'') and under section 408(b)(8) of the Act (investments in collective trust funds maintained by such bank) to such ''sweep'' service arrangements.

[19] PTE 77–4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that the conditions of the exemption are met.

In addition, PTE 77–3, 42 FR 18734 (April 8, 1977) permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met.

In this regard, the Department is expressing no opinion in this proposed exemption regarding whether any of the transactions with the Funds by US Trust involving Plans discussed herein would be covered by PTE 77–4.

[20] The applicant represents that all fees paid by the Client Plans directly to US Trust for services performed by US Trust are exempt from the prohibited transaction provisions of the Act by reason of section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b–2). In this regard, the Department is providing no opinion in this proposed exemption as to whether the conditions required for exemptive relief under section 408(b)(2) of the Act, and the regulations thereunder (see 29 CFR 2550. 408b–2), would be met for fees received by US Trust for the provision of services to the Client Plans.

In addition, the Department notes that to the extent there are prohibited transactions under the Act as a result of services provided by US Trust directly to the Client Plans which are not covered by section 408(b)(2), no relief is being proposed herein for such transactions.

to US Trust monthly in arrears approximately two weeks after the end of the month.

US Trust states that the Client Plans for which it serves as a fiduciary generally should not bear any increased cost burdens as a result of investing in the Funds. In this regard, US Trust credits or ''rebates'' to each Client Plan, generally by the fifth business day of each month (and in no event later than the date it is paid by the Funds), its proportionate share of all Fund-level investment advisory fees for the prior month (the Credit Program).[21] Under the conditions of this proposed exemption, all ''rebates'' of such fees must be made by US Trust to the appropriate Client Plan within not more than one business day after the receipt of such fees by US Trust (see Section II(i) above). US Trust charges each Client Plan, in accordance with its pre-established fee schedules, its full investment management fee for all assets under management, including those assets invested in the Funds. US Trust states that the net effect of the Credit Program will be that no Client Plan will pay, for any period, a ''double'' investment advisory fee for any assets invested in the Funds. Thus, US Trust believes that this procedure effectively operates as a credit against the full Plan-level investment management fee in compliance with the terms of Part II(c) of PTE 77–4. US Trust represents that for each Client Plan, the combined total of all fees received by US Trust for the provision of services to the Client Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, will not be in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

In the case of the Bank Plans, from which US Trust receives no Plan-level fees, US Trust does not rebate or otherwise credit back to the Plans any portion of the fees it receives from the Funds for investment advisory/management services or Secondary Services, consistent with the terms of PTE 77–3.[22] ASA concluded, as the Second Fiduciary for the Bank Plans in connection with the in-kind transfer of CIF assets that was made into the Funds in exchange for shares of the Funds on May 31, 1996, that the fees to be paid by the Bank Plans as investors in the Funds would be reasonable and within industry standards for mutual fund servicing fees.

14. Audit Requirements. US Trust is responsible for establishing and maintaining a system of internal accounting controls for the crediting of the investment advisory or other fees to the Client Plans under the Credit Program. In this regard, US Trust has retained the services of Coopers & Lybrand of New York, New York (the Auditor), an independent accounting firm, to audit annually the rebating of fees to the Client Plans under this program. Such audits will provide independent verification of the proper crediting of fees to the Client Plans. Information regarding fee credits will be used in the preparation of required financial disclosure reports of the Funds for the benefit of the Client Plans.

By letter dated September 25, 1996, the Auditor has described the procedures that will be utilized in the annual audit of the Credit Program. Specifically, in performing its audit, the Auditor will: (a) Review and test compliance with the specific operational controls and procedures established by US Trust for making expense rebates (i.e. credits of fees under the Credit Program); (b) verify, on a test basis, the monthly expense ratios by agreeing them to the respective Fund's prospectus; (c) recalculate, on a test basis, the monthly average balance invested in the Funds; (d) recalculate, on a test basis, the amount of the rebate to be credited to each Client Plan; (e) recompute, on a test basis, the amount of the rebate determined for selected Client Plans and verify that the proper credit was made to the particular Client Plan in a timely manner; and (f) verify, on a test basis, the total amount of credits or ''rebates'' made to the convenience account established for the Credit Program.

In the event that either the internal audit by US Trust or the independent audit by the Auditor identifies an error made in the crediting of fees to the Client Plans, US Trust will correct the error. With respect to any shortfall in credit fees to a Client Plan involving cash credits, US Trust will make a cash payment to the Client Plan equal to the amount of the error plus interest paid at money market rates offered by US Trust for the period involved. With respect to any shortfall in credited fees involving a Client Plan where the Second Fiduciary's prior election was to have credited fees invested in shares of a particular Fund, US Trust will make a cash payment to the Client Plan equal to the amount of the error plus interest based on the greater of either (a) the money market rate offered by US Trust for the period involved or (b) the total rate of return for shares of the Funds, including dividends, that would have been acquired during such period. Any excess credits made to a Client Plan will be corrected by an appropriate deduction and reallocation of cash during the next payment period to reflect accurately the amount of total credits due to the Plan for the period involved.

15. Future Fee Changes. US Trust states that one of the requirements of PTE 77–4 is that any change in any of the rates of fees requires prior written approval by the Second Fiduciary of the Plans participating in the Funds. US Trust notes that where many Plans participate in a Fund, the addition of a service or any increase in fees cannot be implemented until written approval of such change is obtained from every Second Fiduciary. US Trust proposes to follow an alternative ''negative consent'' procedure which it believes provides the basic safeguards for the Plans and is more efficient, cost effective, and administratively feasible than that required by PTE 77–4.

Specifically, in the event of an increase in the rate of any investment management fees, investment advisory fees, or similar fees, the addition of a Secondary Service for which a fee is charged, or an increase in the fees for Secondary Services paid by any Fund to US Trust over an existing rate that had been authorized by the Second Fiduciary, US Trust will provide, at least thirty (30) days in advance of the implementation of such additional service or fee increase, to the Client Plans invested in such Fund a written notice of such additional service or fee increase. Such notice may take the form of a proxy statement, letter, or similar communication that is separate from the Fund prospectus and will explain the nature and amount of the additional service or the increase in fees. In this regard, such increase in fees for Secondary Services can result either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by US Trust

[21] US Trust represents that initially the credit will take the form of a rebate of fees to the extent of the Funds' investment advisory fees and fees for Secondary Services paid to US Trust. The credit will also involve an ''out-of-pocket'' payment by US Trust to the extent that it also credits each Plan with the Plan's proportionate share of fees paid by the Funds to service providers unaffiliated with US Trust. Thus, for a period of time, US Trust intends to ''rebate'' all Fund-level fees to the affected Plans. However, in the future, US Trust will retain a portion of the fees paid to it by the Funds for Secondary Services and will reduce or eliminate the additional credits for fees paid by the Funds to unaffiliated service providers. In this regard, US Trust will continue to ''rebate'' all investment advisory fees charged to the Funds by US Trust, including any investment advisory fees paid by US Trust to third party sub-advisors.

[22] As noted previously, the Department is providing no opinion in this proposed exemption as to whether the fee arrangements discussed herein for the Bank Plans meet the conditions of PTE 77–3.

for such fee over that which had been authorized by the Second Fiduciary of a Client Plan. US Trust believes that notice provided in this way will give the Second Fiduciary of each Plan adequate opportunity to decide whether to continue the authorization of a Plan's investment in any of the Funds in light of the increase in investment management fees, investment advisory fees, or similar fees, the additional Secondary Service for which a fee is charged, or the increase in fees for any Secondary Services. In addition, such fee increase will be disclosed to the Plan in an amendment of or supplement to the Fund's prospectus, as well as in the Fund's Statement of Additional Information, to the extent necessary to comply with disclosure requirements of the U.S. Securities and Exchange Commission (SEC).

The written notice of an additional secondary service for which a fee is charged or a fee increase will be accompanied by a Termination Form, as defined in Section III(i) of this proposed exemption, and by instructions for the use of such form which will expressly provide an election for the Second Fiduciaries of Plans to terminate at will any prior authorizations without penalty to the Plans. Each Client Plan will be supplied with a Termination Form annually during the first quarter of each calendar year, beginning with the first quarter of the calendar year that begins after the date the grant of this proposed exemption is published in the Federal Register and continuing for each calendar year thereafter, regardless of whether there have been any changes in the fees payable to US Trust or changes in other matters in connection with services rendered to the Funds. However, if the Termination Form has been provided to the Plan in the event of an addition of a Secondary Service for which a fee is charged, or an increase in any existing fees for Secondary Services paid by the Fund to US Trust, then such Termination Form need not be provided again to the Plan until at least six months have elapsed, unless such Termination Form is required to be sent sooner as a result of another increase in any such fees or addition of such services.

The Termination Form will contain instructions regarding its use which will state expressly that the authorization is terminable at will by a Second Fiduciary, without penalty to the Plan, and that failure to return the form will be deemed to be an approval of the additional Secondary Service or the increase in the rate of any fees and will result in the continuation of all authorizations previously given by such Second Fiduciary. Termination by any Plan of authorization to invest in the Funds will be effected by US Trust redeeming the shares of the Fund held by the affected Plan by the close of business on the day following the date of receipt by US Trust of the Termination Form or any other written notice of termination. If, due to circumstances beyond the control of US Trust, the redemption cannot be executed within one business day, US Trust will have one additional business day to complete such redemption.

16. No sales commissions are paid by the Client Plans in connection with purchases or sales of shares of the Funds and no redemption fees are paid in connection with the sale of such shares by the Plans to the Funds. In addition, neither US Trust nor any affiliate (including officers, directors and other persons, as defined in Section III(b) above) purchases from or sells to the Client Plans any shares of the Funds. US Trust does not receive any 12b–1 fees, payable pursuant Rule 12b–1 under the ICA, for transactions with the Funds involving the Plans. In all cases, the price paid or received by a Plan for any Fund shares is the net asset value per share, as defined in Section III(e) above, at the time of the transaction and is the same price which would be paid or received for the shares by any other investor at that time. US Trust states that all dealings between the Plans and any of the Funds are on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Plans.

17. On an annual basis, US Trust will provide the Second Fiduciary of a Plan with a copy of the current prospectus for the Funds and, upon such fiduciary's request, a copy of the Statement of Additional Information which contains a description of all fees paid by the Funds to US Trust. In addition, US Trust will provide the Second Fiduciary with a copy of a financial disclosure report prepared by US Trust which contains information about the portfolios of the Funds and includes the Auditor's findings within 60 days of the preparation of the report. Further, US Trust will respond to oral or written responses to inquiries of the Second Fiduciary as they may arise.

In some cases, a US Trust affiliate may execute securities transactions as a broker for the investment portfolios of certain Funds, to the extent permitted by the ICA and the applicable rules of the SEC. To the extent that US Trust does not currently execute securities brokerage transactions for any Fund for which a fee is paid to US Trust, but proposes to do so in the future, US Trust will at least thirty (30) days in advance of the implementation of such additional service provide a written notice to the Plan which explains the nature of such additional service and the amount of the brokerage fees involved. Further for any Fund that US Trust provides such brokerages services, US Trust will provide at least annually to any Plan that invests in such Funds a written disclosure indicating: (a) The total, expressed in dollars, brokerage commissions of each Fund's investment portfolio that are paid to US Trust by such Fund; (b) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to US Trust; (c) the average brokerage commissions per share, expressed as cents per share, paid to US Trust by each portfolio of a Fund; and (d) the average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to US Trust.

18. In summary, US Trust represents that the transactions described herein satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Funds provide the Client Plans and the Bank Plans with a more effective investment vehicle than the CIFs maintained by US Trust without any ''double'' investment advisory or similar fees paid to US Trust.

(b) With respect to the transfer of a Plan's CIF assets into a Fund in exchange for Fund shares, a Second Fiduciary authorizes in writing, such transfer prior to the transaction only after full written disclosure of information concerning the Fund.

(c) Each Bank Plan or Client Plan receives shares of the Funds, in connection with the in-kind transfer of assets of a CIF or a Plan, which have a total net asset value that is equal to the value of such Plan's pro rata share of the CIF or Plan assets on the date of the transfer as determined in a single valuation performed in the same manner and at the close of the business day, using independent sources in accordance with procedures established by the Funds which comply with Rule 17a–7 of the ICA, as amended, and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets.

(d) For all in-kind transfers of CIF or Plan assets to a Fund, US Trust sends by regular mail to each affected Plan a written confirmation, not later than 30 days after the completion of the transaction (except for certain

transactions described herein where such confirmations were sent at a later date), containing the following information: (1) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a–7(b)(4) of the ICA; (2) the price of each such security involved in the transaction; and (3) the identity of each pricing service or market maker consulted in determining the value of such securities.

(e) For all in-kind transfers of CIF assets to a Fund, US Trust sends by regular mail, no later than 90 days after completion of each transfer, a written confirmation that contains the following information: (1) The number of CIF units held by the Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units; and (2) the number of shares in the Funds that are held by the Plan following the conversion, the related per share net asset value and the total dollar amount of such shares.

(f) The price paid or received by a Bank Plan or a Client Plan for shares of the Funds is the net asset value per share at the time of the transaction and is the same price for the shares which was or would have been paid or received by any other investor at that time.

(g) No sales commissions or redemption fees are paid by a Plan in connection with the purchase of shares of the Funds.

(h) US Trust does not receive any 12b–1 fees in connection with the transactions.

(i) Any authorizations made by a Client Plan regarding investments in a Funds and fees paid to US Trust (including increases in the contractual rates of fees for Secondary Services that are retained by US Trust) are terminable at will by the Client Plan, without penalty to the Client Plan, and are effected within one business day following receipt by US Trust, from the Second Fiduciary, of the Termination Form or any other written notice of termination, unless circumstances beyond the control of US Trust delay execution for no more than one additional business day.

(j) The Second Fiduciary receives written notice accompanied by the Termination Form with instructions on the use of the form at least 30 days in advance of the implementation of any increase in the rate of any fees for Secondary Services that US Trust provides to the Funds.

(k) All dealings by or between the Plans, the Funds and US Trust are on a basis which is at least as favorable to the Plans as such dealings are with other shareholders of the Funds.

Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons who had investments in the terminating CIFs and from whom approval was sought for the transfer of Plan assets to the Funds. In this regard, interested persons will include ASA, the Second Fiduciary of the Bank Plans; active participants in the Bank Plans; and Second Fiduciaries of the Client Plans. Notice will be provided to each Second Fiduciary by first class mail and to active participants in the Bank Plans by posting at major job sites. Such notice will be given to interested persons within 15 days following the publication of this notice of pendency of the proposed exemption in the Federal Register. The notice will include a copy of the notice of proposed exemption, as published herein, and give interested persons the right to comment on and/or to request a hearing on the proposed exemption. Comments and requests for a public hearing are due within 45 days of the publication of this notice of pendency of the proposed exemption in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Givens 401(k) Savings and Retirement Plan (the Plan) Located in Chesapeake, VA

[Application No. D–10364]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 F.R. 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase from the Plan of the Plan's interest in a group annuity contract (the GAC Interest) by Givens, Incorporated, a sponsor of the Plan; provided the following conditions are satisfied:

(a) The sale is a one-time transaction for cash;

(b) The Plan suffers no loss nor incurs any expense in connection with the sale; and

(c) The Plan receives a purchase price of no less than the fair market value of the GAC Interest as of the date of the sale.

Summary of Facts and Representations

1. The Plan is a 401(k) defined contribution plan which provides for individual participant accounts (the Accounts) and participant-directed investment of the Accounts. The Plan is maintained by Givens Trucking Company, Incorporated (GTC), a Virginia corporation, on behalf of eligible employees of a controlled group of brother-sister corporations which includes Givens, Incorporated (Givens), a Virginia corporation engaged in the business of public warehousing in Chesapeake, Virginia. GTC, Givens, and other employers in the controlled group (the Sponsors) initially adopted the Plan effective September 1, 1989 as a prototype 401(k) plan (the Predecessor Plan) offered by the J. & W. Seligman Trust Company (Seligman). Seligman served as trustee of the Predecessor Plan. Effective March 31, 1995, the sponsors replaced Seligman as trustee and formed the Plan by adopting a new plan and trust document which amended and entirely restated the Predecessor Plan. At that time, Commerce Bank, located in Virginia Beach, Virginia, was appointed as the new trustee to replace Seligman. The Plan's current trustee, Branch Banking and Trust Company of Virginia (the Trustee), is the successor to Commerce Bank as the result of the Trustee's acquisition of Commerce Bank in 1995. As of June 30, 1996, the Plan had 232 participants and total assets of $2,154,700.

2. Among the investment options offered for Account investments under Seligman's trusteeship was a fixed-income fund which invested participant-directed Account funds in a group annuity contract, Mutual Benefit Deferred Variable Annuity Contract No. 0888000033–S (the GAC). The GAC, which was issued to Seligman on October 19, 1989 by Mutual Benefit Life Insurance Company of New Jersey (Mutual Benefit), is a pooled investment vehicle maintained by Seligman for various employee benefit plans, each of which acquired pro-rata interests in the GAC in proportion to amounts invested in the GAC. The terms of the GAC provided that prior to the beginning of each calendar year, Mutual Benefit would establish a guaranteed rate of interest (the Contract Rates) payable on funds deposited pursuant to the GAC during that year.

3. On July 16, 1991, Mutual Benefit was placed into rehabilitation proceedings by the New Jersey Commissioner of Insurance (the

Commissioner).[23] As a result, the assets of the Plan invested in the GAC were frozen, with the exception of certain hardship withdrawals. The accumulated book value of the Plan's interest in the GAC as of July 16, 1991 was $121,030.18, consisting of the Plan's principal deposits plus interest at the Contract Rates less withdrawals. In 1994, the terms of the GAC were redefined under a rehabilitation plan (the Rehab Plan) approved by the Commissioner and the court overseeing the rehabilitation proceedings, the Superior Court of New Jersey—Mercer County. As a result of the Rehab Plan, all liabilities and obligations of Mutual Benefit with respect to the GAC have been assumed by the MBL Life Assurance Corporation (MBLLAC), a New Jersey life insurance company located in Newark, New Jersey. Under the Rehab Plan, contract holders such as Seligman were offered the ability to ''opt in'' to the Rehab Plan by accepting restructured contracts or to ''opt out'' by surrendering the contract for a reduced amount of cash (generally, approximately 55 percent of the contract face value). Seligman, as Plan trustee, elected to ''opt in'' to the Rehab Plan and was issued a restructured contract designated as Mutual Benefit Life Deferred Variable Annuity Contract No. IVA888000033 (the New GAC) in replacement of the GAC, which was cancelled. Under the terms of the New GAC, interest is earned on deposits not at the GAC's original Contract Rates but at rates determined annually (the Rehab Rates) to reflect MBLLAC's actual investment performance.[24] The Rehab Rate for 1996 was established at 5.10 percent. The New GAC provides that Plan participants are subject to a moratorium charge (the Penalty) for withdrawal of any Account balances from the New GAC prior to December 31, 1999, for any reason other than death or financial hardship as determined by MBLLAC. The Penalty is 21.7 percent of the amount withdrawn through 1996, 16.3 percent through 1997, 10.9 percent through 1998 and 5.4 percent through 1999. The accumulated book value of the Plan's interest in the New GAC was $129,178 as of June 30, 1996, consisting of the accumulated book value of the Plan's interest in the GAC as of July 16, 1991 plus interest at the Rehab Rates less withdrawals.

4. GTC and Givens (the Applicants) represent that allowing the Plan assets to remain invested in the New GAC exposes Plan participants and beneficiaries to some degree of risk, precludes transfers of Account balances invested in the New GAC to other investment options available in the Plan, precludes participant loans with respect to Account balances invested in the New GAC, and prevents lump-sum distributions to retiring participants who do not qualify for hardship distributions. In order to enable restoration of full Plan operations with respect to the amounts invested in the New GAC, and to protect the Plan participants and beneficiaries from any further risk of investment loss associated with the New GAC, the Applicants propose that Givens purchase the Plan's entire interest in the New GAC (the GAC Interest) from the Plan, and is requesting an exemption to enable such transaction under the terms and conditions described herein.

5. Givens will purchase the GAC Interest from the Plan for a purchase price equal to the Plan's pro-rata share of the accumulated book value of the New GAC as of the purchase date under the restructured terms, as determined by MBLLAC. As of June 30, 1996, the value of the GAC Interest under the GAC's restructured terms, $129,178, constituted approximately 6 percent of all Plan assets. The purchase price will reflect interest earnings at the Rehab Rates through the date of the sale transaction. The Plan will incur no expenses in connection with the transaction. The Applicants state that the transaction will enable the Plan participants to gain access to the Account balances invested in the New GAC, for participant loans, distributions and non-hardship withdrawals, without incurring the Penalty for withdrawal, which they estimate would be at least $28,031. The Applicants represent that in the proposed transaction the Plan will experience no loss, since the transaction will enable the Accounts to realize the same amount of cash they would realize from a withdrawal of Account balances from the New GAC, with Rehab Rate interest through the date of withdrawal, if withdrawals without the Penalty were permitted under the terms of the Rehab Plan.

6. In summary, the Applicants represent that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The sale will be a one-time transaction for cash; (b) The Plan will suffer no loss and will incur no expense with respect to the transaction; (c) The transaction will protect the Plan from any risk associated with continued holding of the New GAC, as well as enabling participants to exercise all of their rights under the Plan with respect to distributions, loans, transfers and withdrawals; and (d) the purchase price will be the value of the GAC Interest as of the sale date under the restructured terms of the New GAC, as determined by MBLLAC.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of

[23] The Department notes that the decision to acquire and hold interests in the GAC are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this proposed exemption, the Department is not proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of interests in the GAC.

[24] For the period from July 16, 1991 through April 30, 1994, the Plan earned interest at the Rehab Rates in the amount of $20,395.82, while Plan withdrawals for this same period totalled $10,040.52 and the Plan was assessed a contract expense charge of $60.00. From May 1, 1994 through June 30, 1996, the Plan earned interest at the Rehab Rates in the amount of $13,771.21 and Plan withdrawals for this same period totalled $15,918.69. For 1996, the Rehab Rate has been established at 5.10 percent.

whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 12th day of December, 1996.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 96–31993 Filed 12–16–96; 8:45 am]

BILLING CODE 4510–29–P

[Prohibited Transaction Exemption 96–90; Exemption Application No. D–10150, et al.]

Grant of Individual Exemptions; The Smith Barney Shearson Prototype Defined Contribution Plan (the Plan), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

The Smith Barney Shearson Prototype Defined Contribution Plan (the Plan) Located in Los Angeles, California

[Prohibited Transaction Exemption 96–90; Exemption Application No. D–10150]

Exemption

The restrictions of sections 406(a), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the past acquisition, holding, and exercise by the Plan of certain stock purchase rights (the Rights),[1] which were issued by the Highland Federal Bank (the Employer) to all shareholders of record, as of November 7, 1995, of common stock of the Employer (the Employer Stock) pursuant to a rights offering (the Rights Offering), provided that the following conditions were satisfied:

(a) The Plan's acquisition and holding of the Rights in connection with the Rights Offering occurred as a result of an independent act of the Employer as a corporate entity;

(b) All holders of the Employer stock, including the Plan, were treated in a like manner with respect to all aspects of the Rights Offering; and

(c) The acquisition, holding, and disposition of the Rights by the affected participant accounts in the Plan occurred in accordance with Plan provisions for the individually directed investment of such accounts.

EFFECTIVE DATE: This exemption is effective for the period from November 8, 1995 to December 15, 1995.

The Department notes that a typographical error appears on page 54225 of the notice of proposed exemption, such that the second sentence in the first paragraph under the caption ''Proposed Exemption'' should be corrected to read as follows:

If the exemption is granted, the restrictions of sections 406(a), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code * * *

The operative language in this exemption has been modified accordingly.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on October 17, 1996 at 61 FR 54224.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

International Brotherhood of Electrical Workers Local Union 613 (IBEW) Local 613 Defined Contribution Pension Fund (the Fund), Located in Atlanta, GA

[Exemption 96–91; Application No. D–10225]

The restrictions of sections 406(a), 406(b) (1) and (2) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the sale (the Sale) of a certain parcel of improved real property (the Property) from the Fund to Mr. Charles W. Eason, Sr., a party in interest with respect to the Fund provided that the following conditions are met: (1) The fair market value of the Property is established by an independent and qualified real estate appraiser; (2) Mr. Eason will pay the greater of: The fair market value of the Property at the time of the transaction or $123,000; (3) The Sale will be a one-time transaction for cash; and (4) The Fund will pay no fees or commissions associated with the Sale.

For more complete statement of the facts and representations supporting this exemption, refer to the notice of proposed exemption published on September 6, 1996 at 61 FR 47202.

[1] The Department notes that the Rights do not constitute ''qualifying employer securities'' within the meaning of section 407(d)(5) of the Act.

FOR FURTHER INFORMATION CONTACT: Ms. Allison Padams of the Department, telephone (202) 219–8971. (This is not a toll-free number.)

BA Securities, Inc. (BA) Located in San Francisco, California

[Prohibited Transaction Exemption 96–92; Exemption Application No. D–10335]

Exemption

I. Transactions

A. Effective August 29, 1996, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A. (1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[2]

B. Effective August 29, 1996, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[3] For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B.(1) or (2).

C. Effective August 29, 1996, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.[4]

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a ''qualified administrative fee'' as defined in section III.S.

D. Effective August 29, 1996, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

A. The relief provided under Part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Structured Rating Group (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Credit Rating Company (D&P) or Fitch Investors Service, L.P. (Fitch);

[2] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

[3] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[4] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an ''accredited investor'' as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. ''Certificate'' means:

(1) A certificate—

(a) that represents a beneficial ownership interest in the assets of a trust; and

(b) that entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) that represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) that is issued by and is an obligation of a trust;

with respect to certificates defined in (1) and (2) above for which BA or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to ''certificates representing an interest in a trust'' include certificates denominated as debt which are issued by a trust.

B. ''Trust'' means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) secured consumer receivables that bear interest or are purchased at a discount (including, but not imited to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on commercial real property);

(d) obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) ''guaranteed governmental mortgage pool certificates,'' as defined in 29 CFR 2510.3–101(i)(2);

(f) fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1); [5]

(2) Property which had secured any of the obligations described in subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B.(1).

Notwithstanding the foregoing, the term ''trust'' does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D & P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. ''Underwriter'' means:

(1) BA;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with BA; or

(3) Any member of an underwriting syndicate or selling group of which BA or a person described in (2) is a manager or co-manager with respect to the certificates.

D. ''Sponsor'' means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. ''Master Servicer'' means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. ''Subservicer'' means an entity which, under the supervision of and on

[5] It is the Department's view that the definition of ''trust'' contained in III.B. includes a two-tier structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues securities that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. ''Servicer'' means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. ''Trustee'' means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. ''Insurer'' means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. ''Obligor'' means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, ''obligor'' shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. ''Excluded Plan'' means any plan with respect to which any member of the Restricted Group is a ''plan sponsor'' within the meaning of section 3(16)(B) of the Act.

L. ''Restricted Group'' with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. ''Affiliate'' of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. ''Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be ''independent'' of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. ''Sale'' includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. ''Forward delivery commitment'' means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. ''Reasonable compensation'' has the same meaning as that term is defined in 29 CFR 2550.408c-2.

S. ''Qualified Administrative Fee'' means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. ''Qualified Equipment Note Secured By A Lease'' means an equipment note:

(1) Which is secured by equipment which is leased;

(2) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(3) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as would be the case if the equipment note were secured only by the equipment and not the lease.

U. ''Qualified Motor Vehicle Lease'' means a lease of a motor vehicle where:

(1) The trust holds a security interest in the lease;

(2) The trust holds a security interest in the leased motor vehicle; and

(3) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as would be the case if the trust consisted of motor vehicle installment loan contracts.

V. ''Pooling and Servicing Agreement'' means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, ''Pooling and Servicing Agreement'' also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. ''BA'' means BA Securities, Inc. and its affiliates.

The Department notes that this exemption is included within the meaning of the term ''Underwriter Exemption'' as it is defined in section V(h) of Prohibited Transaction Exemption 95–60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts at 35932.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 6, 1996 at 61 FR 57468.

WRITTEN COMMENTS: The Department received one written comment, which was submitted by the applicant to make three corrections or clarifications with respect to the proposed exemption. The first correction pointed out name changes for S&P's, D&P and Fitch, three of the rating agencies which will be rating the certificates. The appropriate name changes have been made in the operative language. The applicant also stated that representation 6 of the proposed exemption should be modified. The representation had indicated that ''For tax reasons, the trust must be maintained as an essentially passive entity.'' The applicant noted that recent tax changes have liberalized

or eliminated the requirement that the trust be maintained as an essentially passive entity, but BA has agreed to represent that any trust issuing securities in reliance on the exemption will be maintained as an essentially passive entity. Finally, BA sought to clarify that although it anticipates that it will make a secondary market in the certificates as stated in representations 25 and 27, it will have no obligation to do so.

The Department has considered the entire record, including the comments submitted by the applicant, and has determined to grant the exemption as amended in response to the applicant's comments.

FOR FURTHER INFORMATION CONTACT: Gary Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 12th day of December, 1996.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 96–31994 Filed 12–16–96; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., Thursday, December 19, 1996.

PLACE: Board Room, 7th Floor, room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

BOARD BRIEFING:

1. Insurance Fund Report.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Community Development Revolving Loan Program for Credit Unions: Notice of Applications for Participation.
3. Administrative Action under Section 109 of the Federal Credit Union Act.
4. Request for a Merger Between Two Corporate Credit Unions.
5. Final Rule: Amendment to Parts 701 and 707, NCUA's Rules and Regulations, Organization and Operations of Federal Credit Unions; and Truth in Savings.

RECESS: 10:45 a.m.

TIME AND DATE: 11:00 a.m., Thursday, December 19, 1996.

PLACE: Board Room, 7th Floor, room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Closed Meeting.
2. Administrative Action under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (8), (9)(A)(ii), and (9)(B).
3. Administrative Action under Part 745, NCUA's Rules and Regulations. Closed pursuant to exemption (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone 703–518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 96–32060 Filed 12–13–96; 9:16 am]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

DATE: Weeks of December 16, 23, 30, and January 6, 1996.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of December 16

Monday, December 16

2:00 p.m.—Briefing on SALP System and Assessment Process (PUBLIC MEETING) (Contact: Bill Borchardt, 301–415–1257)

Tuesday, December 17

2:00 p.m.—Meeting with Chairman of Nuclear Safety Research Review Committee (NSRRC) (PUBLIC MEETING) (Contact: Jose Cortez, 301–415–6596)

3:00 p.m.—Affirmation Session (PUBLIC MEETING)

Week of December 23—Tentative

There are no meetings scheduled for the week of December 23.

Week of December 30—Tentative

There are no meetings scheduled for the Week of December 30.

Week of January 6—Tentative

Tuesday, January 7

9:30 a.m.—Briefing on Investigative Matters (Closed— Ex. 5 & 7)

2:00 p.m.—Discussion of Procedures for NRC Strategic Assessment (Closed— Ex. 2)

Thursday, January 9

10:00 a.m.—Briefing by Maine Yankee, NRR, and Region I (PUBLIC MEETING) (Contact: Daniel Dorman, 301–415–1429)

12:00 m.—Affirmation Session (PUBLIC MEETING)

The schedule for Commission meetings is subject to change on short notice. to verify the status of meetings call (RECORDING)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: http://www.nrc.gov/SECY/smj/schedule.htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301–415–1661).

In addition, distribution of this meeting notice over the internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

* * * * *

Dated: December 13, 1996.

William M. Hill, Jr.,

SECY Tracking Officer Office of the Secretary.

[FR Doc. 96–32115 Filed 12–13–96; 2:32 pm]

BILLING CODE 7590–01–M

PENSION BENEFIT GUARANTY CORPORATION

Assessment of Penalties for Failure To Provide Premium-related Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Statement of policy.

SUMMARY: The Pension Benefit Guaranty Corporation intends to assess penalties under section 4071 of the Employee Retirement Income Security Act of 1974 for failure to submit premium-related information timely.

DATES: This revision to the PBGC's penalty assessment policy is effective for premium-related filings due on or after January 1, 1997, and to days of delinquency on or after that date with respect to filings due before that date.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024 (202–326–4179 for TTY and TDD).

SUPPLEMENTARY INFORMATION: Section 4071 of ERISA authorizes the PBGC to assess a penalty of up to $1,000 per day for failure to timely provide a notice or other material information that is required under certain statutory or regulatory provisions. The PBGC's current policy on the assessment of penalties under section 4071 (60 FR 36837 (July 18, 1995)), does not cover submissions of premium-related information under ERISA section 4007 and the PBGC's premium payment regulation. This notice revises the PBGC's section 4071 penalty assessment policy to include premium-related information.

Issued in Washington, DC, on the 10th day of December 1996.

Robert B. Reich,

Chairman, Board of Directors, Pension Benefit Guaranty Corporation.

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

James J. Keightley,

Secretary, Board of Directors, Pension Benefit Guaranty Corporation.

[FR Doc. 96–31973 Filed 12–16–96; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22391; File No. 811–6276]

Annuity Management Series

December 11, 1996

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of Application for an Order under the Investment Company Act of 1940 (''1940 Act'').

APPLICANT: Annuity Management Series (''Applicant'' or ''Trust'').

RELEVANT 1940 ACT SECTION: Order requested pursuant to Section 8(f) of the 1940 Act and Rule 8f–1 thereunder.

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application was filed on January 15, 1993. Amendments to the application were filed on September 21, 1994 and August 15, 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 Commission and serving Applicant with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on January 6, 1997, and should be accompanied by proof of service on Applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should sate the nature of the requestor's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant: J. Martin Levine, Federated Investors, Federated Investors Tower, Pittsburgh, PA 15222–3779.

FOR FURTHER INFORMATION CONTACT: Mark C. Amorosi, Attorney, or Kevin M. Kirchoff, Branch Chief, 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 Pubic Reference Branch of the Commission.

Applicant's Representations

1. The Trust is an open-end, diversified management investment company organized as a Massachusetts Business Trust. The Trust consists of four portfolios; Equity Growth Fund, Equity Income Fund, Prime Money Fund, and U.S. Government Bond Fund.

2. On February 5, 1991, the Trust filed with the Commission a notice of registration on Form N–8A, pursuant to Section 8(a) of the 1940 Act, and a registration statement on Form N–1A (File Nos. 33–38845 and 811–6276) pursuant to the Securities Act of 1933 and Section 8(b) of the 1940 Act (the ''Registration Statement''). The Registration Statement was declared effective and the public offering commenced on June 7, 1991.

3. On February 12, 1992, it was reported to the Trust's Board of Trustees that Crown America Life Insurance Company (''Crown Life'') had withdrawn from its agreement to offer investments of the Trust to Crown Life's variable annuity separate account, and the Board of Trustees unanimously decided to terminate the Trust. As of that date, there were no public shareholders of three of the portfolios, the Equity Income Fund, the Prime Money Fund, and the U.S. Government Bond Fund. In addition, based upon communications between Crown Life and the two insurance contract holders whose accounts were invested in the separate account which, it turn, invested in the Equity Growth Fund, those contract holders intended to, and did, redeem their shares prior to February 12, 1992.

4. At the time of the application, the Trust had no security holders, assets or liabilities, and the Trust was not a party to any litigation or administrative proceeding.

5. The Trust has not, within the last 18 months, transferred any of its assets to a separate trust, the beneficiaries of which were or are security holders of the Trust. No assets have been retained by the Trust. The Trust is not now

engaged nor does it propose to engage in business activities other than those necessary for the winding-up of its affairs. All expenses incurred in connection with the liquidation of the Trust have been, and will be, paid by Federated Advisers, the investment adviser to the portfolios of the Trust. There will be no allocation of these expenses to the Trust.

6. If the order sought herein is granted, the trust will shortly thereafter file with the Secretary of State of the Commonwealth of Massachusetts the documents necessary to dissolve itself as a Massachusetts Business Trust, thereby ceasing to exist as a legal entity.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–31958 Filed 12–16–96; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–38042; File No. SR–NASD–96–42]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc.

December 11, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] Notice is hereby given that on November 15, 1996, the National Association of Securities Dealers Regulation, Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation proposes to amend Rule 11580 of the Conduct Rules of the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), the grant authority to NASD Regulation staff to provide exemptions to the provisions of NASD Rule 11580. The text of the proposed rule change is set forth below [next text is italicized; deleted text is bracketed]:

Uniform Practice Code

11500. Delivery of Securities With Restrictions

* * * * *

11580. Transfer of Limited Partnership Securities

(a) Each member who participates in the transfer of limited partnership securities, as defined in Rule 2810, shall use standard transfer forms in the same form as set forth in IM–11580. This rule shall not apply to limited partnership securities which are traded on the Nasdaq Stock Market or a registered national securities exchange.

(b) The Corporate Financing Department may, pursuant to a written request for good cause shown, grant an exemption from the requirements of subparagraph (a) to permit a member to modify the standard transfer forms for the transfer of limited partnership securities where necessary to meet other legal or regulatory requirements or to otherwise facilitate the transfer of the securities.

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. NASD Regulation has prepared summaries, set forth in Section A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

On January 29, 1996, the Commission approved an amendment to the NASD's Uniform Practice Code requiring members to use standardized transfer, registration confirmation, and distribution allocation forms (''Forms'') when transferring limited partnership securities.[2] Prior to the amendment, NASD members were confronted with limited partnership transfer requirements that varied widely as to the type of information and documents necessary for a valid transfer of a partnership interest. In addition, non-standardized distribution payment provisions required by partnerships caused or contributed to delays or mistakes in the allocation of cash distributions between buyers and sellers of partnership securities, often leading to disputes over distributions that were settled by broker-dealers at their own expense or through arbitration or litigation. The Forms were developed in order to provide a uniform way for members to assist in the transfer of limited partnership interest and the allocation of partnership distributions. Use of the Forms became mandatory for NASD members on May 15, 1996.

After the amendment became effective, transfer agents, member firms, and securities attorneys raised a number of questions concerning the applicability of the Forms to certain types of transfers. For example, it was suggested that the distribution allocation form be modified to provide additional options for specific treatment of capital transactions, capital distributions, sale or refinancing proceeds, special distributions, liquidating distributions, and distributions with respect to terminating transactions.

In another case, an NASD member stated that in order to satisfy certain legal and operating requirements of partnerships sold by it, modifications to both the transfer and distribution allocation forms were necessary to satisfy certain conditions of purchase imposed by its limited partnership secondary transaction department.

In addition, while the Forms were intended to be used for all purchases, sales, exchanges, and transfers of limited partnership interests, many member firms have developed standard one page documents for transfers that are ''not for consideration,'' such as transfers related to a change of trustee or custodian or transfers resulting from death, divorce, or gift. These previously developed documents fulfill the same purpose as the new Standardized Transfer Forms, *i.e.*, permitting a fast and efficient transfer of the security.

Finally, other miscellaneous issues have been raised in connection with the use of the Forms, including a request to meet a requirement that each investor demonstrate U.S. citizenship.

Description of Proposed Amendment

NASD Regulation believes it will continue to receive requests for permission to modify the Forms in order to meet differing requirements. NASD Regulations is, therefore, proposing to add new paragraph (b) to NASD Rule 11580 to grant authority to NASD

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 36783 (Jan. 29, 1996), 61 FR 3955 (approving File No. SR–NASD–95–53).

Regulation's Corporate Financing Department, pursuant to a written request for good cause shown, to allow an exemption from the requirements of paragraph (a) to NASD Rule 11580 to permit a member to modify the standard transfer forms for the transfer of limited partnership securities where necessary to meet other legal or regulatory requirements or to otherwise facilitate the transfer of the securities. Thus, the proposed rule change would grant NASD Regulation staff the authority to issue exemptions from the requirement to use the Forms. Such exemptions would allow members to modify the Forms in certain situations where, for example, other regulatory or legal requirements may present a conflict or would impede the transfer process.

NASD Regulation recognizes that it may not be possible to bring specific uniformity to every transfer due to the uniqueness and variety of partnership products, but also believes that the proposed rule change will not have an adverse impact on the standardized nature of the Forms. Moreover, the proposed rule change will allow the staff to provide the flexibility sometimes necessary to facilitate a more efficient transfer of partnership interests in particular cases where a rigid ''form over substance'' requirement might hinder the transfer process.

2. Statutory Basis

NASD Regulation believes the proposed rule change is consistent with the provisions of Section 15A(b)(6)[3] of the Act, which require that the Association adopt and amend its rules to promote just and equitable principles of trade, and generally provide for the protection of investors and the pubic interest, in that the proposed rule change maintains the standardization of the process and means by which limited partnership securities are transferred in the secondary markets, while providing the needed flexibility to allow members to comply with modified requirements of the transfer forms as needed, thus eliminating specific delays and inefficiencies in the transfer process in particular circumstances.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD Regulation believes the proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NASD Regulation has neither solicited nor received written comments.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, 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 Room. Also, copies of such filing will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–96–42 and should be submitted by January 7, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–31890 Filed 12–16–96; 8:45 am]

BILLING CODE 8010–01–M

[3] 15 U.S.C. 78*o*–3(b)(6).

[4] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 2483]

Advisory Committee on International Law; Notice of Meeting

A meeting of the Advisory Committee on International Law will take place on Tuesday, January 14, 1997, from 2:00 to approximately 5:00 p.m., as necessary, in Room 1207 of the United States Department of State, 2201 C Street, N.W., Washington, D.C. The meeting will be chaired by the Acting Legal Adviser of the Department of State, Michael J. Matheson, and will be open to the public up to the capacity of the meeting room. The meeting will focus on developments involving the International Court of Justice and the International Law Commission, work on an International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and other current developments.

Entry to the building is controlled and will be facilitated by advance arrangements. Members of the public desiring access to the session should, by January 10, 1997, notify the Office of the Assistant Legal Adviser for United Nations Affairs (telephone (202) 647–2767) of their name, Social Security number, date of birth, professional affiliation, address and telephone number in order to arrange admittance. This includes both government and non-government attendees. All attendees must use the ''C'' Street entrance. One of the following valid IDs will be required for admittance: any U.S. driver's license with photo, a passport, or a U.S. Government agency ID.

Dated: December 2, 1996.

John R. Crook,

Assistant Legal Adviser for United Nations Affairs; Executive Director, Advisory Committee on International Law.

[FR Doc. 96–31917 Filed 12–16–96; 8:45 am]

BILLING CODE 4710–08–M

[Public Notice No. 2482]

U.S. State Department Overseas Security Advisory Council Renewal

The Department of State has renewed the Charter of the Overseas Security Advisory Council. This advisory council will continue to interact on overseas security matters of mutual interest between the U.S. Government and the American private sector. The Council's initiatives and security publications provide a unique contribution to protecting American private sector interests abroad. The Under Secretary

for Management has determined that the Council is necessary and in the public interest.

The Council consists of representatives from four (4) U.S. Government agencies and twenty-one (21) American private sector companies and organizations. The Council will follow the procedures prescribed by the Federal Advisory Committee Act (FACA) (Public Law 92–463). Meetings will be open to the public unless a determination is made in accordance with Section 10(d) of the FACA, 5 U.S.C. 552b(c) (1) and (4), that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will be provided in the Federal Register at least 15 days prior to the meeting.

For more information contact Nick Proctor, Executive Director, Overseas Security Advisory Council, Department of State, Washington, D.C. 20522–1003, phone: 202–663–0533.

Dated: November 26, 1996.

Wiliam D. Clarke,

Acting Director of the Diplomatic Security Service.

[FR Doc. 96–31919 Filed 12–16–96; 8:45 am]

BILLING CODE 4710–24–M

[Public Notice No. 2481]

Renewal of the Shipping Coordinating Committee; Notice of Meeting

The Department of State is renewing the Shipping Coordinating Committee to solicit the view of interested members of the public and government agencies on maritime policy issues, for the guidance of U.S. delegations to international meetings on these matters. The Under Secretary for Management has determined that the committee is necessary and in the pubic interest.

Membership includes representatives from the maritime industry, labor unions, environmental groups and government bureaus and agencies. The Committee will follow the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will be open to the public unless a determination is made in accordance with the FACA Section 10(d), 5 U.S.C. 552(b) (1) and (4) that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will be provided in the Federal Register at least 15 days prior to the meeting date.

For further information, contact Stephen Miller, Executive Secretary of the Committee at (202) 647–6961.

Dated: December 4, 1996.

Stephen M. Miller,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 96–31918 Filed 12–16–96; 8:45 am]

BILLING CODE 4710–09–M

[Public Notice 2479]

Bureau of Oceans and International Environmental and Scientific Affairs; Preparation of Second U.S. Climate Action Report

ACTION: Request for public comments.

SUMMARY: In June 1992, the United States signed the United Nations Framework Convention on Climate Change (UNFCCC). Pursuant to the reporting requirements under Articles 4.2 and 12 of the Convention and to proposed format guidelines later adopted by the UNFCCC Conference of the Parties (COP) at its first session, the United States submitted the U.S. Climate Action Report (USCAR) to the UNFCCC Secretariat. At its second session, the COP to the UNFCCC agreed that the second national communications from developed country Parties would be due on April 15, 1997. The U.S. government has initiated a process to complete its submission within the given timeframe.

As part of that process, we are soliciting public comment on the first USCAR, which will be used as the basis for the second submission due in April.

SUPPLEMENTARY INFORMATION:

Background

In June 1992, at the United Nations Conference on Environment and Development (the ''Earth Summit''), the United States signed the United Nations Framework Convention on Climate Change (UNFCCC). The ultimate objective of this Convention is to: ''achieve * * * stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.''

In accordance with the UNFCC's reporting requirements as specified in Articles 4.2 and 12, and following reporting guidelines developed (and adopted by the UNFCCC COP at its first session), the United States prepared the U.S. Climate Action Report (USCAR) and submitted it to the UNFCCC Secretariat in October 1994.

The USCAR provided a description of the U.S. program designed to reduce emissions to 1990 levels by the year 2000. The initial USCAR incorporated much of the information contained in the first Climate Change Action Plan announced by President Clinton and Vice President Gore on October 19, 1993. The revised USCAR will review key elements contained in the initial Climate Change Action Plan including: An update on key baseline assumptions; a review and assessment of activities to date under the almost 50 actions listed in the plan; and update of the list of actions reflecting changes initiated by responsible agencies since the plan was first proposed in 1993. The revised USCAR will also reflect information submitted to the Council on Environmental Quality in response to a request for comments on the original Climate Change Action Plan that was published in the Federal Register on August 24, 1995 (60 FR 44022) and information presented at a subsequent public hearing held on September 22, 1995.

In keeping with international guidelines, the USCAR provided an inventory of U.S. greenhouse gas emissions and sinks, estimated effects of mitigation measures and policies on future emissions levels, and described U.S. involvement in international programs including associated contributions and funding efforts.

In addition, the USCAR included a discussion of U.S. national circumstances which affect U.S. vulnerability and responses to climate change. Information on the U.S. Global Change Research Program, the largest climate change research program in the world, and on adaptation programs was also presented.

At the Second COP, the Parties agreed to request developed country Parties to the Convention to submit to the UNFCCC Secretariat, in accordance with Articles 12.1 and 12.2 of the Convention, a second national communication by April 15, 1997. Parties that submitted first reports in 1996 are to provide an update by the 1997 deadline and Parties with economies in transition are to provide their second communication by April 15, 1998. Developing country Parties have different guidelines and due dates for their first communications.

The Parties to the UNFCCC also adopted revisions to the guidelines for the reports at their second session. Among other modifications, the revised guidelines encourage Parties to provide information on actions implemented by

regional and local governments or the private sector. At its 12th Plenary meeting in September 1996, the Intergovernmental Panel on Climate Change (IPCC) approved additional guidance with respect to the methodologies to inventory greenhouse gas emissions. We anticipate that these revised methodologies will be approved at the next session of the UNFCCC's Subsidiary Body for Scientific and Technological Advice (SBSTA) when it meets in December 1996. We intend to follow both sets of guidelines, to the extent possible, in the preparation of the second USCAR.

Public Input Process

The comments received in response to this Federal Register notice will be considered in the preparation of the second national communication. We invite contributions and comments on all aspects of the USCAR and in particular, on issues related to regional, local, and private sector actions to address climate change.

DATES: Written comments on the first USCAR should be received on or before noon, January 2, 1997. The deadline cannot be extended because of a carefully planned timetable for the report's preparation in anticipation of the April 15, 1997 due date.

ADDRESSES: Comments should be submitted to: Mr. Daniel Reifsnyder, OES/EGC Room 4330, U.S. Department of State, Washington, DC 20520–7818. Copies of the First National Communication may be obtained from the Iternet (text only) at the following address: (ftp://fedbbs.access.gpo.gov/gpo__bbs/dos__env/lclimate.txt), or by contacting the Government Printing Office (ISBN 0–16–045214–7).

FOR FURTHER INFORMATION CONTACT: Mr. Daniel A. Reifsnyder, Director, Office of Global Change, U.S. Department of State at (202) 647–4069.

Dated: December 4, 1996.

Rafe Pomerance,

Deputy Assistant Secretary for Environment and Development, Bureau of Oceans and International Environmental and Scientific Affairs.

[FR Doc. 96–31914 Filed 12–16–96; 8:45 am]

BILLING CODE 4710–09–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP); Notice of Out-of-Cycle Country Eligibility Review

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: This notice announces the deadline for the submission of petitions for an out-of-cycle GSP Review of country eligibility. The deadline is Friday, February 28, 1997.

FOR FURTHER INFORMATION CONTACT: GSP Subcommittee, Office of the United States Trade Representative, 600 17th Street, NW, Room 518, Washington, DC 20508. Telephone: (202) 395–6971.

SUPPLEMENTARY INFORMATION:

Announcement of 1997 Out-of-Cycle GSP Country Eligibility Review

The U.S. Generalized System of Preferences (GSP) program provides for the duty free importation of designated articles when imported from designated beneficiary developing countries. GSP is authorized by Title V of the Trade Act of 1974, as amended (''Trade Act'') (19 U.S.C. 2461 *et seq.*). The GSP program was implemented by Executive Order 11888 of November 14, 1975, and modified by subsequent Executive Orders and Presidential Proclamations. The GSP regulations provide for annual reviews unless otherwise specified by Federal Register notice (15 CFR 2007.3 *et seq.*). The Trade Policy Staff Committee (TPSC) hearby gives notice that an out-of-cycle country eligibility review will be conducted in 1997. No annual country eligibility review was initiated at the normal time in 1996 since the GSP program was suspended. Moreover, public interest has been expressed in support of delinking the time table for the annual product reviews and country eligibility reviews. No decision has been made to permanently alter the schedule. However, the TPSC has decided to provide for an out-of-cycle country eligibility review at this time. Notice is hereby given, therefore, that in order to be considered in the 1997 out-of-cycle country eligibility review, all petitions containing requests to review the GSP status of any beneficiary developing country must be received by the GSP Subcommittee no later than 5 p.m., Friday February 28, 1997. Petitions submitted after the deadline will not be considered for review and will be returned to the petitioner.

Interested parties or foreign governments may submit petitions to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in sections 502(b)or 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c)). Petitions should be addressed to the GSP Subcommittee, Office of the U.S. Trade Representative, 600 17th Street, NW, Room 518, Washington, DC 20508. All such submissions must conform with the GSP regulations which are set forth at 15 CFR 2007. These regulations were published in the Federal Register on Tuesday, February 11, 1986 (51 FR 5035). The regulations are also printed in ''A guide to the U.S. Generalized System of Preferences (GSP)'', (August 1991) (''GSP Guide''). Information submitted will be subject to public inspection by appointment only with the staff of the USTR Public Reading Room, except for the information granted ''business confidential'' status pursuant to 15 CFR 2007.7. An original and fourteen (14) copies of each petition must be submitted in English. If the petition contains business confidential information and a party is requesting an exemption from public inspection for this information, each page containing such information should be clearly marked ''BUSINESS CONFIDENTIAL'' in a contrasting color ink at the top of each page, and an original and fourteen (copies) of this business confidential version of the petition must be submitted together with a nonconfidential summary of the confidential information. The version that does not contain business confidential information (the public version) should be clearly marked at the top and bottom of each page (either ''public version'' or ''nonconfidential''). This version and the nonconfidential summary shall be placed in the file that is open to public inspection.

Petitioners are strongly advised to review the GSP regulations. Petitioners are reminded that submissions that do not provide all information required by the GSP regulations will not be accepted for review except upon a detailed showing in the submission that the petitioner made a good faith effort to obtain the information required. These requirements will be strictly enforced.

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 96–31884 Filed 12–16–96; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ending 12/6/96

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST–96–1996.

Date filed: December 2, 1996.

Parties: Members of the International Air Transport Association.

Subject: PTC23 EUR–JK 0005 dated November 15, 1996 r1–47 Europe-Japan/Korea resos Correction—PTC23 EUR-JK 0006 dated November 26, 1996, Minutes—PTC23 EUR-JK 0007 dated November 26, 1996, Tables—PTC23 EUR-J/K Fares dated November 22, 1996 Intended effective date: April 1, 1997.

Docket Number: OST–96–2000.

Date filed: December 4, 1996.

Parties: Members of the International Air Transport Association.

Subject: TC12 Telex Mail Vote 841, Fuel-related fare increase between U.S. and Austria, Belgium, Germany, Netherlands, Scandinavia and Switzerland (not applicable to Alliance Airlines) Intended effective date: December 15, 1996.

Docket Number: OST–96–2002.

Date filed: December 6, 1996.

Parties: Members of the International Air Transport Association.

Subject: PTC COMP Telex Mail vote 844, Netherlands Security & Passenger Service charges Intended effective date: January 1, 1997.

Docket Number: OST–96–2003.

Date filed: December 6, 1996.

Parties: Members of the International Air Transport Association.

Subject: PTC1 Telex Mail Vote 843 Excursion Fares within South America Intended effective date: January 1, 1997.

Myrna F. Adams,

Acting Chief, Documentary Services.

[FR Doc. 96–31877 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–62–P

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending December 6, 1996

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–96–2001.

Date filed: December 4, 1996.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 1, 1997.

Description: Application of Swissair, Swiss Air Transport Company, Ltd., pursuant to 49 U.S.C. 41301 and 41302, and Subpart Q of the Regulations, applies for an amendment to its foreign air carrier permit to authorize Swissair to provide (a) scheduled foreign air transportation of persons, property and mail ''from points behind Switzerland via Switzerland and intermediate points to a point or points in the United States and beyond,'' as provided in Annex I of the Open Skies Agreement, together with all of the operational rights provided for in that Annex and (b) charter service in foreign air transportation for passengers (and their accompanying baggage) and/or cargo to the full extent permitted by Annex II of the Open Skies Agreement.

Myrna F. Adams,

Acting Chief, Documentary Services.

[FR Doc. 96–31876 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–62–P

Coast Guard

[CGD 96–065]

Merchant Marine Personnel Advisory Committee; Request for Applications

AGENCY: Coast Guard, DOT.

ACTION: Request for applications.

SUMMARY: The Coast Guard is seeking applicants for appointment to membership on the Merchant Marine Personnel Advisory Committee (MERPAC). The Committee is a 19-member Federal Advisory committee that advises the Coast Guard on matters related to the training, qualification, licensing, certification, and fitness of seamen serving in the U.S. merchant marine.

DATES: Membership applications should be received no later than February 19, 1997.

ADDRESSES: Persons interested in applying for membership on MERPAC may obtain an application form by writing to Commandant (G–MSO–1), room 1210, U.S. Coast Guard Headquarters, 2100 Second St. SW., Washington, DC 20593–0001, or by calling (202) 267–0229 between 8 a.m. and 4 p.m. Monday through Friday, except Federal holidays. Requests may also be submitted by facsimile at (202) 267–4570.

FOR FURTHER INFORMATION CONTACT: CDR Greg T. Jones, Executive Director, or Mr. Mark Gould, Assistant Executive Director, MERPAC, room 1210, U.S. Coast Guard Headquarters, 2100 Second St. SW., Washington, DC, 20593–0001, (202) 267–0229.

SUPPLEMENTARY INFORMATION: MERPAC is chartered under the Federal Advisory Committee Act (5 U.S.C. App. 2) to advise the Coast Guard on merchant marine personnel issues. Six current appointments will expire in 1996.

Applicants with one or more of the following backgrounds are needed to fill the positions:

(a) Shipping company representative.

(b) Deck Officer.

(c) Public representative.

(d) Two marine educator representatives.

(e) Engineering officer (preferably with a limited horsepower endorsement).

The membership term is 3 years. No member may hold more than two consecutive 3-year terms.

The Coast Guard is seeking greater representation from the inland and rivers maritime communities, particularly in the position of Engineering Officer (limited Chief Engineer or Designated Duty Engineer). Although the Coast Guard was seeking increased representation from these same communities during the last selection process, it was not totally successful in filling the positions.

To achieve the desired balance of membership, the Coast Guard is especially interested in receiving applications from minorities and women. The members of the Committee serve without compensation from the Federal Government, although travel reimbursement and per diem may be provided. The Committee normally meets twice a year, once in Washington, D.C., and once elsewhere in the country. Working group meetings may be authorized for specific problems as required.

Applicants may be required to complete an Executive Branch Confidential Financial Disclosure Report (SF 450).

Dated: December 9, 1996.

Joseph J. Angelo,

Director of Standards, Marine Safety and Environmental Protection.

[FR Doc. 96–31878 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–14–M

Federal Railroad Administration

Petition for a Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received from Trinity Industries,

Incorporated a request for a waiver of compliance with certain requirements of the Federal safety laws and regulations. The petition is described below, including the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

Trinity Industries, Incorporated

Docket Number: SA–96–5

Trinity Industries, Incorporated seeks a waiver of compliance from certain sections of Title 49 CFR Part 231, Railroad Safety Appliance Standards. Trinity is requesting a permanent waiver of the provisions of 49 CFR 231.21(b)(2) and 231.21(j)(2)(vi) requiring that platforms be of a minimum thickness of one and three-quarter inches. Trinity requests that this requirement be waived and instead requirements similar to those found at section 231.1(c)(4)(iii) be applied.

Section 231.1(c)(4)(iii) refers to running boards and requires that they be made of wood or material which provides the same as or a greater degree of safety than wood of 1⅛ inches thickness. When made of material other than wood, the tread surface shall be of anti-skid design and constructed with sufficient open space to permit the elimination of snow and ice from the tread surface.

The requirements of 49 CFR 231.21 refers to Tank Cars Without Underframes. Section 231.21(b) requires that there be two end platforms with a minimum width of 10 inches and a minimum thickness of 1¾ inches. Section 231.21(j) requires that there be one operating platform with a minimum width of 7 inches and a minimum thickness of 1¾ inches.

Trinity advised that the typical construction of platforms by them and other manufacturers for tank cars without underframes is to construct a frame of members 2 to 3 inches deep with cross support members. A grating meeting the requirements of section 231.1 (c)(4)(iii) is secured to the cross supports with bolts or rivets not less than ½-inch diameter.

The interest in this change stems from the basic operations of Trinity, which is manufacturing, leasing and repairing of railroad cars. This waiver would permit them to use grating designs of the same style and thickness on tank cars without underframes as used on other types of railroad cars. Trinity claims the option to use a thinner grating on platforms would allow greater flexibility in design and construction but would still maintain or exceed the existing levels of strength and safety.

Trinity contends that the platform thickness requirements for all car types, except tank cars without underframes, can be met with a component of any thickness so long as it provides the same degree of safety as wood 1⅛-inch thickness. Running boards and end platforms meeting this requirement have been used on other car types for many years and have been considered to be safe. Trinity further states that the basic use and function of running boards and platforms are identical. That is, they afford a place for a person to walk, stand, or cross over the car and in some instances may require a person to kneel or sit in order to perform inspection of valves, etc.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket No. SA–96–5) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at FRA's temporary docket room located at 1120 Vermont Avenue, N.W., Room 7051, Washington, D.C. 20005.

Issued in Washington, D.C. on December 10, 1996.

Phil Olekszyk,

Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 96–31921 Filed 12–16–96; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Submission for OMB Review; Comment Request

AGENCY: Office of the Comptroller of the Currency, Treasury.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Office of the Comptroller of the Currency (OCC) hereby gives notice that it has sent to the Office of Management and Budget (OMB) for review an information collection titled (MA)—Securities Exchange Act Disclosure Rules (12 CFR 11). The OCC may not conduct or sponsor, and respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number. Comments are invited on: (a) Whether the proposed revisions to the following collections of information are necessary for the proper performance of the OCC's functions, including whether the information has practical utility; (b) the accuracy of the OCC's estimate of the burden of the information collection as it is proposed to be revised, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

DATES: Comments regarding this information collection are welcome and should be submitted to the OMB Reviewer and the OCC Contact. Comments are due on or before January 16, 1997.

ADDRESSES: A copy of the submission may be obtained by calling the OCC Contact listed.

SUPPLEMENTARY INFORMATION:

OMB Number: 1557–0106.

Form Number: None.

Type of Review: Regular.

Title: (MA)—Securities Exchange Act Disclosure Rules (12 CFR 11).

Description: The OCC's regulations in 12 CFR Part 11 ensure that publicly-owned national banks provide adequate information about their operation to current and potential shareholders,

depositors, and to the public. The OCC reviews the information to ensure that it complies with Federal law and makes public all information required to be filed under these rules. Investors, depositors, and the public use the information to make informed investment decisions.

Respondents: Businesses or other for-profit; individuals.

Number of Respondents: 131.

Total Annual Responses: 636.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 5,360.

OCC Contact: Jessie Gates, OCC Clearance Officer, or Dionne Walsh, (202) 874–5090, Legislative and Regulatory Activities Division (Attention: 1557–0106), Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

OMB Reviewer: Alexander Hunt, (202) 395–7340, Paperwork Reduction Project 1557–0106, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Dated: December 11, 1996.

Karen Solomon,

Director, Legislative and Regulatory Activities Division.

[FR Doc. 96–31898 Filed 12–16–96; 8:45 am]

BILLING CODE 4810–33–P

UNITED STATES INFORMATION AGENCY

U.S. Advisory Commission on Public Diplomacy; Meeting

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: A meeting of the U.S. Advisory Commission on Public Diplomacy will be held on December 18 in Room 566, 301 4th Street, SW., Washington DC from 10:00 a.m. to 11:00 a.m.

The Commission will participate in a Digital Video Conference with Bonn Charge J.D. Bindenagel and Public Affairs Officer, Robert L. Earle, U.S. Embassy.

FOR FURTHER INFORMATION: Please call Betty Hayes, (202) 619–4468, if you are interested in attending the meeting. Space is limited and entrance to the building is controlled.

Dated: December 12, 1996.

Rose Royal,

Management Analyst, Federal Register Liaison.

[FR Doc. 96–31977 Filed 12–16–96; 8:45 am]

BILLING CODE 8230–01–M

Federal Register

Tuesday
December 17, 1996

Part II

Department of Labor

Mine Safety and Health Administration

30 CFR Parts 56, 57, 62, 70 and 71

Health Standards for Occupational Noise Exposure in Coal, Metal, and Nonmetal Mines; Proposed Rule

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, 62, 70 and 71

RIN 1219–AA53

Health Standards for Occupational Noise Exposure

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would replace MSHA's existing standards for occupational noise exposure in coal mines and in metal and nonmetal mines with a single new standard applicable to all mines.

This action is part of the Agency's ongoing review of its safety and health standards. The review found that the Agency's existing noise standards, which had been promulgated more than 20 years ago, are inadequate to prevent the occurrence of occupational noise-induced hearing loss (NIHL) among miners. There remains a significant risk to miners of material impairment of health from workplace exposure to noise over a working lifetime. The risk becomes significant when exposure exceeds an 8-hour time-weighted average of 85 dBA.

DATES: Comments must be received on or before February 18, 1997. Submit written comments on the information collection requirements by February 18, 1997.

ADDRESSES: Comments on the proposed rule may be transmitted by electronic mail, fax, or mail. Comments by electronic mail must be clearly identified as such and sent to this e-mail address: noise@msha.gov. Comments by fax must be clearly identified as such and sent to: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, 703–235–5551. Send mail comments to: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, Room 631, 4015 Wilson Boulevard, Arlington, VA 22203–1984. Interested persons are encouraged to supplement written comments with computer files or disks; please contact the Agency with any questions about format. Written comments on the information collection requirements may be submitted directly to the Office of Information and Regulatory Affairs, OMB New Executive Office Building, 725 17th Street, NW., Rm. 10235, Washington, D.C. 20503, Attn: Desk Officer for MSHA.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director; MSHA; Office of Standards, Regulations, and Variances; 703–235–1910.

SUPPLEMENTARY INFORMATION:

Comprehensive Summary

The proposal would retain the existing permissible exposure level (PEL) but establish a new ''action level''. The action level would be an 8-hour time-weighted average of 85 dBA; the PEL would remain an 8-hour time-weighted average of 90 dBA.

Whenever a miner's noise exposure exceeds the action level, the miner would receive special training in noise protection.

When the miner's noise exposure exceeds the action level, but is below the PEL, the operator would be required to make annual audiometric (hearing) examinations available to the miner through enrollment in a hearing conservation program, and to provide properly fitted hearing protection in three circumstances—before the initial hearing examination, if a significant threshold shift in hearing acuity is detected, and at any other time upon miner request. If it will take more than 6 months for the initial examination because of the need to wait for a mobile test van, or a significant threshold shift in hearing acuity is detected, the operator would also be required to ensure the miner uses the provided hearing protection.

If a miner's exposure exceeds the PEL, the proposal would require that the mine operator use all engineering and administrative controls which it is feasible for that mine operator to utilize to reduce noise to the PEL. The proper combination of engineering and administrative controls would be left to the discretion of the mine operator.

Should the use of all feasible engineering and administrative controls not reduce a miner's noise exposure to the PEL, the operator would have to use those controls to lower exposure to as close to the PEL as is feasible. In addition, the operator would have to provide any such miner properly fitted hearing protection, ensure the miner uses such protection, and ensure the miner takes the annual audiometric examinations. Should a miner's exposure exceed an 8-hour time-weighted average of 105 dBA, the operator must ensure the miner is provided and uses both a plug and a muff type protector.

MSHA recognizes that successful implementation of these new uniform health rules will require training of MSHA personnel and guidance to miners and mine operators, particularly small mine operators. Accordingly, the Agency proposes that the final rule take effect one year after the date of publication of the final rule, and solicits comments on whether a phased-in approach would permit some elements of the new rule to be implemented more quickly.

The Supplementary Information accompanying this notice is detailed. Accordingly, to facilitate review and comment by the mining community, this material begins with questions and answers summarizing key points about the proposal. Included are two charts comparing the main features of the proposal to existing standards in the mining industry and those applicable to other industries under the Occupational Safety and Health Act. Also included are MSHA's estimates of the impacts of the proposal from the Agency's preliminary Regulatory Impact Analysis (RIA), copies of which are available from the Agency.

I. Questions and Answers, Required Notices, and History

(A) Questions and Answers About Key Features of this Proposal

(1) What Are the Key Features of This Proposal?

MSHA has developed a proposal that it estimates can reduce by two-thirds the number of miners currently projected to suffer a material impairment of their hearing—but which it estimates can be implemented at a cost of less than $9 million to the mining industry as a whole.

The focus of the proposal is on the use of the most effective means to control noise—engineering controls to eliminate the noise, or administrative controls (e.g. rotating miner duties) to minimize noise exposure—whenever feasible.

Specifically, the proposal requires that an operator use all feasible engineering or administrative controls to reduce noise to the PEL—a TWA_8 of 90 dBA. While MSHA has determined there is a significant risk of harm at a TWA_8 of 85 dBA, the Agency believes that it may not be feasible at this time for the mining industry to control noise to this level using engineering and administrative controls.

The proposal would require that steps be taken when noise exceeds a TWA_8 of 85 dBA, the ''action level'', to prevent hearing loss. Operators would have to provide special instruction in noise, make annual hearing examinations available, and provide properly fitted hearing protection—before the initial examination, if a significant threshold shift in hearing acuity is detected, and at any other time upon a miner's

request. If it will take more than 6 months to take the initial examination because of the need to wait for a mobile test van, or if a significant threshold shift is detected, an operator would also be required to ensure that the miner uses the hearing protection.

The proposal also provides for supplemental protection in those cases in which individual operators are unable to reduce noise to the PEL through the use of all feasible engineering or administrative controls. The operator must ensure any miner so exposed takes the annual hearing examinations, must provide properly fitted hearing protection to all miners so exposed, and must ensure the hearing protection is used by all miners so exposed.

The focus on engineering and administrative controls would significantly change the way noise is addressed in the coal mining industry. Currently, hearing protectors generally are allowed when a coal miner's noise exposure exceeds the PEL. The proposal would require a coal mine operator to use all feasible engineering and administrative controls to reduce exposure to the PEL—the practice currently required in the rest of the mining industry. MSHA estimates that this change alone can prevent 3 out of every 5 impairments projected to occur due to occupational noise exposure in the coal mining industry.

While this change would cost the coal mining industry more money for implementation of engineering controls, MSHA estimates these costs would be significantly offset by the paperwork savings the coal mining industry will accrue under the proposal. In particular, MSHA is proposing to replace the costly, paperwork-intensive requirements for biannual coal miner noise exposure surveys, supplemental noise surveys, calibration reports, survey reports, and survey certifications with a performance-oriented requirement that mine operators establish a monitoring program that effectively evaluates miner exposures. MSHA believes the existing requirements have not been effective.

Other parts of the proposal would change current practices throughout the mining industry. No actions are currently required if noise exposures are below the PEL. Moreover, the proposal requires, for the first time, certain explicit protections if an operator cannot feasibly reduce noise exposures to the PEL through the use of all feasible engineering and administrative controls.

MSHA's proposal also incorporates revisions warranted by our increased understanding of the effects of noise, to the extent that the Agency determined such changes would be feasible for the mining industry to implement. For example, to reflect that exposure to sound levels above 80 dBA is now generally recognized as harmful, the proposal would include exposure to such sound levels in determining a miner's noise dose. Such adjustment will result in more miners than at present being determined to have noise exposures over the PEL, but the Agency has determined that the industry can feasibly accommodate this change.

(2) Do I Need To Read This Entire Notice To Understand the Proposal?

The Agency hopes these questions and answers will provide the information most of the mining community will want. Nevertheless, MSHA is accompanying publication of this proposed rule with a detailed discussion of the information it has considered in developing the proposal. That way, those interested in a particular topic can have the benefit of the Agency's thinking in developing their comments.

The information is divided into five parts. Part I includes a review of the projected impacts of the proposal, including benefits, costs and paperwork, taken from the Agency's preliminary RIA. Part II is the Agency's analysis of the current risks to miners from occupational noise exposure. Part III is a section-by-section discussion of the elements of the proposal. Part IV is an analysis of the technological and economic feasibility of the proposal and of key alternatives considered by the Agency. Part V is a complete list of publications referenced by the Agency.

(3) What Are the Projected Impacts of the Proposed Rule?

The estimated benefits and costs and paperwork requirements of the proposed rule are summarized in the following table, ''Summary of Key Impacts of MSHA's Noise Proposal,'' followed by a brief explanation. The Agency's estimates, and a complete description of the methodology used to obtain them, are contained in the Agency's preliminary RIA, a copy of which can be obtained from the Agency.

SUMMARY OF KEY IMPACTS OF MSHA'S NOISE PROPOSAL *

	Coal	Metal/nonmetal	All mining
Benefits:			
% hearing impairments avoided	81	57	67
# miners saved from hearing impairment	15,300	15,300	30,600
Annual costs (in millions of dollars)	$0.3	$8	$8.3
Paperwork burden hours added/saved	(88,740)	73,755	(14,985)

* Rounded.

The analysis of benefits compares the number of miners who are projected to incur a material impairment of their hearing under the current rule with the number of miners who are projected to incur such an impairment under the proposed rule. Overall for the mining community, the proposal would reduce the risk of material impairment by 67%. More than 30,000 miners otherwise expected to develop a material impairment would be spared.

As displayed in the chart entitled ''Benefits of MSHA Noise Proposal in Saving Miners From Hearing Impairment,'' the most significant benefits are expected in the coal sector. Engineering and administrative controls are expected to significantly reduce noise exposures above the PEL. A significant benefit also accrues from the establishment of an action level: based on the assumption that most employees exposed to noise between the action level and the PEL will elect to use hearing protection for the first time at such levels. While the metal and nonmetal mining industry already uses engineering controls above the PEL, additional benefits are anticipated in this regard; primarily because the change in the way noise dose would be measured under the proposal would require the use of engineering and administrative controls in more cases than at present. Like coal, a benefit in

this sector is anticipated from the establishment of an action level.

As indicated by this chart, MSHA projects that even after implementation of the proposal some miners will continue to develop a material impairment of hearing. This is of serious concern to the Agency. The Agency believes, however, that the mining industry may not be able at this time to feasibly take actions which would eliminate the remaining risk (see response to Questions 9 and 13 on this point). MSHA is seeking comments on this issue.

BENEFITS OF MSHA NOISE PROPOSAL IN SAVING MINERS FROM HEARING IMPAIRMENT

		Miners
Coal:		
Current expected impairment	15% of miners	18,947
Saved by eng/admin controls	58% of projected impairment	11,072
Saved by hearing protectors	22% of projected impairment	4,232
Saved by proposal	81% of projected impairment	15,304
Remaining expected impairment	3% of miners	3,643
Metal and Nonmetal:		
Current expected impairment	13% of miners	26,977
Saved by eng/admin controls	11% of projected impairment	2,693
Saved by hearing protectors	46% of projected impairment	12,320
Saved by proposal	57% of projected impairment	15,283
Remaining expected impairment	6% of miners	11,694
Mining Industry as a Whole:		
Current expected impairment	14% of miners	45,924
Saved by eng/admin controls	31% of projected impairment	14,035
Saved by hearing protectors	36% of projected impairment	16,552
Saved by proposal	67% of projected impairment	30,587
Remaining expected impairment	5% of miners	15,377

MSHA's estimates of cost follow a standard approach in which initial costs of compliance (like equipment purchase costs) are amortized over ten years at seven percent and added to costs that recur each year. The assumptions on what controls would be needed, how many hours have to be spent on particular tasks, and the costs of the personnel performing various tasks are set forth in detail in the Agency's preliminary RIA.

MSHA estimates that the proposed rule would increase the mining industry's costs by approximately $8.3 million annually for the first 10 years. MSHA estimates the proposed rule will cost the coal mining industry about $300,000 a year; because while there will be additional costs under the proposal, they will be significantly offset by the elimination of the requirements for biannual noise surveys of coal miners. Costs to the metal and nonmetal industry would rise by about $8 million annually.

The most costly aspect of the proposed rule would be the provision of audiometric examinations—about $3.6 million, with about $2 million of that borne by the metal and nonmetal mining industry. The provision of engineering controls is estimated to cost about $3.5 million, with about $2.2 million of this borne by the coal mining industry—which would no longer be permitted, as at present, to substitute hearing protectors for engineering or administrative controls. MSHA's costing assumptions are described in its preliminary RIA; comments on this methodology are being solicited.

The table entitled ''Cost Impacts of MSHA Noise Proposal'' summarizes the net annual costs of the proposal's requirements. An explanation of the requirements is included in the questions and answers that follow.

COST IMPACTS OF MSHA NOISE PROPOSAL

Task	Total cost	M/NM cost	Coal cost
Engineering Controls	$3,475,700	$1,289,000	$2,186,700
Dose Determination	(1,928,550)	1,734,895	(3,663,445)
Notification	45,910	28,085	17,825
Record of Noise Surveys, et al.	(1,653,565)	.....	(1,653,565)
Administrative Controls	16,595	6,580	10,015
HPDs (provide, selection, fit)	926,710	792,560	134,150
Training	1,834,560	1,071,140	763,420
Audiograms (base, annual); notice to miners	3,574,030	1,964,970	1,609,060
Audiometric Test Procedures	195,835	113,835	82,000
Evaluation of Audiogram	892,215	492,215	400,000
Follow-up Evaluation	145,780	78,865	66,915
Follow-up Corrective Measures	99,440	52,455	46,985
Notification of Results	138,710	74,340	54,370
Access to Records	23,710	18,865	4,845
Transfer of Records	5,040	2,950	2,090
Contractors	541,640	316,320	225,320
Total	8,323,760	8,037,075	286,685

MSHA's estimates of paperwork burden hours reflect the requirements and definitions in the Paperwork Reduction Act. Overall, the proposal would decrease paperwork requirements in the mining industry by about 14,985 burden hours. This reflects a savings to the coal mining industry of 88,740 burden hours, as a result of a proposal to eliminate

existing requirements for biannual surveys of coal miners and other various reports. The metal and nonmetal mining sector would have a net increase of about 73,755 burden hours. The chart entitled ''Paperwork Impacts of MSHA Noise Proposal'' summarizes the projected paperwork burdens.

PAPERWORK IMPACTS OF MSHA NOISE PROPOSAL

Section	Paperwork requirement and associated tasks	Coal	M/NM	Total
62.120	Evaluate miners' noise exposure; notify miner of overexposure, prepare and post administrative controls; give miners copy of administrative controls.	(140,545)	5,295	(135,250)
62.130	Prepare and file a training certification	4,000	6,270	10,270
62.140	Perform audiograms, notify miners to appear for testing and need to avoid high noise	30,655	39,275	69,930
62.150	Compile an audiometric test record, obtain a certification	3,930	5,245	9,175
62.160	Provide information and audiometric test record, perform audiometric retests	9,340	12,015	21,455
62.170	Perform audiometric evaluations and follow-up evaluations	475	570	1,045
62.180	Prepare a training certification for retrained miners, review effectiveness of engineering and administrative controls.	335	365	700
62.190	Inform miner of test results, inform miner of STS	2,715	3,585	6,300
62.200	Provide access to records	255	1,000	1,255
62.210	Transfer records	100	135	235
All	(any discrepancies due to rounding)	(88,740)	73,755	(14,985)

(4) What Special Consideration Did MSHA Give to Alternatives for the Smallest Mines?

MSHA estimates that as a result of this proposal, metal and nonmetal mines with less than 20 miners would incur an average cost increase of about $500 per year in annual costs and annualized first year costs. Coal mines with less than 20 miners would have an average savings per mine of about $30, reflecting the elimination of the numerous survey and paperwork requirements in the current noise rules for the coal sector.

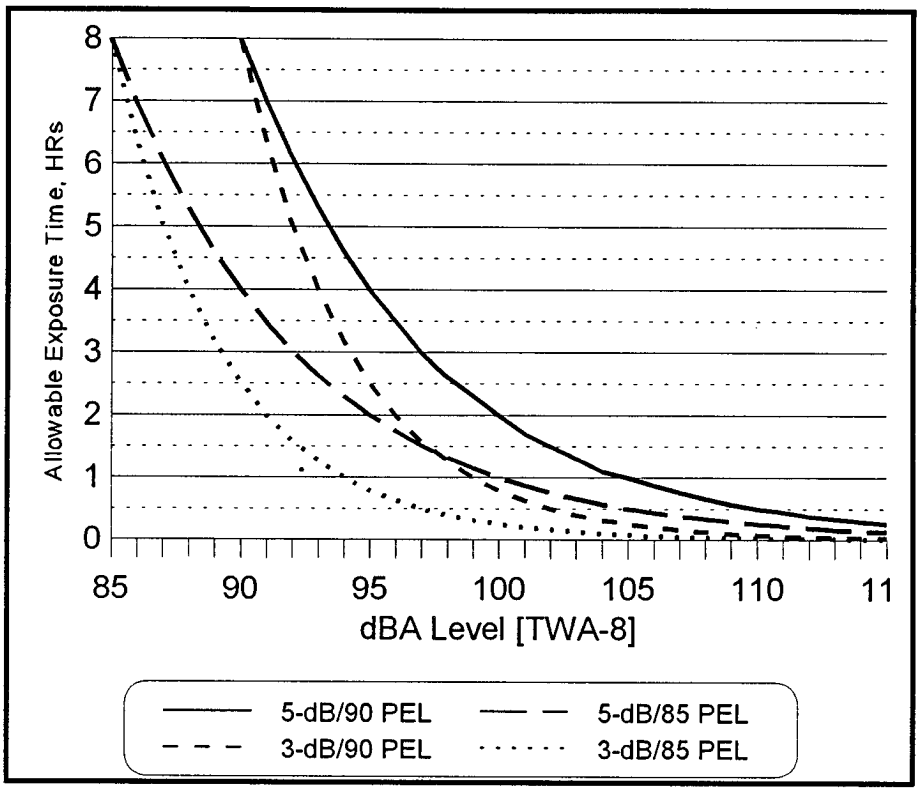
MSHA compared the proposed costs for small mines in each sector to the estimated revenues and profits for small mines in each sector. MSHA did this at various size levels. In each case, the costs as a percentage of revenue are less than 1%, and the costs do not appear to have any appreciable impact on profits. Accordingly, for the purposes of the Regulatory Flexibility Act, MSHA has certified that the proposed rule does not have a significant economic impact on a substantial number of small entities.

The limited impacts on small mines reflect decisions by MSHA not to propose more costly regulatory alternatives. In considering regulatory alternatives for small mines, MSHA must observe the requirements of its authorizing statute. Section 101(a)(6)(A) of the Mine Act requires the Secretary to set standards which most adequately assure, on the basis of the best available evidence, that no miner will suffer material impairment of health over his/her working lifetime. In addition, the Mine Act requires that the Secretary, when promulgating mandatory standards pertaining to toxic materials or harmful physical agents, consider other factors, such as the latest scientific data in the field, the feasibility of the standard and experience gained under the Act and other health and safety laws. Thus, the Mine Act requires that the Secretary, in promulgating a standard, attain the highest degree of health and safety protection for the miner, based on the ''best available evidence,'' with feasibility a consideration.

As a result of this requirement, MSHA seriously considered two alternatives that would have significantly increased costs for small mine operators—lowering the PEL to a TWA_8 of 85 dBA, and lowering the exchange rate to 3 dB. In both cases, the evidence in favor of these approaches was strong. But in both cases, MSHA has tentatively concluded that it may not be feasible for the mining industry to accomplish these more protective approaches. The impact of these approaches on small mine operators was an important consideration in this regard.

Part IV of this preamble contains a full discussion of MSHA's preliminary conclusions about these alternatives. The graph labeled ''Effect of Alternative Exchange Rates and PELs on Allowable Exposure Times at Various Decibel Levels'' provides an indication of what the Agency's decisions in this regard mean in practice.

BILLING CODE 4510–43–P



Effect of Alternative Exchange Rates and PELs on Allowable Exposure Time at Various Decibel Levels.

BILLING CODE 4510–43–C

In accordance with the Small Business Regulatory Enforcement and Fairness Act (SBREFA), MSHA is taking actions to minimize the compliance burden on small mines. The proposed effective date of the rule would be a year after final promulgation, to provide adequate time for small mines to achieve compliance. MSHA will also mail a copy of the proposed rule to every mine operator which primarily benefits small mine operators. MSHA is committed to writing the final rule in plain English so it can be readily understood by miners and mine operators. The Agency has committed itself to issuance of a compliance guide, and is inviting comment on whether compliance workshops or other such approaches would be valuable. (These proposed actions are discussed in more detail in other Questions and Answers.)

The approximately 350 small sand and gravel or crushed stone operations run by State, local and tribal governments may also be interested in MSHA's analysis on the impacts of the proposed rule on such entities. Such an analysis is required by the Unfunded Mandates Reform Act of 1995. Like other small metal and nonmetal mines, their costs for prevention of hearing loss are expected to average about $500 per year. Benefits to these governmental entities include fewer hearing impairments and reduced workers' compensation costs.

(5) Why Is the Proposed Rule Needed?

MSHA has concluded that the existing rules to protect miners from workplace noise exposure must be revised because current noise exposures continue to create a significant risk of material impairment of health to miners. MSHA estimates that 14% of U.S. miners—about 46,000 of them—can be expected under current exposure conditions to develop a material impairment of hearing during a working lifetime. The figures are 15% (19,000) of U.S. coal miners and 13% (27,000) of U.S. metal and nonmetal miners.

Generally, prolonged exposure to noise over a period of several years causes permanent damage to the auditory nerve and/or its sensory components: the higher the noise exposure the more rapid the loss. The loss may be so gradual, however, that a person may not realize that he or she is becoming impaired until a substantial amount of hearing is lost. This damage, known as noise-induced hearing loss or NIHL, is irreversible, and makes it difficult to hear as well as understand speech. In addition to the personal and social costs of hearing loss, the loss of the ability to understand speech can have a significant impact on miner safety which is highly dependent upon good communication.

The Agency has carefully analyzed the risk miners currently face of incurring such harm. What follows is a short summary of MSHA's risk analysis (the complete analysis is presented as part II of the Supplemental Information accompanying this notice).

First, the Agency considered the various definitions of impairment used in the risk analyses in the literature. Three definitions of impairment have been widely recognized within the scientific community as useful for the purposes of assessing risk. All three focus on the risks of acquiring a 25 dB hearing ''level''—the deviation from audiometric zero. The three accepted approaches differ in that they examine hearing acuity at a different set of frequencies. For the purpose of its analysis, MSHA chose the approach that measures hearing acuity at those frequencies most relevant to the ability to understand human speech. This is the approach developed in 1972 by the National Institute for Occupational Safety and Health (NIOSH) and subsequently used by the Occupational Safety and Health Administration

(OSHA): a 25 dB hearing level at 1000, 2000 and 3000 Hz. The Agency is aware that NIOSH is now considering a revised approach that would include hearing acuity at 4000 Hz, but believes it is inappropriate to utilize that approach until peer review has validated its utility.

Next, the Agency reviewed the major studies on the level of risk at different noise exposures. The data consistently indicate that the risk of developing a material impairment of hearing, as a result of a working lifetime of occupational exposure, becomes significant when workplace noise exposures exceed an eight-hour time-weighted average (TWA_8) of 85 dBA. The table entitled ''Excess Risk Estimates'' presents estimates by NIOSH of how the excess risk of developing a material impairment (using its 1972 definition) varies with exposure over a working lifetime.

EXCESS RISK ESTIMATES

Exposure (TWA_8)	<80	80–84.9	85–89.9	90–94.9	95–99.9	≥100
Excess Risk	0	3%	15%	29%	43%	54%

MSHA also reviewed a large body of data on the effects of varying industrial noise exposures on worker hearing. These studies are supportive of the same conclusion. MSHA refined its picture of what occurs at lower sound levels by reviewing a number of other studies, particularly those of workers in other countries.

To confirm the magnitude of the risks of NIHL among miners, MSHA asked NIOSH to examine a body of audiometric data collected over the years tracking hearing acuity among coal miners. The analysis (Franks, 1996) supports the data from the risk studies. It indicates that 90% of these miners have a hearing impairment by age 50 as compared with only 10% of the general population. Further, Franks stated that miners, after working 20 to 30 years, could find themselves in life-threatening situations because safety signals and ''roof talk'' could go unheard. (For the purposes of the analysis, NIOSH used a definition of hearing impairment including losses at 4000 Hz; MSHA conducted its own analysis of the data without the 4000 Hz, and the results are generally consistent with those of NIOSH).

MSHA also examined other sources of data that might provide direct confirmation of the risks of hearing loss to miners—comments received in response to the Agency's Advance Notice of Proposed Rulemaking (ANPRM), (December 4, 1989, 54 FR 50209), the reports of hearing loss provided to the Agency by mine operators pursuant to 30 CFR part 50, and workers' compensation data. In each case, the available data are too limited to draw any conclusions. The Agency is requesting the public to provide further information along these lines.

To develop a profile of the mining population at risk, MSHA began by gathering information on noise exposures in the U.S. mining industry.

Current exposures appear to be gradually declining in the metal and nonmetal industry, where engineering or administrative controls are the primary means of miner protection against NIHL. But the data indicate that all sectors of the mining industry continue to have a significant number of overexposures.

Charts II–9 and II–10 display exposure trends based on inspector samples. Only those samples that exceed the PEL are displayed. For 1995, 14.4% of samples from the metal and nonmetal mining industry, and 22.5% of samples from the coal industry, exceeded the PEL. (Because they are 3–D graphs, the data points sometimes look lower than they are; the actual data points can be found in part II, Tables II–9 and II–10.)

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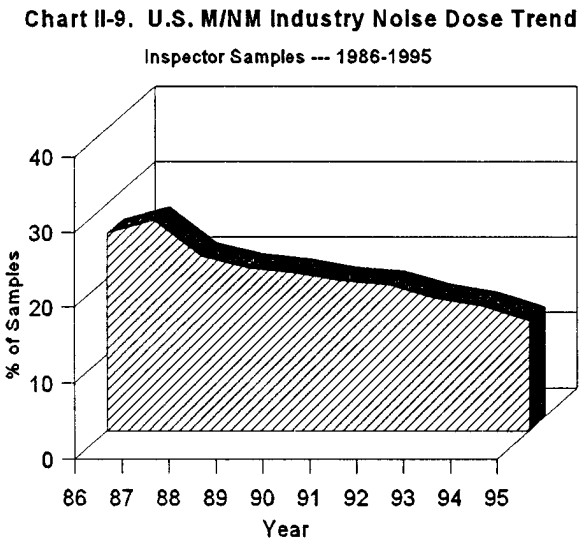

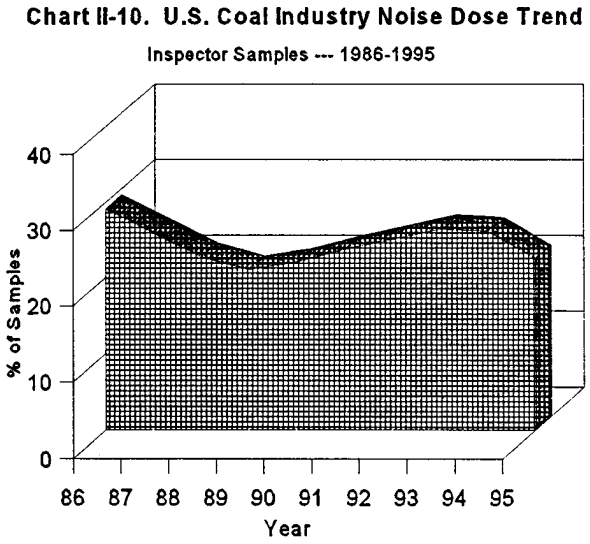

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These figures actually understate truly harmful exposures because the samples were taken in a way that did not count any exposures to sound levels below 90 dBA. As discussed herein (see Question 9), MSHA has concluded that exposures to sound levels above 80 dBA are harmful. Accordingly, to get a better picture of present harmful miner exposures, MSHA examined the results of a special survey taking thousands of

samples that included sound levels as low as 80 dBA. The results indicate that 36.8% of coal samples, and 26.9% of the metal and nonmetal samples would exceed the PEL if the lower, but still harmful, sound levels are counted in the dose measurement.

To derive a risk profile of miners, the Agency utilized the exposure data from the survey and the excess risk estimates. (The methodology for developing the miner risk profile is explained in detail in the Agency's preliminary RIA. Among other adjustments to the sample data, MSHA assumed coal miners were currently receiving some protection from hearing protectors; as a result, the estimates of miners at excess risk are lower than might be suggested by the foregoing figures.) Based on its analysis, MSHA estimates that 14% of U.S. miners—about 46,000 miners—can be expected under current exposure conditions to develop a material impairment of hearing of handicapping or disabling proportions during a working lifetime. The figures are 15% (19,000) of U.S. coal miners as a group and 13% (27,000) of U.S. metal and nonmetal miners.

The Agency is interested in receiving additional data with respect to the risks of noise exposure to workers and to the mining population in particular, as well as comments on its risk methodology and analysis.

(6) Why Proceed Without Waiting for NIOSH To Issue a New Criteria Document on Noise Exposure?

As MSHA was preparing this notice for publication, the National Institute for Occupational Safety and Health (NIOSH) released for peer review a draft criteria document for occupational noise exposure to update the one issued in 1972.

A summary of that draft, prepared and released by NIOSH, is included in the discussion of the rulemaking history in the Supplementary Information accompanying this notice. NIOSH is considering whether the evidence on noise since 1972 warrants a change in its recommendations. In some cases NIOSH is considering reiterating its prior recommendations, and in other cases it is considering changing its recommendations.

MSHA has determined that it would not be appropriate to delay publication of this proposed rule to await the possible issuance of a new NIOSH criteria document. The NIOSH draft is still being peer reviewed, and MSHA does not believe it would be appropriate to delay acting based upon the uncertain timing of the document's redrafting and release. Moreover, many of the issues covered in the NIOSH draft have been considered by MSHA, as part of the Agency's review of all the latest scientific information on noise.

Should a new criteria document be issued before MSHA promulgates a final rule, it will of course consider the NIOSH recommendations. The summary of the NIOSH draft included in this notice should provide ample notice to the mining community of the position NIOSH may take in a new criteria document.

(7) What Mines Are Covered by the Proposal?

The proposal would apply one set of rules uniformly to all mines. Those who responded to MSHA's ANPRM generally agreed that consolidation and simplification of multiple standards into one rule may help to facilitate understanding of, and thus compliance with, the regulatory requirements for controlling noise exposures.

(8) Are There Special Definitions Applicable?

To help mine operators and miners, the proposed rule would include definitions of some technical terms universally used in noise measurement. But the proposed rule also includes some terms used in a way that differs from usage in certain other contexts—e.g., under the OSHA standard.

In particular, MSHA is proposing a non-standard use of the term ''hearing conservation program'' or ''HCP.'' Most hearing conservation programs include provision for hearing examinations, training and the use of hearing protectors. Since audiograms would be new for the mining industry, unlike the other components, the Agency thought it might be less confusing to treat the components separately. Accordingly, under the MSHA proposal, hearing protector and training requirements are established independently, and a ''hearing conservation program'' is defined as a generic reference to those sections of the proposal that set forth the requirements for an audiometric testing program.

(9) How Is a Miner's Noise Dose To Be Determined Under the Proposal?

The proposal sets forth a formula for dose computation, which is to be measured over a full shift, which corresponds to the readouts of most currently used personal noise dosimeters.

The proposal would continue the use of a 5-dB exchange rate. The exchange rate is a measure of how quickly the dose of noise doubles. Accordingly, the measure is the rate determining how much a miner's exposure must be limited to compensate for increasing dose. Using the 5–dB exchange rate, the exposure time permitted at a sound level of 90 dBA is half that permitted at a sound level of 85 dBA—a miner gets the same noise dose in 4 hours at 90 dBA as at 8 hours at 85 dBA.

The Agency gave serious consideration to changing the exchange rate from 5 dB to 3 dB, and is specifically seeking comment on this important matter. There is a consensus in the recent literature that noise dose actually doubles more quickly than measured by the 5-dB rate; the consensus is for an exchange rate of 3 dB. Moreover, the current 5–dB exchange rate incorporates an assumption that there is significant time for hearing to recover from high sound levels. MSHA has concluded that noise exposure under mining conditions does not warrant such an assumption. A 3–dB exchange rate does not incorporate this assumption.

Nevertheless, the Agency is proposing to retain the existing 5-dB exchange rate because of feasibility considerations. Changing to a 3-dB rate from a 5-dB rate would significantly reduce the amount of time that miners could be exposed to higher sound levels without exceeding the PEL. For example, MSHA estimates that the percentage of miners whose exposure would be in violation of the PEL would just about double if a 3-dB exchange rate is used. This means mine operators would have to utilize controls to reduce exposures to the PEL much more frequently. Moreover, more expensive controls would often be required; if doses are doubling more quickly, the controls needed to reduce overexposures to the PEL would have to be more effective. Furthermore, if a 3-dB exchange rate is used, it is extremely difficult to reduce the noise exposures to the PEL with currently available engineering or administrative noise controls or a combination thereof. Accordingly, moving the industry to a 3-dB exchange rate may not be feasible at this time.

The sound levels to be included in a miner's dose are being expanded. At present, only exposures to sounds of 90 dBA and above are included in determining a miner's dose under MSHA's standards. (Thus, 90 dBA is considered the ''threshold.'') The proposed rule would include exposure to sound levels as low as 80 dBA. The Agency has concluded that capturing such sound levels is necessary if it establishes an action level based on an eight-hour time-weighted average of 85 dBA. Among other reasons, exposure of a miner to an extended shift (e.g.,16

hours) at just over 80 dBA can result in an exposure that exceeds the action level. OSHA uses this threshold for its action level, but a higher threshold for the PEL; based on the comments received in response to its Advance Notice of Proposed Rulemaking, MSHA concluded it would be easier for the mining industry to use a single threshold for both purposes.

While necessary, this change will generally result in higher dose readings in both the coal and metal and nonmetal sectors than at present. (See the discussion of exposure data in response to Question 5). In this case, however, MSHA has concluded that this change would clearly be feasible for the industry.

The proposed regulation would not allow dose measurements to be adjusted to reflect the effect of hearing protectors. This provision would reinforce MSHA's intent to preclude the current practice in the coal mining industry of not issuing a citation based upon a noise exposure that exceeds the PEL when the miners are wearing hearing protection. (See Question 11 for additional information on this topic.)

(10) What Controls Are Required Whenever a Miner's Exposure Exceeds the Action Level?

The proposal would require that all miners exposed above the action level be provided special instruction in the hazards of noise and protective methods. The training is to be provided annually for as long as exposure exceeds the action level. (The nature of this instruction, how it is to be provided, and how it can be coordinated with other required miner training are discussed in response to other questions.)

(11) What Additional Controls Are Required If a Miner's Exposure Exceeds the Action Level but Is Below the PEL?

An operator will be required to enroll a miner whose exposure exceeds the action level in a hearing conservation program (HCP). While enrollment in the HCP would require the operator to make annual audiometric testing available to the miner, miners exposed to noise below the PEL would have the right to decline taking any annual audiometric testing. The requirements for such testing are discussed in more detail in response to other questions.

MSHA is seeking comments on how to minimize the burden on mine operators of providing audiometric examinations for those miners with only a temporary attachment to the mining work force (e.g., summer employees), while recognizing the importance of detecting and tracking hearing loss among those who switch jobs.

In addition, the operator must provide properly fitted hearing protection in 3 cases: before the initial hearing examination, if a significant threshold shift in hearing acuity is detected, and at any other time upon miner request.

Both MSHA and OSHA normally require an employer or operator to ensure that personal protective equipment is in fact used; an operator can be cited for failure to enforce rules to this effect. In the case of this proposal, however, MSHA is making two exceptions in that regard. First, should the initial hearing examination take less than 6 months to provide, the operator will not be required to ensure the provided hearing protection be worn. The operator is obligated to ensure protector use if more time is needed for the baseline examination (e.g., to wait for a mobile test van). Second, hearing protection provided because of miner request does not generate an operator obligation to enforce the use of the requested protection. At exposure levels above the action level but below the PEL, the proposal's goal is to encourage the use of hearing protection by training, providing choice, and encouraging proper fit—but the proposal would not require hearing protector use unless the miner has a significant threshold shift or unless the miner has to wait more than 6 months for a baseline examination.

(12) What Controls Are Required If a Miner's Exposure Exceeds the PEL?

If a miner's noise dose exceeds the PEL, the proposal would require the mine operator to use all feasible engineering and administrative controls to reduce the miner's noise exposure to that level. The mine operator has a choice of whether to use engineering controls, administrative controls, or both; but if administrative controls are utilized, a copy of the procedures involved must be posted, and copies given to the affected miners.

Under the proposal, a consistent hierarchy of controls is established for all mines. Mine operators must first utilize all feasible engineering and administrative controls to reduce sound levels to the PEL before (as explained in response to question 15) relying on other controls to protect against hearing loss. This approach is consistent with that currently in place for metal and nonmetal mines, but would be a change for coal mines. In the coal mining industry, MSHA inspectors do not cite for noise overexposures without first deducting from the measured dose the attenuating value of hearing protectors being worn by the miners exposed to excessive levels of noise. In practice, this means that personal protective equipment is in most cases accepted as a substitute for engineering and administrative controls.

MSHA has conducted research on the attenuating value of hearing protectors under actual mining conditions and has reviewed the literature on this issue. MSHA is aware that NIOSH is considering new approaches on how to establish a system that will accurately derate hearing protector attenuation values for actual workplace conditions; but the Agency's own research suggests that the attenuation of a hearing protector is highly variable in practice, and that the amount of attenuation cannot be predicted accurately. This is discussed in part III of the Supplementary Information accompanying this notice.

MSHA has also considered the data showing declining noise exposures in the metal and nonmetal industry, and contrasted this with the data on the coal mining industry.

The Agency has concluded that, in practice, reliance upon hearing protectors to reduce noise exposures simply does not provide effective protection against hearing loss to miners. The Agency does not contend that properly fitted and maintained hearing protectors are worthless; on the contrary, the Agency is proposing to rely upon them as a supplemental control, and has taken their value into account in conducting its risk and benefit analyses. MSHA has concluded, however, that hearing protectors should no longer be relied upon as a primary means of control, and that this change can bring about dramatic reductions in the rate at which coal miners would otherwise be expected to incur hearing impairments.

(13) For an Individual Mine Operator, What Are ''Feasible'' Engineering and Administrative Controls?

The proposal would require a mine operator to use only such engineering controls as are technologically feasible, and to use only such engineering and administrative controls as are economically feasible for that mine operator. Those in the metal and nonmetal mining industry are already familiar with the Agency's policies and practices in this regard, but those in the coal mining industry may wish to take note of the following few paragraphs.

The Federal Mine Safety and Health Review Commission (Commission) has addressed the issue of what MSHA must consider, with regard to MSHA's existing noise standard for metal and

nonmetal mines, when determining what is a feasible noise control for enforcement purposes at a particular mine. According to the Commission, a control is considered feasible when: (1) The control reduces exposure, (2) the control is economically achievable, and (3) the control is technologically achievable. See *Secretary of Labor* v. *Callanan Industries, Inc.*, 5 FMSHRC 1900 (1983), and *Secretary of Labor* v. *A. H. Smith*, 6 FMSHRC 199 (1984).

In determining technological feasibility of a proposed control, the Commission has ruled that a control is deemed achievable if through reasonable application of existing products, devices, or work methods with human skills and abilities, a workable engineering control can be applied to the noise source. The control does not have to be ''off-the-shelf;'' but, it must have a realistic basis in present technical capabilities.

In determining economic feasibility, the Commission has ruled that MSHA must assess whether the costs of the control are disproportionate to the ''expected benefits'', and whether the costs are so great that it is irrational to require its use to achieve those results. The Commission has expressly stated that cost-benefit analysis is unnecessary in order to determine whether a noise control is required. According to the Commission, an engineering control may be feasible even though it fails to reduce exposure to permissible levels contained in the standard, as long as there is a significant reduction in exposure. *Todilto Exploration and Development Corporation* v. *Secretary of Labor*, 5 FMSHRC 1894 (1983). No guidance has been provided by the Commission as to what level of reduction is considered significant. However, the Commission has accepted the Agency's determination that a 3 dBA reduction is significant.

In the metal and nonmetal mining industry, MSHA has interpreted the ''expected benefits'' to be the amount of noise reduction achievable by the control. MSHA generally considers a reduction of 3 dBA or more to be a significant reduction of the sound level. Consequently, a control that achieves relatively little noise reduction at a high cost could be viewed as not meeting the Commission's test of economic feasibility.

Accordingly, consistent with the case law, MSHA has considered three factors in determining whether engineering controls are feasible at a particular metal and nonmetal mine: first, the nature and extent of the overexposure; second, the demonstrated effectiveness of available technology; and third, whether the committed resources are wholly out of proportion to the expected results. Before a violation of these requirements of the standard could be found, MSHA would have to determine that a worker has been overexposed; that administrative or engineering controls are feasible; and that the mine operator failed to install or maintain such controls.

Part III of the Supplemental Information accompanying this notice provides many examples of engineering controls that are feasible for mine operators to utilize, and the Agency and the former Bureau of Mines (USBOM) have available many other materials in this regard. Nevertheless, the Agency welcomes information about particular operations for which it may be particularly difficult to control noise.

(14) Is It feasible for the Coal Mining Industry, and for the Metal and Nonmetal Mining Industry, To Provide the Controls Proposed To Be Required When Noise Exposures Exceed the PEL?

Part IV of the Supplementary Information in this notice provides a detailed discussion of the statute's requirements and the Agency's analysis in this regard. The Agency has concluded that the coal mining industry as a whole, and the metal and nonmetal mining industry as a whole, can meet these requirements at a PEL set at a TWA_8 of 90 dBA.

In fact, the Agency seriously considered lowering the PEL. As noted in response to Question 5, MSHA has concluded that there is a significant risk of material impairment from noise exposures at or above a TWA_8 of 85 dBA. MSHA believes, however, that such a change may not be feasible at this time for the mining industry. Based on an analysis of exposure survey data, MSHA has concluded that if the PEL were a TWA_8 of 85 dBA, about two-thirds of the mine operators in the metal and nonmetal mining industry, and about three-quarters of the mine operators in the coal mining industry, would need to use engineering and administrative controls to reduce current exposures. Moreover, the engineering controls needed to reduce those exposures would be more expensive, because they would have to be capable of reducing the exposures further than with a PEL set at a TWA_8 of 90 dBA.

(15) What Supplemental Controls Are Required If a Miner's Exposure Cannot Be Feasibly Reduced to the PEL?

If reducing the dose to this level with such controls is not feasible, the proposal requires the mine operator to use such controls to lower the noise exposure as much as is feasible.

In addition, in such cases, the proposal requires that the operator take extra steps to protect miner hearing. The operator must ensure any miner so exposed takes the annual hearing examinations, must provide properly fitted hearing protection to all miners so exposed, and must ensure the hearing protection is used by all miners so exposed.

MSHA believes that when a miner is exposed to such high levels of noise because engineering and administrative controls are not feasible for an operator, these supplemental obligations are necessary to protect miner hearing. Hearing protectors are not without their discomforts, but the risk of hearing loss at such exposure levels ought to be a controlling factor. While audiometric testing is not an invasive procedure, the Agency is concerned that there may be economic pressures and personal reasons that may lead miners to decline to take hearing examinations. The information generated by these tests is necessary, however, to trigger investigation of potentially serious flaws in the layers of noise controls required at these high exposure levels. In addition, the Agency believes that miners operating under such high noise conditions should be aware of the severity of any hearing loss; in a mining environment, this knowledge could have implications for the safety of the miner and the safety of others. Comments on this provision are specifically solicited.

(16) Is There an Absolute Maximum Noise Dose?

Under the proposal, a miner, as at present, is never to be exposed to sound levels exceeding 115 dBA. This is because sound at that level provides the full dose permitted in a matter of minutes.

There is, however, no dose which the Agency would require to be abated without regard to whether it is feasible for an individual mine operator. The proposal does provide that should a miner's noise exposure exceed a TWA_8 of 105 dBA during any workshift, the mine operator shall, in addition to taking all actions required to protect miners exposed above the PEL, also require the miner to use dual hearing protection, i.e., both a plug type and a muff type hearing protector. A TWA_8 of 105 dBA is a dose of 800% of the PEL, using a 5-dB exchange rate. In the notice accompanying this proposal, the Agency presents information about the mining jobs at which the exposures of this level are occurring, and requests comment on

whether there should be an absolute dose ceiling regardless of the feasibility of control by an individual mine operator.

(17) What Are an Operator's Obligations Under the Proposal To Monitor Noise Exposures?

The proposal would require mine operators to establish a system of monitoring which effectively evaluates each miner's noise exposure. This will ensure that mine operators have the means to determine whether a miner's exposure exceeds any of the limitations established by this section, as well as to assess the effectiveness of noise controls. The proposed rule is performance oriented in that the regularity and methodology used to make this evaluation are not specified; MSHA's own measurements will enable it to check on the effectiveness of an operator's monitoring program. Specific requirements for biannual noise surveys, monitoring records, supplemental noise surveys, calibration reports, survey reports, and survey certifications now applicable to the coal sector would be revoked, significantly reducing cost and paperwork burdens.

(18) When Must Miners Be Notified of Monitoring Results?

The proposal would require that miners be notified in writing should their exposure exceed any of the levels specified by this section—whether based on operator or MSHA evaluations of noise. Notice would be required within 15 calendar days.

The proposal has been designed to ensure that miners are made aware of the hazards they currently face. Miners exposed above the action level should be notified of that fact so, for example, they can consider the importance of using provided, properly fitted and maintained hearing protectors. On the other hand, the proposal does not require notification of a particular miner if an exposure measurement indicates that the miner's exposure has not changed and the miner has within the last year been apprised of the same information. No notification is required if a miner's measurement is below the action level—although operators might wish to provide such notification if this indicates a reduction in noise exposure.

(19) What Rules Are There To Ensure That Required Hearing Protectors Provide Effective Protection?

Whenever hearing protectors are to be provided, they must be provided in accordance with specific requirements. The miner is to have a choice from at least one earplug type and muff type protector; and, in the event dual hearing protection is required, a choice of one of each. Whenever the mine operator is required to ensure that hearing protection is worn (the circumstances are noted in response to prior questions), it is worn by the miner when exposed to sound levels required to be integrated into a miner's dose measurement, i.e., any sound levels above 80 dBA. The hearing protector is to be fitted and maintained in accordance with the manufacturer's instructions. Hearing protectors and necessary replacements are to be provided at no cost to the miner. Finally, should the miner suffer a medical pathology of the ear, the miner is to be allowed to select a different hearing protector from among those offered by the mine operator.

MSHA has concluded that existing rating systems for hearing protectors do not provide a reliable measure of effectiveness under normal mining working conditions. The Agency believes that the best way to ensure such devices can provide effective protection is to focus on the conditions affecting hearing protector use.

(20) How Frequently Must Required Training Be Provided?

If a miner's noise exposure exceeds the action level, training is to be provided annually. The training is to be provided when the miner is first determined to have exceeded the action level and every 12 months thereafter that the miner continues to exceed that level.

Annual refresher training is necessary to reinforce the proper procedures for the use and care of hearing protectors, and the importance of administrative and engineering controls. Additionally, it serves to re-emphasize the hazards of noise and the purpose for audiometric testing for those miners exposed above the PEL. MSHA received comments in response to its Advance Notice of Proposed Rulemaking (ANPRM) that supported an annual training requirement. Studies have shown that the effectiveness of an HCP is highly dependent on the proper use of hearing protectors and the commitment of both management and the employees, both of which can be enhanced by training.

(21) What Specifications Are There With Respect to the Instruction To Be Provided During Required Training?

Miners would receive instruction in hearing protection: (1) the need for such protection, (2) selection and fitting, and (3) proper use of such protectors. Miners would also receive instruction about hearing conservation programs: as to the operation of that program and the mine operator's noise control efforts. There are no special qualifications for instructors, nor any specifications on the hours of instruction. Training is required to be provided without cost to the miner. The mine operator would be required to certify the completion of any training required by this part, and maintain the most recent certification for a miner at the mine site for as long as the miner is required to use hearing protectors or be enrolled in an HCP, and at least 6 months thereafter.

(22) Can the Required Training Be Covered During Part 48 Training?

Yes, but it may not always be feasible to do so.

MSHA considered whether the requirements of part 48, ''Training and Retraining of Miners,'' were adequate to ensure the training required under this part. The requirements of part 48 specify the initial and annual retraining of all miners in a list of subjects, many specified in the law itself (section 115 of the Mine Safety and Health Act). The importance of this training is emphasized by statutory requirements for the submittal of training plans, on the specification of the hours to be devoted to the training, and on the qualifications of instructors. Training is required on noise, but it is in general terms, covering the purpose of taking exposure measurements and on any health control plan in effect at the mine. Mine operators may provide additional training, but the topics that need to be covered may make this impracticable within the prescribed time limits.

After considering the available information about the importance of training requirements, and based upon its experience in implementing the requirements of part 48, MSHA has determined that the requirements of part 48 do not provide adequate noise training for those miners for whom exposure is clearly a problem. Most current part 48 training is neither comprehensive enough to provide such miners with the level of education needed for the proper use of hearing protection devices, nor, in the case of noisy mines, detailed enough on methods to reduce sound levels.

Nevertheless, MSHA believes compliance with this proposal can in many cases be fulfilled at the same time as scheduled part 48 training. The Agency does not believe special language in proposed part 62 is required to permit this action under part 48, but welcomes comment in this regard. Mine operators who can do so are free to fulfill their noise training requirements by covering the topics in initial and

annual part 48 training, and may so certify on the separate form required by this part. If incorporated into part 48, mine operators would, however, be required to submit a revised training plan to the appropriate district office for approval. Some mine operators, however, may not be able to incorporate these topics in their part 48 plans. Moreover, it is important to note that there are some circumstances in which training required under the proposal will likely not fit within a regular schedule, e.g., the training required when a miner's exposure is determined to require selection of a hearing protector or a new protector.

MSHA has endeavored to make the training requirements as simple as possible. If conducted separately from part 48 training, there are no specifications on trainer qualifications, no minimal training time, nor any training plans. If, however, the training is incorporated into part 48, then all applicable part 48 requirements will have to be met.

(23) If a Mine Operator Is Required To Offer Audiometric Testing, When Must a Baseline Audiogram Be Taken?

It is critical to obtain a baseline audiogram before exposure to hazardous noise. If this is not possible, then the baseline is to be obtained as soon as is reasonably possible.

Due to remote locations and intermittent operations of many mines, MSHA determined that allowing six months (or 12 months if a mobile test van is used) for offering the baseline audiogram was reasonable. The 12 month period would allow mine operators to schedule many baseline and annual audiograms simultaneously, and thus, substantially reduce the cost when mobile test vans are used. Miners enrolled in a hearing conservation program would be provided hearing protection until such time as the baseline audiogram is conducted. In the case of a miner who has to wait more than 6 months for a baseline examination because of the need for a mobile test van, and in the case of a miner whose exposures cannot be reduced to the PEL through the use of all feasible engineering and administrative controls, the operator would be required to ensure the hearing protection is worn.

MSHA has also determined that a 14-hour quiet period should precede the baseline audiogram to ensure a valid result. Moreover, unlike the OSHA rule, MSHA's proposal would not permit the use of hearing protectors as a substitute for a quiet period. The Agency has determined this is necessary to ensure that a temporary threshold shift in hearing acuity does not occur during the quiet period, rendering the baseline audiogram inaccurate. Moreover, MSHA's research has not shown a reliable method for predicting hearing protector attenuation under actual working conditions. Under the proposal, miners are to be notified of the importance of compliance with the quiet period. MSHA is not proposing to require this quiet period for annual audiograms, although it may be in the mine operator's interest to do so.

(24) What Qualification Requirements Are Proposed for Those Who Will Take Audiograms?

MSHA would require that an ''audiologist'' be certified by the American Speech-Language-Hearing Association or licensed by a state board of examiners. ''Qualified technicians'' would be required to have been certified by the Council for Accreditation in Occupational Hearing Conservation (CAOHC) or another recognized organization offering equivalent certification. CAOHC or equivalent certification would assure that the technicians are qualified. MSHA is not proposing to require qualifications for physicians.

(25) Does the Proposal Specify Audiometric Test Procedures?

MSHA proposes not to include specific procedural requirements for conducting audiometric tests, calibrating audiometers, and qualifying audiometric test rooms. Instead, MSHA proposes a performance-oriented requirement that audiometric testing be conducted in accordance with scientifically validated procedures. MSHA would specify the test frequencies, but would allow the physician or the audiologist to use professional judgement in choosing the appropriate testing procedure(s) and require certification of the scientific validity of the procedures.

While this approach may require somewhat more in the way of paperwork requirements, MSHA believes this is far preferable to the alternative of a detailed specification standard, which could stifle technology and impede improvements in methodology.

(26) What Test Records Must Be Maintained?

The proposal would also specify what records must be maintained at the mine site and the retention duration. The proposed items included in the audiometric test record—name, job classification, audiograms and certifications as to the procedures used to take them, any exposure determinations, and the results of any follow-up examinations—would provide information essential for evaluating a miner's audiogram, among other purposes.

The proposal would require that the audiometric records be retained for at least six months beyond the duration of the miner's employment. The six-month retention period at the mine site would assure that test records are not destroyed during what might be normal breaks in employment and remain available for use by the mine operator to conduct further evaluations upon the miner's return. In practice, MSHA believes that many mine operators will keep a miner's audiograms long after the miner's employment ceases, for use if the miner should file a subsequent workers' compensation claim for hearing loss.

(27) How Are Audiograms To Be Evaluated?

MSHA's proposal would require that the mine operator inform the person evaluating the audiogram of the requirements of this part and provide such person with copies of the miner's audiometric test records. The mine operator would be responsible for having a physician, audiologist, or qualified technician determine if an audiogram is valid, and to determine if a standard threshold shift in hearing acuity (STS) or reportable hearing loss has occurred. Time frames within which these actions must occur are part of the proposal.

The proposal would permit, but not require, mine operators to adjust audiometric test results by applying a correction for presbycusis, the progressive loss of hearing acuity associated with the aging process, before determining whether an STS or reportable hearing loss has occurred, and it includes tables for this purpose. The proposed adjustment for presbycusis is optional, however, if a mine operator uses this approach, it must be applied uniformly to both the baseline and annual audiograms in accordance with the procedures and values listed in the proposed standard. Although this is the position taken in the proposal, MSHA notes that NIOSH recently has advised against the use of presbycusis correction factors. Moreover, the Agency is concerned about locking-in particular presbycusis adjustment tables. MSHA, therefore, requests additional comments on whether to use presbycusis corrections for audiograms and, if so, how to

provide for such adjustment in a regulatory context.

(28) What Happens If an Audiogram Is Not Valid?

A prompt retest is required.

When a valid audiogram cannot be obtained due to a suspected medical pathology of the ear, and the physician or audiologist evaluating the audiogram believes that the problem was caused or aggravated by the miner's exposure to noise or the wearing of hearing protectors, a miner must be referred for a clinical audiological or otological evaluation as appropriate at mine operator expense.

If the physician or audiologist concludes that the suspected medical pathology of the ear which prevents obtaining a valid audiogram is unrelated to the miner's exposure to noise or the wearing of hearing protectors, the miner is to be advised of the need for an otological evaluation; but in such cases, no financial obligation would be imposed on the mine operator.

A mine operator would be required to instruct the physician or audiologist not to reveal to the mine operator any specific findings or diagnoses unrelated to the miner's exposure to noise or the wearing of hearing protectors without the written consent of the miner.

(29) What Corrective Measures Are Required When a Standard Threshold Shift in Hearing Acuity (STS) Is Detected?

STS is defined in this proposal, as in OSHA's standard, as a change in a worker's hearing acuity for the worse, relative to that worker's baseline audiogram, of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear.

If the STS is determined to be permanent, a supplemental baseline is established and this becomes the baseline for determining any future STS. This definition is sufficiently restrictive to locate meaningful shifts in hearing, yet not so stringent as to create unnecessary follow-up procedures. The frequencies were chosen for this purpose to ensure hearing losses are detected as soon as feasible. While NIOSH is currently considering an approach that would not require averaging at several frequencies, this remains under peer review; moreover, the averaging of hearing levels at adjacent frequencies will reduce the effect of testing errors at single frequencies.

MSHA's proposal would require that, unless a physician or audiologist determines that an STS is neither work-related nor aggravated by occupational noise exposure, mine operators would have 30 days after the finding of an STS to—

(1) Retrain the miner;

(2) Provide the miner with the opportunity to select a hearing protector, or a different hearing protector if the miner has previously selected one; and

(3) Review the effectiveness of any engineering and administrative controls to identify and correct any deficiencies. The proposal also requires that an operator ensure that a miner with an STS wear the provided hearing protector.

A hearing loss of 10 dB from a miner's prior hearing level is of enough significance to warrant intervention by a mine operator, unless it is determined the loss is not work-related. If the controls in place are effective, including the training, this loss should not be occurring. It should be noted that the retraining required is to take place within 30 days after the finding of the STS, and thus it is unlikely mine operators can satisfy this requirement through their part 48 training programs.

MSHA's proposal does not include a provision for transferring a miner who incurs repeated STS's. A miner transfer program would be complex to administer, and would probably not be feasible in the metal and nonmetal sector. This sector consists largely of smaller mines which may be unable to feasibly rotate workers to other assignments on a long-term basis.

(30) When Must MSHA Be Notified About Hearing Loss?

Pursuant to 30 CFR part 50, MSHA must be notified of any ''reportable'' hearing loss. There is currently no uniform definition of this term. The proposed rule would establish a uniform definition for reporting a miner's hearing loss—a change in hearing acuity for the worse relative to the miner's baseline audiogram of an average of 25 dB or more at 2000, 3000, and 4000 Hz in either ear. MSHA intends that a loss for any miner need not be reported again until there is an additional 25 dB loss. Having a uniform definition will ease reporting burdens on mine operators while promoting the development of an improved data base on hearing loss in the mining community.

MSHA has two specific questions in this regard on which it is seeking comment. First, MSHA would like comment on how to define ''reportable'' hearing loss for those operators who do not have audiometric test data. Not all mine operators will be required to obtain audiometric test data under the proposed rule; thus, such operators may not be able to use a definition of reportable hearing loss defined in this manner.

Second, MSHA is concerned that reporting only losses of 25 dB may not provide MSHA a full picture of hearing loss in the mining industry. A loss of 25 dB is used by many states as a basis for making disability awards. Some have recommended that any STS (10 dB loss) should be captured in a hearing loss data base. OSHA, which currently requires any 25 dB loss to be captured in an employer's log, has proposed to capture any 15 dB loss. MSHA accordingly solicits comment on this point.

(31) When Must a Miner Be Notified of Audiometric Testing Results?

The proposal would require the mine operator, within 10 working days of receiving the results of an audiogram, or receiving the results of a follow-up evaluation, to notify the miner in writing of the results and interpretations, including any finding that an STS or reportable hearing loss has occurred. The notification would include an explanation of the need and reasons for any further testing or evaluation that may be required.

MSHA believes that informing miners of the results of their audiometric tests in a timely manner is critical to the success of an HCP. Immediate feedback upon completion of the testing provides the greatest benefit.

(32) Who Has Access to Exposure and Test Records Maintained by Mine Operators?

Authorized representatives of the Secretaries of Labor and Health and Human Services would have access to all records required under this part.

Moreover under the proposal, a miner or former miner, or his/her designated representative with written consent, would have access to all the records that the mine operator is required to maintain under this part for that individual miner or former miner. Also, the miners' representative is in all cases to have access, for miners they represent, to noise training records and to notices required to be made to miners exposed to noise above various levels.

The mine operator would have 15 days from receipt of a written request to provide such access. The proposal would define ''access'' as the right to examine and copy records. The first copy of any record requested by a person is to be provided without cost to that person, and any additional copies requested by that person are to be provided at reasonable cost.

Upon termination of employment, mine operators would be required to provide a miner, without cost, an actual copy of all his or her own records (those required under this part).

The proposed standard would require mine operators to transfer all records (or a copy thereof) required by this part to any successor mine operator. The successor mine operator would be required to receive these records and maintain them for the period required. Additionally, the successor mine operator would be required to use the baseline audiogram obtained from the original mine operator (or supplemental baseline audiogram as appropriate) for determining an STS and reportable hearing loss.

MSHA has no uniform records access provision. The provisions proposed here are similar to those in other health standards proposed in recent years by the Agency. The Agency welcomes comment on whether it needs to make changes to facilitate the use of electronic recordkeeping systems.

(33) How Does the Proposal Compare With the Existing Standards?

MSHA has prepared two charts comparing some of the key features of the proposed standard to MSHA's existing standards. A comparison to OSHA's noise standard is also provided since many mine operators and others are familiar with that standard.

It is important the reviewers exercise some caution in using these charts. The entries were ''shorthanded'' to fit into the chart. Accordingly, other parts of this preamble should be consulted for details. In comparing the proposed rule with OSHA's standard, for example, reviewers interested in differences on the definition of a hearing conservation program should consult the answer to Question 8; those interested in differences on the threshold should consult the answer to Question 9; those interested in differences on employer obligations to ensure the wearing of provided hearing protections should consult the answer to Question 11; and those interested in differences about the use of hearing protection in lieu of a quiet period before a baseline audiogram should consult the answer to Question 23.

Care should also be taken in consulting the existing standards themselves. The entries in the charts and the discussions in the preamble reflect legal and/or policy interpretations of the various standards that now determine their meaning, something that would not be apparent from an examination of the text of the standards.

To conserve space, the following abbreviations are used in the charts: HP (hearing protection), HCP (hearing conservation program), STS (standard threshold shift), TWA_8 (time-weighted eight-hour average), dBA (decibel, A-weighted), PEL (permissible exposure limit); ''admin'' (administrative), kHz (kilohertz), and N/A (none or not applicable).

COMPARISON CHART 1: EXPOSURE/DOSE TRIGGERS

TWA_8 noise above	Proposal	Existing metal/nonmetal	Existing coal	OSHA
85 dBA	Provide training on noise; enroll miner in HCP (must offer annual hearing test); provide HP before baseline audiogram taken, if STS detected or upon request of miner; must ensure miner uses HP if more than 6 months for baseline (mobile van) or STS detected.	No action required	No action required	Enroll employee in HCP (must offer annual hearing test); if more than 6 months before baseline audiogram taken (mobile van), employee must be provided and wear HP; employee must also be provided and use HP if STS detected.
90 dBA	Use all feasible engineering and admin. controls to reach; if can't reach 90 using such controls, use controls to get as low as possible, provide HP to all miners, ensure HP used and ensure hearing tests taken.	Use all feasible engineering or admin. controls to reach; if can't reach 90 using such controls, then must also provide HP.	Use all feasible engineering or admin. controls to reach * * * but can first reduce exposure reading by rated value of HP minus 7 unless cited for failure to require HP use; must enroll miners in HCP if cited.	Use all feasible engineering or admin. controls to reach * * * but if exposure less than 100 dBA, can first reduce reading by value of HP attenuation =.50 x (rated value of HP minus 7).
105 dBA	Dual HP must be provided and used.	Limited requirement for dual HP.	n/a	n/a.

COMPARISON CHART 2: ISSUES

Issue	Proposal	Existing metal/nonmetal	Existing coal	OSHA
Monitoring	Operator must establish system of monitoring exposures.	No requirement on mine operator.	Mine operator required to conduct periodic monitoring.	Employer must conduct represent. personal sampling if info suggests noise exceeds action level.
Notification of exposure level.	Notify miner of measured exposure level if: (a) exposure changed, or (b) even if shows no change if miner not notified within last year.	Not required	Not required	Notify employee if exposure exceeds action level.

COMPARISON CHART 2: ISSUES—Continued

Issue	Proposal	Existing metal/nonmetal	Existing coal	OSHA
Threshold: lowest sound levels counted.	80 dBA	90 dBA	90 dBA	80 dBA for monitoring & HCP enrollment but 90 dBA for PEL.
Exchange rate	5 dB	5 dB	5 dB	5 dB.
Ceiling	115 dBA	115 dBA	115 dBA	115 dBA.
Training on hearing protector selection & use.	Annual if above action level.	Part 48 general discussion	Part 48 general discussion	Annual if exposure exceeds TWA_8 of 85 dBA.
Training on audiology & employer program.	Annual if above action level.	No	No	Audiology only; annual if enrolled in HCP.
Quiet period before aud. exam.	14 hours for baseline audiogram; can not use hearing protectors.	n/a	n/a	14 hours for baseline audiogram; can use hearing protectors.
Standard threshold shift	10 dB av. shift @ 2, 3, & 4 KHz.	n/a	n/a	10 dB av. shift @ 2, 3, & 4 KHz.
Reportable hearing loss	Must report 25 dB av. shift @ 2, 3, & 4 kHz, either ear.	Reporting required but level not defined.	Reporting required but level not defined.	No reporting; must record 25 dB av. shift @ 2, 3, & 4 kHz, either ear; 1/96 proposal would drop to 15 dB.
Employee access to records.	Yes	No	No	Yes.

(34) Is MSHA Going To Write the Final Rule in Plain English so Miners and Mine Operators Can Understand Their Obligations?

The text of the proposed rule can be found at the very end of this notice. While the Agency endeavored to write clearly, it is interested in suggestions to make the final rule as comprehensible as possible to mine operators and miners.

MSHA has developed two examples, based on the proposed rule, to illustrate some alternative approaches it could take.

The first example illustrates one way in which a rule's organization can be reformulated so as to serve as a more useful reference tool. This proposal's table of contents begins as follows:

62.100 Purpose and scope; effective date.
62.110 Definitions
62.120 Limitations on noise exposure

The alternative version presents the table of contents as a series of practical questions that are likely to be asked by the mining community. The sections have been subdivided so as to address questions one at a time. In the mining industry, the Department of the Interior has also experimented with this approach, e.g., proposed coalbed methane regulations (60 FR 47920).

62.100 What is the purpose of requiring mine operators to limit miner noise exposure?
62.101 What kinds of mining operations are covered by this regulation?
62.102 When does this regulation take effect?
62.110 What is meant by various technical terms used in this regulation?
62.120 How is a miner's noise dose calculated?
62.121 How is dose converted to 8-hour time-weighted averages?
62.122 Can a miner's dose measurement be adjusted to reflect the type of hearing protection being worn by the miner?
62.123 What are a mine operator's obligations to evaluate miner noise exposure?
62.124 When must miners and/or their representatives be notified of measured exposures?
62.130 What must a mine operator do whenever a miner's noise dose exceeds the action level?
62.131 What else must a mine operator do if a miner's noise dose exceeds the action level but remains below the PEL?
62.132 What else must a mine operator do if a miner's noise dose exceeds the PEL?
62.133 What is the highest sound level to which a miner may be lawfully exposed?

The contents of several of these sections might be more clear if presented in a tabular format. This would be particularly useful where the mine operator may have choices or has to do more than one thing. An example involves the controls required at the action level. The current proposal, as it would appear in the Code of Federal Regulations, as paragraph (b) of proposed § 62.120, is:

(b) *Action level.* When a miner's noise exposure exceeds a TWA_8 of 85 dBA during any workshift, or equivalently a dose of 50%, the operator shall take the actions specified in paragraphs (b) (1) and (2) of this section and, at the request of the miner, also take the actions specified in paragraph (b)(3) of this section.

(1) An operator shall provide the miner training that includes the instruction required by § 62.130, at the time exposure exceeds the action level and every 12 months thereafter that exposure continues to exceed the action level.

(2) An operator shall enroll the miner in a hearing conservation program which shall meet the requirements of §§ 62.140 through 62.190. Moreover, the operator shall, with respect to any miner enrolled in such program, provide hearing protection in accordance with the requirements of § 62.125 until such time as a baseline audiogram has been obtained. If it takes more than 6 months to conduct the baseline audiogram, or if the miner is determined to have incurred an STS, the operator shall ensure that the hearing protection is provided to the miner and worn by the miner.

(3) At the request of any miner, the operator shall provide hearing protection to the miner in accordance with the requirements of § 62.125.

The alternative format would appear, using the revised numbering and naming conventions from example 1, somewhat like the following:

62.131 What specifically must a mine operator do if a miner's noise dose exceeds the action level?

If a miner's noise exposure exceeds a dose of 50% (a TWA_8 of 85 dBA):

You must	Which means you
(a) Provide training.	Provide a miner with the training required by MSHA's rules— (1) When his or her exposure exceeds the action level; and (2) Every 12 months thereafter that his or her exposure continues to exceed the action level.

You must	Which means you
(b) Enroll the miner in a hearing conservation program.	(1) Offer the miner annual audiometric examinations that comply with MSHA's rules for hearing conservation programs; and (2) Provide a miner with hearing protection until a baseline audiogram has been taken; and in the event that will take more than 6 months due to the needs to wait for a mobile test van, require the miner to use the hearing protector; and (3) Provide a miner with hearing protection, and require its use, whenever an STS is detected.
(c) At the request of a miner, provide the miner with hearing protection.	Provide hearing protection in accordance with MSHA's rules.

MSHA's rules for training are discussed in § 62.137. MSHA's rules for hearing conservation programs are discussed in §§ 62.140 through 62.190. MSHA's rules for hearing protection are discussed in § 62.135.

MSHA has not yet consulted with the Office of the Federal Register on the specifics of such approaches; moreover, the examples noted above should not be considered as necessarily accurately representing the content of MSHA's proposed rule. These caveats notwithstanding, the Agency is interested in the potential of these approaches, and would welcome comment on these specific examples.

(35) Is MSHA Going To Provide Adequate Guidance Before Implementing the Rule?

The Agency plans to take several steps toward this end.

First, the Agency is proposing that the new standard not take effect until one year after the date of publication of the final rule. This should provide time to train MSHA personnel and provide mine operators with technical assistance and guidance. An alternative would be to phase in the new requirements. The Agency believes some could be phased in quickly, but wants to avoid confusion. The Agency requests comment on whether a phased-in approach is appropriate and how it might most effectively be designed.

In addition, the Agency is committed to issuing a compliance guide for mine operators before a final rule takes effect. MSHA would welcome suggestions on matters that should be discussed in such a guide.

MSHA would also welcome comments on other actions it could take to facilitate implementation, and in particular whether a series of workshops would be useful.

(36) Are There Special Enforcement Issues of Which the Mining Community Should Take Note?

Question 13 addresses the question of what constitutes ''feasible'' engineering and administrative controls.

Operators in the mining industry are aware that the Agency has traditionally not cited an operator for exceeding the PEL unless the Agency's measurement of noise shows that it exceeds a TWA_8 of 92 dBA. This provides adequate room to accommodate, in an enforcement context, any technical questions about MSHA's measurements. MSHA's citation policy does not, however, alter operator obligations of the rule, including those based on operator exposure readings.

The Agency is interested in comment on whether the new final rule should include a provision requiring operators to develop a written plan in certain cases. At the present time, coal operators in violation of the PEL must submit for approval a plan for the administration of a continuing, effective program to assure compliance including provision for reducing environmental noise levels, hearing protectors, and audiograms. No such plans are provided in the metal and nonmetal sector. The proposed rule, which would establish a uniform approach to noise for both sectors, would eliminate the current coal requirement, because MSHA does not believe such plans need to be created every time an operator violates the PEL. The Agency recognizes, however, that achieving effective compliance in some cases would be furthered by the existence of a written plan. In particular, such plans may be appropriate when there is a history of multiple noise violations, or a failure to effectively abate. Such plans would include specific details on how operators will comply with the final rule; a failure to comply with the plan's specifications would be enforceable through MSHA's normal citation/order process. Making explicit provision in the standard for such plans would ensure clarity about the Agency's enforcement policy on noise.

The Agency notes that in some cases the proposal would require operators to ensure certain miners wear hearing protection that is provided, and ensure certain miners take tests that are offered. Comment is welcome on how Agency personnel could distinguish these miners from others.

(B) Executive Order 12866

In accordance with Executive Order 12866, MSHA has prepared a preliminary analysis of the estimated costs and benefits associated with the proposed revisions of the noise standards for coal and metal and nonmetal mines.

The preliminary RIA containing this analysis is available from MSHA. MSHA welcomes comments on its analysis and methodology. The proposal would cost approximately $8.3 million and would save 765 hearing impairment cases annually. The benefits are expressed in terms of cases of hearing impairment that can be avoided and have not been monetized. Although the Agency has attempted to quantify the benefits, it believes that monetization of these benefits would be difficult and inappropriate.

Based upon the economic analysis, MSHA has determined that this rule is not an economically significant regulatory action pursuant to section 3(f)(1) of Executive Order 12866. The Agency does consider this rulemaking significant under section 3(f)(4) of the Executive Order for other reasons, and has so designated the rule in its annual agenda. This means that while the Office of Management and Budget was provided an opportunity to review this proposal and the preliminary RIA (as discussed in the History section of this preamble), specific determinations of the costs and benefits are not required pursuant to section 6(a)(3)(C) of the Executive Order.

(C) Paperwork Reduction Act

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA95). The title, description, and respondent description of the information collection are shown below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. With respect to the following collection of information, MSHA invites comments on: (1) Whether the proposed collection of information is necessary for proper performance of MSHA's functions, including whether the information will have practical utility; (2) the accuracy of MSHA'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 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.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to MSHA.

Submission

The Agency has submitted a copy of this proposed rule to OMB for its review and approval of these information collections. Interested persons are requested to send comments regarding this information collection, including suggestions for reducing this burden, to the Office of Information and Regulatory Affairs, OMB New Executive Office Bldg., 725 17th St. NW., Rm. 10235, Washington, DC 20503, Attn: Desk Officer for MSHA. Submit written comments on the information collection not later than February 18, 1997.

Description of Respondents

Those required to provide the information are mine operators and individuals who are paid to perform tasks for the mine operator (e.g., physicians reporting the results of audiograms to the mine operator).

Description

The proposal contains information collection requirements in §§ 62.120, 62.130, 62.140, 62.150, 62.160, 62.170, 62.180, 62.190, 62.200, and 62.210. The following chart presents the paperwork requirements by section.

NET INFORMATION COLLECTION BURDEN HOURS BY PROPOSED SECTION

Section	Paperwork requirement and associated tasks	Hours
62.120	Evaluate miners' noise exposure; notify miner of overexposure; prepare and post administrative controls; give miners copy of administrative controls.	(135,250)
62.130	Prepare and file a training certification	10,270
62.140	Perform audiograms; notify miners to appear for testing and need to avoid high noise	69,930
62.150	Compile an audiometric test record; obtain a certification	9,175
62.160	Provide information and audiometric test record; perform audiometric retests	21,350
62.170	Perform otological evaluations and provide information and notice	1,045
62.180	Prepare a training certification for retrained miners; review effectiveness of engineering and administrative controls	700
62.190	Inform miner of test results; inform miner of STS	6,300
62.200	Provide access to records	1,255
62.210	Transfer records	235
Total		(14,985)

These paperwork requirements have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1995 (PRA 95). Respondents are not required to respond to any collection of information unless it displays a currently valid OMB control number.

The following chart summaries MSHA's estimates by section in tabular form. Data is distributed by commodity. All numbers have been rounded.

NET INFORMATION COLLECTION BURDEN HOURS BY COMMODITY

Task		Coal	Metal/ nonmetal
62.120	Limitations on Noise Exposure	(140,545)	5,295
62.130	Training	4,000	6,270
62.140	Audiometric Testing Program	30,655	39,275
62.150	Audiometric Test Procedures	3,930	5,245
62.160	Evaluation of Audiograms	9,340	12,015
62.170	Followup Evaluation	475	570
62.180	Followup Corrective Measures	335	365
62.190	Notification of Results	2,715	3,585
62.200	Access to Records	255	1,000
62.210	Transfer of Records	100	135
Total (discrepancies due to rounding)		(88,740)	73,755

Alternatively, the paperwork hours may be distributed between small and large mines. The following table provides this analysis. Small mines are those with less than 20 employees.

NET INFORMATION COLLECTION BURDEN HOURS BY MINE SIZE

Task		Small	Large
62.120	Limitations on Noise Exposure	(15,510)	(119,740)
62.130	Training	2,965	7,305
62.140	Audiometric Testing Program	19,270	50,660
62.150	Audiometric Test Procedures	2,885	6,290
62.160	Evaluation of Audiograms	6,185	15,170
62.170	Followup Evaluation	250	800
62.180	Followup Corrective Measures	160	540

NET INFORMATION COLLECTION BURDEN HOURS BY MINE SIZE—Continued

Task	Small	Large
62.190 Notification of Results	1,935	4,365
62.200 Access to Records	500	755
62.210 Transfer of Records	185	50
Total (discrepancies due to rounding)	18,825	(33,805)

Metal/nonmetal mines would incur 75,080 burden hours under the proposal and coal mines would incur 55,675 hours. For metal/nonmetal mines, the existing burden is 1,325 hours as defined and calculated under PRA 95; this makes the net burden for metal/nonmetal mines 73,755 hours. For coal mines, the net burden is 88,740 fewer hours than the existing burden as calculated under PRA 95. The proposal would result in a net decrease of 14,985 burden hours associated with information collection from that associated with the current requirements. It should be noted that the existing burden hours are currently approved in three separate paperwork packages and reflect burden hours calculated under the provisions of the 1980 Paperwork Reduction Act (PRA 80). MSHA is in the process of updating and combining these three packages. The Agency's official paperwork submission accompanying this proposal includes a chart comparing the existing burden hours under PRA 80, the existing burden hours under PRA 95, and the proposed burden hours under PRA 95.

Additional detail is presented in the charts that follow. These charts provide annual and annualized paperwork burden hours as measured by PRA 95. Burden hours for tasks which predominantly would occur in the first year only, dose determination and notification, are presented in annualized form. Proposed §§ 62.140(b)(3), 62.250 (b) and (c), 62.160 (a)(1) and (a)(3), 62.170 (b) and (c), 62.180(a), 62.190 (a)(1) and (a)(2), 62.200(b) and 62.210(a) are anticipated to require the paperwork burden of the mine operator providing instructions to the clerical worker. This burden is included in the total hours per regulation column.

Regulation	Number of respondents	Hours per response	Number of responses	Number of responses per respondent	Total hours per regulation	Maintenance and operating costs	Annualized capital costs
Small Metal and Nonmetal Mines							
62.120(f)(1)	6,218	2.00	n/a	n/a	3,530	$597,922	$1,315,604
62.120(f)(2)	6,218	0.08	35,300	6	490	1,253	0
62.120(c)(1)	18	1.75	18	1	25	0	0
62.120(c)(1)	18	0.05	103	5	5	26	0
62.130(b)	6,218	0.05	35,300	6	2,385	8,825	0
62.140(b)(1)	2,430	1.00	13,779	6	13,780	413,370	0
62.140(b)(3)	2,430	0.08	13,779	6	1,345	3,445	0
62.150(b)	2,430	0.08	13,779	6	1,345	3,445	0
62.150(c)	2,430	0.05	13,779	6	930	3,445	0
62.160(b)(1)	300	1.50	1,720	6	2,585	86,000	0
62.160(a)(1)	2,430	0.08	13,779	6	1,345	3,445	0
62.160(a)(3)	2,430	0.05	13,779	6	930	3,445	0
62.170(a)	15	2.00	90	6	180	22,500	0
62.170(b)	15	0.08	90	6	9	23	0
62.170(c)	15	0.08	90	6	9	23	0
62.180(a)	320	0.05	1,808	6	90	452	0
62.180(c)	15	2.00	15	1	20	0	0
62.190(a)(1)	2,430	0.08	13,779	6	1,345	3,445	0
62.190(a)(2)	320	0.08	1,812	6	180	1,461	0
62.200(b)	60	0.10	4,374	12	440	1,094	0
62.210(a)	361	0.25	361	1	125	0	0
Monitoring (existing)	1,705	2.00	n/a	n/a	970	163,953	360,744
Large Metal and Nonmetal Mines							
62.120(f)(1)	1,023	5.00	n/a	n/a	1,455	$98,372	$216,446
62.120(f)(2)	1,023	0.08	75,700	75	875	2,687	0
62.120(c)(1)	40	2.25	40	1	90	0	0
62.120(c)(1)	40	0.05	2,972	70	150	726	0
62.130(b)	1,023	0.05	75,700	75	3,885	18,925	0
62.140(b)(1)	301	1.00	22,328	75	22,330	669,840	0
62.140(b)(3)	301	0.08	22,328	75	1,820	5,582	0
62.150(b)	301	0.08	22,328	75	1,820	5,582	0
62.150(c)	301	0.05	22,328	75	1,150	5,582	0
62.160(b)(1)	40	1.50	2,790	70	4,185	139,500	0
62.160(a)(1)	301	0.08	22,328	70	1,820	5,582	0
62.160(a)(3)	301	0.05	22,328	70	1,150	5,582	0
62.170(a)	2	2.00	174	85	344	43,500	0
62.170(b)	2	0.08	174	85	15	44	0

Regulation	Number of respondents	Hours per response	Number of responses	Number of responses per respondent	Total hours per regulation	Maintenance and operating costs	Annualized capital costs
62.170(c)	2	0.08	174	85	15	44	0
62.180(a)	50	0.05	3,490	70	175	873	0
62.180(c)	35	2.25	35	1	80	0	0
62.190(a)(1)	301	0.08	22,328	75	1,820	5,582	0
62.190(a)(2)	40	0.08	2,965	70	240	742	0
62.200(b)	10	0.10	5,601	560	560	1,400	0
62.210(a)	10	1.00	10	1	10	0	0
Monitoring (existing)	250	5.00	n/a	n/a	355	24,040	52,895
Small Coal Mines							
62.120(f)(1)	1,255	2.00	n/a	n/a	715	$120,681	$265,533
62.120(f)(2)	1,255	0.08	9,020	7	120	320	0
62.120(c)(1)	20	1.75	20	1	30	0	0
62.120(c)(1)	20	0.05	173	7	10	43	0
62.130(b)	1,255	0.05	9,020	7	580	2,255	0
62.140(b)(1)	536	1.00	3,851	7	3,851	115,530	0
62.140(b)(3)	536	0.08	3,851	7	360	963	0
62.150(b)	536	0.08	3,851	7	360	963	0
62.150(c)	536	0.05	3,851	7	250	963	0
62.160(b)(1)	70	1.50	480	7	720	24,050	0
62.160(a)(1)	536	0.08	3,851	7	360	1,926	0
62.160(a)(3)	536	0.05	3,851	7	250	0	0
62.170(a)	4	2.00	24	6	48	6,000	0
62.170(b)	4	0.08	24	6	2	6	0
62.170(c)	4	0.08	24	6	2	6	0
62.180(a)	60	0.05	507	8	25	127	0
62.180(c)	20	1.25	20	1	25	0	0
62.190(a)(1)	536	0.05	3,851	7	360	963	0
62.190(a)(2)	73	0.05	505	7	50	126	0
62.200(b)	15	0.10	610	40	60	131	0
62.210(a)	160	0.25	160	1	60	0	0
Monitoring (existing)	1,762	0.50	25,334	14	12,670	357,492	169,434
Audiograms (existing)	35	1.00	74	2	70	2,220	0
Supplemental Noise Survey	420	0.05	840	2	(120)	0	0
Supplemental Noise Survey	420	0.25	5,980	14	(2,990)	0	0
Written HCP	90	6.00	90	1	(535)	0	0
Calibration Reports	1,762	0.25	1,762	1	(440)	0	0
Survey Reports	1,762	0.05	1,762	1	(90)	0	0
Monitoring Records	1,762	0.10	25,334	14	(2,530)	0	0
Survey Certificates	1,762	0.05	1,762	1	(90)	0	0
Large Coal Mines							
62.120(f)(1)	890	5.00	n/a	n/a	1,265	$85,582	$188,306
62.120(f)(2)	890	0.08	66,667	75	770	2,367	0
62.120(c)(1)	45	2.25	45	1	75	1,309	0
62.120(c)(1)	45	0.05	5,237	75	290	0	0
62.130(b)	890	0.05	66,667	75	3,420	16,667	0
62.140(b)(1)	334	1.00	25,007	75	25,007	750,210	0
62.140(b)(3)	334	0.08	25,007	75	2,035	6,252	0
62.150(b)	334	0.08	25,007	75	2,035	6,252	0
62.150(c)	334	0.05	25,007	75	1,285	6,252	0
62.160(b)(1)	40	1.50	3,126	80	4,690	156,300	0
62.160(a)(1)	334	0.08	25,007	80	2,035	6,252	0
62.160(a)(3)	334	0.05	25,007	80	1,285	6,252	0
62.170(a)	3	2.00	196	65	392	49,000	0
62.170(b)	3	0.08	196	65	16	49	0
62.170(c)	3	0.08	196	65	16	49	0
62.180(a)	400	0.05	3,908	35	195	977	0
62.180(c)	40	2.25	40	1	90	0	0
62.190(a)(1)	334	0.05	25,007	75	2,035	6,252	0
62.190(a)(2)	40	0.05	3,322	80	270	831	0
62.200(b)	10	0.10	1,934	194	195	484	0
62.210(c)	40	1.00	40	1	40	0	0
Monitoring existing	1,134	0.50	169,424	150	84,710	230,077	239,932
Audiograms (existing)	6	1.00	542	90	540	0	0

Regulation	Number of respondents	Hours per response	Number of responses	Number of responses per respondent	Total hours per regulation	Maintenance and operating costs	Annualized capital costs
Supplemental Noise Survey	293	0.05	43,712	150	(21,860)	0	0
Supplemental Noise Survey	293	0.25	293	1	(40)	0	0
Written HCP	67	6.00	67	1	(405)	0	0
Calibration Reports	1,134	0.25	1,134	1	(280)	0	0
Survey Reports	1,134	0.05	1,134	1	(60)	0	0
Monitoring Records	1,134	0.10	169,424	150	(16,940)	0	0
Survey Certificates	1,134	0.05	1,134	1	(60)	0	0

(D) Regulatory Flexibility Act

In accordance with § 605 of the Regulatory Flexibility Act (RFA), the Mine Safety and Health Administration certifies that the noise proposal does not have a significant economic impact on a substantial number of small entities. MSHA considers small mines to be mines with fewer than 20 employees. However, for the purposes of the RFA and this certification, MSHA has also evaluated the impact of the proposal on mines up to and including those with fewer than 500 employees. No small governmental jurisdictions or nonprofit organizations are affected. Under the Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments to the RFA, MSHA must include in the proposal a factual basis for this certification. The Agency also must publish the regulatory flexibility certification statement in the Federal Register, along with the factual basis, followed by an opportunity for comment by the public. The Agency has consulted with the Small Business Administration (SBA) Office of Advocacy and believes that this analysis provides a reasonable basis for the certification in this case.

MSHA specifically solicits comment on the Agency's determination in this regulatory flexibility certification statement, including cost data and data sources. To facilitate the public participation in the rulemaking process, MSHA will mail a copy of the proposed rule, including the preamble and regulatory flexibility certification statement, to every mine operator.

Factual Basis for Certification

The Agency has used a quantitative approach in concluding that the proposed rule does not have a significant impact on a substantial number of small entities. The Agency performed its analysis separately for two groups of mines: the coal mining sector as a whole, and the metal and nonmetal mining sector as a whole. Based on a review of available sources of public data on the mining industry, the Agency believes that a quantitative analysis of the impacts on various mining subsectors (i.e., beyond the 4-digit SIC level) may not be feasible. The Agency requests comments, however, on whether there are special circumstances that warrant separate quantification of the impact of this proposal on any mining subsector, and information on how it might readily obtain the data necessary to conduct such a quantitative analysis. The Agency is fully cognizant of the diversity of mining operations in each sector, and has applied that knowledge as it developed the proposal.

Under the RFA, MSHA must use the SBA definition for a small mine of 500 employees or fewer or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the Federal Register for notice and comment. The alternative definition could be the Agency's traditional definition of ''fewer than 20 miners,'' or some other definition. As reflected in the certification, MSHA analyzed the costs of this proposal for small and large mines using both the traditional Agency definition, and SBA's definition, as required by RFA, of a small mine. The Agency compared the costs of the proposal for small mines in each sector to the revenues and profits for each sector for every size category analyzed. In each case, the results indicated that the costs as a percent of revenue are less than 1%. Further, the costs do not appear to have any appreciable impact on profits.

The following table summarizes the results of this analysis for mines which employ fewer than 500 miners, at various sizes.

SMALL MINES: COSTS COMPARED TO REVENUES AND PROFITS

	Estimated costs (thous.)	Estimated revenue (millions)	Average profit as % of revenue	Total estimated profits (millions)	Estimated cost per small mine	Cost as % of revenue	Cost as % of profit
Coal Mines:							
Small <20	($45)	$855	3.82	$33	($26)	−0.01	−0.14
Large >=20	332	19,094	3.82	729	293	0.00	0.05
Small <50	586	3,542	3.82	135	237	0.02	0.43
Large >=50	(300)	16,408	3.82	627	(709)	0.00	−0.05
Small <100	832	6,061	3.82	232	309	0.01	0.36
Large >=100	(545)	13,888	3.82	531	(2,684)	0.00	−0.10
Small <250	677	12,624	3.82	482	240	0.01	0.14
Large >=250	(391)	7,326	3.82	280	(5,140)	−0.01	−0.14
Small <500	382	19,117	3.82	730	132	0.00	0.05
Large >=500	(95)	831	3.82	32	(8,660)	−0.01	-0.30
M/NM Mines:							
Small <20	4,437	11,929	4.55	543	479	0.04	0.82
Large >=20	3,600	26,071	4.55	1,186	2,324	0.01	0.30
Small <50	5,731	18,814	4.55	856	557	0.03	0.67
Large >=50	2,306	19,186	4.55	873	4,359	0.01	0.26

SMALL MINES: COSTS COMPARED TO REVENUES AND PROFITS—Continued

	Estimated costs (thous.)	Estimated revenue (millions)	Average profit as % of revenue	Total estimated profits (millions)	Estimated cost per small mine	Cost as % of revenue	Cost as % of profit
Small <100	6,323	23,047	4.55	1,049	599	0.03	0.60
Large >=100	1,714	14,953	4.55	680	6,418	0.01	0.25
Small <250	7,037	29,558	4.55	1,345	655	0.02	0.52
Large >=250	1,000	8,442	4.55	384	14,492	0.01	0.26
Small <500	7,571	32,134	4.55	1,462	702	0.02	0.52
Large >=500	466	5,866	4.55	267	17,249	0.01	0.17

In determining revenues for coal mines, MSHA multiplied coal production data (in tons) for mines in specific size categories (reported to MSHA quarterly) by the average price per ton (from the Department of Energy, Energy Information Administration, *Annual Energy Review 1995*). For metal and nonmetal mines, the Agency estimated revenues for specific mine size categories as the proportionate share of these mines' contribution to the Gross National Product (from the Department of the Interior, former Bureau of Mines, *Mineral Commodity Summaries 1996*). Average profit as a percent of revenue for both coal mines and metal and nonmetal mines comes from Dun & Bradstreet Information Services, *Industry Norms & Key Business Ratios*, 1993–94.

Based on the information in the Agency's preliminary Regulatory Impact Analysis (summarized in the ''costs'' table in the Question and Answer section of this preamble), the costs of the proposal for all metal and nonmetal mines with fewer than 20 employees would be $4.6 million; the average cost of the proposal for a small metal and nonmetal mine with fewer than 20 employees is about $500. The average cost of the proposal for a small metal and nonmetal mine with fewer than 500 employees is about $700. For small coal mines with fewer than 20 employees, the proposal is estimated to result in a small net savings of about $30. This savings results from the proposed elimination of a substantial paperwork burden that now exists in the coal mine sector for monitoring miners' noise exposures. For small coal mines with fewer than 500 employees, the proposal is estimated to result in a small net cost of about $130.

Regulatory Alternatives Rejected

The limited impacts on small mines, regardless of size definition, reflect decisions by MSHA not to propose more costly regulatory alternatives. In considering regulatory alternatives for small mines, MSHA must observe the requirements of its authorizing statute. Section 101(a)(6)(A) of the Mine Act requires the Secretary to set standards which most adequately assure, on the basis of the best available evidence, that no miner will suffer material impairment of health over his/her working lifetime. In addition, the Mine Act requires that the Secretary, when promulgating mandatory standards pertaining to toxic materials or harmful physical agents, consider other factors, such as the latest scientific data in the field, the feasibility of the standard and experience gained under the Act and other health and safety laws. Thus, the Mine Act requires that the Secretary, in promulgating a standard, attain the highest degree of health and safety protection for the miner, based on the ''best available evidence,'' with feasibility as a consideration.

As a result of this statutory requirement, MSHA seriously considered two alternatives that would have significantly increased costs for small mine operators—lowering the PEL to a TWA_8 of 85 dBA, and lowering the exchange rate to 3 dB. In both cases, the scientific evidence in favor of these approaches was strong. But in both cases, for the purpose of this proposal, MSHA has concluded that it may not be feasible for the mining industry to accomplish these more protective approaches. The impact of these approaches on small mine operators was an important consideration in this regard. Part IV of this preamble contains a full discussion of MSHA's preliminary conclusions about these alternatives. The public is invited to propose other alternatives for consideration.

Paperwork Impact

In accordance with the Regulatory Flexibility Act and the Paperwork Reduction Act of 1995 (PRA 95), MSHA has analyzed the paperwork burden for small mines. While the proposal results in a net paperwork burden decrease for all mines, it results in an increase in paperwork hours. For mines with fewer than 20 miners the proposal would result in an increase of about 18,800 hours, and with fewer than 500 miners it would result in a decrease of about 14,985 hours. The bulk of the new hours (greater than 80%) is derived from the audiometric testing program and procedures. While mines with fewer than 20 employees in the coal and metal and nonmetal sectors will have extra burden hours associated with new requirements, the net burden hours for small coal mines are actually reduced, because the proposal would eliminate current requirements for biannual noise surveys and other miscellaneous reports and surveys in that sector. However, at this size level, there are more metal and nonmetal mines than there are coal mines. Thus, at this size level, the proposal would result in a net gain in paperwork burdens.

As required by PRA 95, MSHA has included in its paperwork burden estimates the time needed to perform tasks associated with information collection. For example, the proposed rule requires a mine operator to notify a miner if the miner's noise exposure exceeds the action level. In order to determine if notification is necessary, the mine operator must perform dose determination monitoring. Although completion of the notification would take 0.05 hour on average, the time for dose determination must be included in the burden estimate according to the new paperwork law. The proposal's average paperwork burden per small metal and nonmetal mine is 4.8 hours and per small coal mine is 6 hours per year.

Other Relevant Matters

In accordance with the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA is taking actions to minimize the compliance burden on small mines. As discussed in the ''Questions and Answers'' section of this preamble, MSHA is committed to writing the final rule in plain English, so that it can be easily understood by small mine operators. The proposed effective date of the rule would be a year after final promulgation, to provide adequate time for small mines to achieve compliance. Also, as stated

previously, MSHA will mail a copy of the proposed rule to every mine operator which primarily benefits small mine operators. The Agency has committed itself to issuance of a compliance guide for all mines, and has invited comment on whether compliance workshops or other such approaches would be valuable.

MSHA is considering whether to continue to use ''fewer than 20 miners'' as the definition of a small mine for purposes of the Regulatory Flexibility Act (RFA). For this rulemaking's Regulatory Flexibility Analysis, the Agency is using fewer than 20 employees, in addition to the SBA's definition of fewer than 500, as required by the RFA. MSHA presently is consulting with the SBA Office of the Chief Counsel for Advocacy in order to determine an appropriate definition to propose to the public for comment in the future. For purposes of this proposed rule on noise, MSHA has continued its past practice of using ''under 20 miners'' as the appropriate point of reference, in addition to SBA's definition. Reviewers will note that the paperwork and cost discussions continue to refer to the impacts on ''small'' mines with fewer than 20 employees. The Agency has not established a definition of ''small entity'' for purposes of the final rule. Based on this analysis, MSHA concludes that whatever definition of ''small entity'' is eventually selected, the proposed noise rule does not have a significant economic impact on a substantial number of small entities.

(E) Unfunded Mandates Act

MSHA has determined that, for purposes of § 202 of the Unfunded Mandates Reform Act of 1995, this proposal does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million. Moreover, the Agency has determined that for purposes of § 203 of that Act, this proposed rule does not significantly or uniquely affect small governments.

Background

The Unfunded Mandates Reform Act was enacted in 1995. While much of the Act is designed to assist the Congress in determining whether its actions will impose costly new mandates on State, local, and tribal governments, the Act also includes requirements to assist Federal agencies to make this same determination with respect to regulatory actions.

Analysis

Based on the analysis in the Agency's preliminary Regulatory Impact Statement (summarized in the ''cost'' table in the Questions and Answers section of this preamble), the cost of this proposed rule for the entire mining industry is less than $10 million. Accordingly, there is no need for further analysis under § 202 of the Unfunded Mandates Reform Act.

MSHA has concluded that small governmental entities are not significantly or uniquely impacted by the proposed regulation. The proposed rule will impact approximately 14,000 coal and metal and nonmetal mining operations; however, increased costs would be incurred only by those operations where noise exposures exceed the allowable limits. MSHA estimates that approximately 350 sand and gravel or crushed stone operations are run by state, local, or tribal governments and would be impacted by this rule. MSHA anticipates that these entities would be able to reduce noise exposure below the PEL via engineering and administrative controls and would not need to use a Hearing Conservation Program, thereby minimizing their costs. MSHA estimates that increased costs for these entities would be about $500 per year which would be partially offset by reduced worker compensation costs. Other tangible benefits include reduction in the number of cases of hearing impairment in these entities.

When MSHA issues the proposed rule, the Agency will affirmatively seek input of any state, local, and tribal government which may be affected by the noise rulemaking. This would include state and local governmental entities who operate sand and gravel mines in the construction and repair of highways and roads. MSHA will mail a copy of the proposed rule to approximately 350 such entities.

Following is MSHA's state-by-state listing of sand and gravel mines owned or operated by state or local governments.

The Agency welcomes any corrections.

STATE/COUNTY OWNED/OPERATED SAND AND GRAVEL OPERATIONS

[As of 12/08/95]

State	State owned	County owned	City owned
ARIZONA	2	2	
ARKANSAS		5	
CALIFORNIA		4	
COLORADO	4	27	
IDAHO		13	
ILLINOIS		2	
INDIANA		5	
IOWA		2	
KANSAS		2	
MAINE	5		
MARYLAND			6
MICHIGAN		8	
MISSISSIPPI		5	
MISSOURI		8	
MONTANA	8	34	
NEBRASKA		2	
NEVADA		1	
NEW MEXICO		4	
NEW YORK		15	95
OKLAHOMA		2	
OREGON		11	
PENNSYLVANIA			1
SOUTH CAROLINA		1	
SOUTH DAKOTA		15	
TENNESSEE		3	
TEXAS		6	
UTAH	1	5	
VERMONT			11
WASHINGTON		9	
WISCONSIN		20	1
WYOMING		1	
Total 346	20	212	114

(F) Rulemaking History

MSHA's noise standards in metal and nonmetal mines (30 CFR 56/57.5050) and in coal mines (§§ 70.500 through 70.511, and §§ 71.800 through 71.805) were first published in the early 1970's. These standards, derived from the Walsh-Healey Public Contracts Act occupational noise standard, adopted a TWA_8 PEL of 90 dBA and a 5-dB exchange rate.

Because of the differences between the standards for coal mines and those for metal and nonmetal mines, members of the mining community with operations in coal and metal and nonmetal requested that MSHA revise its standards to provide one set of noise standards covering all mines. Other mine operators with facilities regulated by both MSHA and OSHA suggested that MSHA promulgate noise standards which are generally consistent with OSHA standards. The United Mine Workers also requested that the Agency reconsider the existing standards to address several asserted deficiencies.

Based on these comments and the incidence of noise-induced hearing loss (NIHL) among miners, the Agency published an Advanced Notice of Proposed Rulemaking (ANPRM) on December 4, 1989 (54 FR 50209). In this

ANPRM, the Agency solicited information for revision of the noise standards for coal and metal and nonmetal mines. The Agency received numerous comments which are reflected in this proposal from mine operators, trade associations, labor groups, equipment manufacturers, and other interested parties.

A draft of the proposed rule and accompanying analyses was sent to the Office of Management and Budget and to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with law and Executive Order. Consultations with these two agencies were completed within 90 days. No substantive changes to the proposal were recommended during these consultations, nor were any made by MSHA. The Agency did receive valuable advice on the presentation of its initial Regulatory Flexibility Analysis and on displaying the results of its paperwork analysis, so as to better highlight the Agency's compliance with PRA 95 and SBREFA.

In the Spring of 1996, the National Institute for Occupational Safety and Health (NIOSH) released for peer review a draft criteria document for occupational noise exposure to update the one issued in 1972. As indicated previously (see response to Question 6 in ''Questions and Answers''), MSHA has determined that it would not be appropriate to delay publication of this proposed rule to await the issuance of the final NIOSH criteria document.

A summary of the draft criteria document, prepared by NIOSH, is reprinted here verbatim for those in the mining community who have not otherwise received copies. This summary should provide ample notice of the position NIOSH may be taking in a new criteria document.

April 16, 1996—(NIOSH) Summary of Recommendations, Criteria for a Recommended Standard: Occupational Noise Exposure

1. Hearing Impairment and Risk Assessment

The protection goal incorporated in most definitions of hearing impairment has been to preserve hearing at critical audiometric frequencies for speech discrimination. Hearing impairment as defined by NIOSH in 1972 was an average of the hearing threshold levels (HTLs) at the audiometric frequencies of 1000, 2000 and 3000 Hertz (Hz) that exceeded 25 decibels (dB). The 4000-Hz audiometric frequency has been recognized as being not only sensitive to noise but also extremely important for hearing and understanding speech in unfavorable or noisy listening conditions. Because listening conditions are not always ideal in everyday life, and on the basis of the American Speech Language-Hearing Association Task Force's proposal made in 1981, NIOSH has modified its definition of hearing impairment to include the 4000-Hz audiometric frequency for use in assessing the risk of occupational NIHL. Hence, with this modification, NIOSH defines material hearing impairment as an average of the HTLs at 1000, 2000, 3000 and 4000 Hz that exceeds 25 dB.

Because of the prolific occupational use of hearing protectors since the early 1980's, new data that can be used to determine dose-response relationships for NIHL in U.S. workers are not known to exist. NIOSH recently conducted a risk assessment on occupational noise-induced hearing loss (NIHL) using the original definition of hearing impairment and the hearing data from the 1972 criteria document. Although the risk model used in the new assessment is different from the risk model used in 1972, the excess risk estimates derived in the new assessment are comparable to those published in 1972. The excess risk at age 60 from a 40-year occupational exposure to an average daily noise level of 85 decibels, a weighted network (dBA) is approximately 14%, versus the 16% published in 1972. With the new NIOSH definition of hearing impairment, and based on the new risk assessment, the excess risk at the 85-dBA REL is 8%. Thus, the new risk assessment did not revise the excess risk at the 85-dBA REL upward, and although there is still evidence of excess risk at exposure levels below 85 dBA, NIOSH is recommending that the current REL be retained.

2. Exchange Rate

Health effect outcomes are dependent on exposure level and duration. This relationship is called the ''exchange rate,'' which is the increment in decibels that requires the halving of exposure time. The most commonly used exchange rates are 3 dB and 5 dB. A 3-dB exchange rate requires that noise exposure time be halved for each 3-dB increase in noise level; likewise, a 5-dB exchange rate requires that exposure time be halved for each 5-dB increase. NIOSH now recommends the 3-dB exchange rate. The 1972 criteria document recommended the 5-dB exchange rate, which is what OSHA and MSHA currently enforce. There is more scientific, although not unequivocal, support for the 3-dB exchange rate than for the 5-dB exchange rate, which is not based on scientific data and is derived from a series of over-simplifications of the original criteria. The 3-dB exchange rate is recommended by the International Organization for Standardization (ISO), and it is now enforced by most European countries and some provinces of Canada. In the U.S., there have been recent ''converts'' to the 3-dB exchange rate: the U.S. Air Force in 1993; and the American Conference of Governmental Industrial Hygienists and the U.S. Army in 1994.

3. Ceiling Limit

In the 1972 criteria document, NIOSH recommended a ceiling limit of 115 dBA, which is retained in this draft criteria document. Exposures to noise levels greater than 115 dBA would not be permitted regardless of the duration of the exposure. This ceiling limit is based on the assumption that above a critical intensity level the ear's response to energy no longer has a relation to the duration of the exposure, but is only related to the intensity of the exposure. Recent research with animals indicates that the critical level is between 115 and 120 dBA. Below this critical level, the amount of hearing loss is related to the intensity and duration of exposure; but above this critical level, the relationship does not hold. For a noise standard to be protective, there should be a noise ceiling level above which no unprotected exposure is permitted. Given the recent data, 115 dBA is a reasonable ceiling limit beyond which no unprotected exposure should be permitted.

4. Hearing Protectors

One consideration for selecting a hearing protector would be its noise reduction capabilities, which are expressed in terms of a noise reduction rating (NRR). The NRR is a single-number, laboratory-derived rating required by the Environmental Protection Agency (EPA) to be shown on the label of each hearing protector sold in the U.S. In the late 1970's and early 1980's, two NIOSH field studies found that insert-type hearing protectors in the field provided less than one-half the attenuation measured in the laboratory, and since the 1970's, 22 additional studies of ''real-world'' attenuation with a variety of hearing protectors have shown similar results.

In calculating the noise exposure to the wearer of a hearing protector, OSHA has implemented the practice of derating the NRR by one-half for all types of hearing protectors. In the 1972 criteria document, NIOSH recommended the use of the equivalent full NRR value, but now it recommends derating the NRR by 25%, 50% and 70% for earmuffs, formable earplugs and all other earplugs, respectively. This derating scheme is not perfect and is intended only as an interim recommendation. If the testing and labeling requirements for hearing protectors are to be changed, EPA must initiate the rulemaking procedures because it has the statutory authority. Given that the funding for EPA's Office of Noise Abatement and Control was eliminated in the early 1980's, this change is unlikely to occur in the near future.

The draft also recommends that hearing protectors be worn for any noise exposure over 85 dBA, regardless of exposure duration. This measure is simplistic but extremely protective because its implementation does not require the calculation of time-weighted-average (TWA) exposures. This ''hard-hat'' approach, as opposed to predicating the requirement on TWA exposures, is a departure from what was recommended in 1972. It appears to be a prudent policy, which the U.S. Army has been using for years, but there are no data in the document to support this recommendation.

5. Exposure Level Requiring a Hearing Loss Prevention Program

In this draft document, the requirement for a hearing loss prevention program (HLPP), which includes audiometry, worker education, etc., is triggered by the exposure level of 82 dBA, 8-hour TWA (i.e., ½ of the REL). This level is essentially an ''action level''—a concept developed in the mid-

1970's to address interday exposure variability and later adopted in the Standards Completion Program as ½ of an exposure limit. In the 1972 criteria document, which preceded the Standards Completion Program, the requirement for a HLPP began at the REL of 85 dBA, 8-hour TWA.

6. Types and Frequency of Audiometric Examinations

In this draft document, the recommended types (i.e., baseline, monitoring, confirmation and exit audiograms) and frequency of audiometric examinations are different from those in the 1972 criteria document. The new recommendations are in line with current practices in HLPPs.

7. Significant Threshold Shift

Significant threshold shift is a shift in hearing threshold levels, outside the range of audiometric testing variability (±5 dB), that warrants follow-up action to prevent further hearing loss. NIOSH recommends an improved significant threshold shift criterion, which is an increase of 15 dB in hearing threshold at 500, 1000, 2000, 3000, 4000, or 6000 Hz that is repeated for the same ear and frequency in back-to-back tests. This criterion is different from that in the 1972 criteria document, and has been selected from among several criteria on the bases of their relative sensitivity and specificity. The new criterion has the advantages of a high identification rate (identifying those workers whose hearing thresholds have shifted toward higher levels) and a low false-positive rate.

8. Age Correction on Audiogram

NIOSH recommends that age correction not be applied to an individual's audiogram for the calculation of a significant threshold shift. Although many people experience some decrease in hearing sensitivity with age, age correction cannot be accurately applied to audiograms in determining an individual's significant threshold shift because the data on age-related hearing losses describe only the statistical distributions in populations. Thus, the median hearing loss attributable to presbycusis for a given age group will not be generalizable to the presbycusis experienced by an individual in that age group. The argument for age correction has been that the employer should not be penalized for hearing losses due to ageing. In the 1972 criteria document, NIOSH recommended age correction but did not provide a rationale for it.

9. Evaluation of Program Effectiveness

To assess the effectiveness of a HLPP, it is necessary to have an evaluation method that can monitor trends in the population of workers enrolled in the program and thus indicate program effectiveness before many individual shifts occur. In general, NIOSH suggests that the success of a smaller HLPP should be judged by the audiometric results of individual workers. An overall program evaluation becomes critical when the number of workers grows so large that one cannot simply look at each worker's audiometric results and get an adequate picture of the program's efficacy. At the present time, there is not one generally accepted method for the overall evaluation of HLPPs. NIOSH recommends a significant threshold shift incidence rate of 5% or less as evidence of an effective HLPP. This method is currently the simplest procedure available, and has no more disadvantages than other potential evaluation methods.

10. American National Standards Institute (ANSI)

In the 1972 criteria document, NIOSH recommended several ANSI standards for quality assurance in audiometry and in noise measurements. Since then, these standards have been updated several times. In the draft document, NIOSH recommends that these standards be superseded with the latest versions as they become available. The major advantage for this ''blanket'' endorsement is that the revised criteria document will stay current with changing technology.

II. The Risks to Miners

This part of the preamble sets out the evidence collected by MSHA to date with respect to whether there is a continuing risk to miners of exposure to harmful levels of noise, despite existing standards, and evidence on the level of that risk. Based upon this information, MSHA has concluded that workplace noise exposure does continue to pose a significant risk of material impairment of health and functional capacity to miners.

The data presented in this part provide a profile of the mining population at risk at different levels of workplace noise exposure. The noise exposure limitations being proposed by the Agency, described in part III, would not eliminate the risk of material impairment—although they would cut the present risk by two-thirds. (The feasibility of further reducing risk is discussed in part IV. The data in this part II were utilized by the Agency to assist it in determining the cost to industry of reducing risk to various levels, and thus in reaching the Agency's conclusions about economic feasibility.)

There are a number of technical terms used throughout this section. Reviewers not familiar with noise terminology should refer to the discussion in part III of this preamble concerning proposed § 62.110, *Definitions.*

All the studies discussed and cited in this part are included in the references listed in part V, along with similar studies reviewed by the Agency. All constitute part of the Agency's rulemaking record.

The Agency is interested in receiving additional data with respect to the risks of noise exposure.

Defining the Problem

Noise is one of the most pervasive health hazards in mining. Exposure to hazardous sound levels results in the development of occupational noise-induced hearing loss (NIHL), a serious physical, psychological, and social problem. NIHL can be distinguished from aging and medical factors, diagnosed, and prevented.

The National Institute for Occupational Safety and Health (NIOSH) has identified the ten leading work-related diseases and injuries in the publication, ''Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries, Part 2.'' According to NIOSH, NIHL is among these ''top ten'' diseases and injuries.

For many years, the risk of acquiring an NIHL was accepted as an inevitable consequence associated with mining occupations. Miners use mechanized equipment and work under conditions that often expose them to hazardous sound levels. But MSHA standards, OSHA standards, military standards, and others around the world have been established in recognition of the controllability of this risk. Quieter equipment, isolation of workers from noise sources, and limiting worker exposure times are among the many well accepted methods now used to reduce the costly incidence of NIHL.

NIHL can be temporary or permanent depending on the intensity and duration of the noise exposure. Temporary hearing loss results from short term exposures to noise, with normal hearing returning after a period of rest. Generally, prolonged exposure to noise over a period of several years causes permanent damage to the auditory nerve: the higher the sound level the more rapid the loss. The loss may be so gradual, however, that a person may not realize that he or she is becoming impaired until a substantial amount of hearing acuity is lost.

Damage to the inner ear hair cells and auditory nerve makes it difficult to hear as well as understand speech. This damage is irreversible. Although people with NIHL sometimes can benefit from the use of a hearing aid, the aid can never ''correct'' a hearing loss the way eyeglasses usually can correct impaired vision. That is because hearing aids primarily amplify sound without making it clearer or less distorted. Also, they amplify the unwanted noise as well as the wanted speech signals.

People with significant NIHL have difficulty with the perception of speech. They are often frustrated by missing information that is vital for social or vocational functioning, and can produce workplace safety hazards. Also, people around them need to speak louder, and more clearly to be understood. In addition, background noise has a much more disruptive effect on hearing-

impaired individuals because they are less able to differentiate between the wanted signal and the unwanted background noise.

There is a wealth of information on the relationship between noise exposure and its auditory (hearing loss) and non-auditory (physiological and psychosocial) effects.

Numerous studies are available which describe the effects of noise on hearing as a function of sound level and duration. Dose-response relationships have been well established for noise equal to or greater than average sound levels of 85 dBA (see, e.g., Lempert and Henderson, 1973).

Although the non-auditory effects of noise are more difficult to identify, document, and quantify than is hearing loss, recent laboratory and field studies have implicated noise as a causative factor in cardiovascular problems (Tomei et al., 1992 and Lercher et al., 1993) and other illnesses such as hypertension (Talbott, 1990, and Jansen, 1991). Decreasing the noise exposure from greater than 85 dBA to less than 85 dBA significantly improved both the psychological and physiological stress reactions (Melamed and Bruhis, 1996). However, these studies of health effects have not been conclusive.

In Earlog 6, Berger (1981) discussed the adverse non-auditory effects of noise exposure. He suggests that effective hearing conservation programs may not only prevent NIHL, but also improve general employee health and productivity.

Schmidt, et al. (1980) studied injury rates among workers in a North Carolina cotton manufacturer exposed to noise ranging from 92 to 96 dBA. During the ten year time period studied, a significant reduction in injury rates was observed for those workers who were in an HCP, compared to those who were not.

Safety risks can specifically be created because workers harmed by NIHL can no longer hear safety signals. Most people with an NIHL have reduced hearing acuity at the higher frequencies and lose their ability to distinguish consonants on which the intelligibility of speech depends. For example, they would have difficulty in distinguishing between ''fish'' and ''fist.''

Although MSHA recognizes that non-auditory effects of noise can be significant, they are difficult to quantify; by contrast, the auditory risks have a well-established dose-response relationship, and thus provide a solid foundation on which to base regulatory action. The Agency believes that reducing sound levels and protecting miners from hazardous noise exposures will also reduce the non-auditory effects of noise.

Definition of Material Impairment

Section 101(a)(6) of the Mine Safety and Health Act provides that in setting standards to protect workers from the risks of harmful physical agents, the Secretary ''shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life.''

While the material impairment to which the law refers is material impairment of ''health or functional capacity'', the term material impairment in the literature on noise risk generally refers to a level of harm which is considered handicapping or even disabling—a 25 dB hearing level (deviation from audiometric zero)—so this had to be the basis of MSHA's estimates of the risk of material impairment. The scientific community has actually utilized over time at least three different definitions of what constitutes ''material impairment'' in the case of NIHL. All use a 25 dB hearing level, but each definition has used a different set of frequencies. Of these, the Agency believes the one developed in 1972 by NIOSH and subsequently used by OSHA is most appropriate of the three for evaluating the risks faced by miners of developing disabling NIHL. The OSHA/NIOSH definition of material impairment of hearing is a 25 dB hearing level averaged over 1000, 2000, and 3000 Hertz (Hz) in either ear. As noted in the History section of this preamble, the Agency is aware that NIOSH is currently considering a new definition that also includes hearing loss at 4000 Hz; but until such an approach is peer reviewed and approved, MSHA believes it is not an appropriate basis for evaluating risk.

Background

Ideally, a definition of material impairment based solely upon audiometric tests that measure individual ability to understand speech would best characterize the debilitating effects of an NIHL. Unfortunately, these tests are complicated, not well standardized, and therefore seldom used to determine hearing impairment. For these reasons, most definitions of impairment are based solely on pure tone audiometry.

Pure tone audiometric tests utilize an audiometer to measure the hearing level threshold of an individual by determining the lowest level of discrete frequency tones that the individual can hear. The test procedures for conducting pure tone audiometry are relatively simple, widely used, and have been standardized. Although there is little debate among the scientific community about the usefulness of pure tone audiometry in assessing hearing loss, some disagreement exists as to the hearing level where hearing impairment begins and the range of audiometric frequencies to use in making the assessment.

In issuing its Hearing Conservation Amendment (46 FR 4078), OSHA defined hearing impairment as exceeding a 25 dB ''hearing level'' averaged over 1000, 2000, and 3000 Hertz (Hz) in either ear. Hearing level is the deviation in hearing acuity from audiometric zero, the lowest sound pressure level audible to the average normal-hearing young adult. Positive values indicate poorer hearing acuity than audiometric zero, while negative values indicate better hearing. Because OSHA based its definition on a 1972 recommendation by NIOSH (1972), MSHA refers to this definition as the OSHA/NIOSH criteria for hearing impairment.

NIOSH specifically developed its definition of hearing impairment for understanding speech under everyday (noisy) conditions. NIOSH concluded that ''the basis of hearing impairment should be not only the ability to hear speech, but also to understand speech,'' and this is best predicted by the hearing levels at 1000, 2000, and 3000 Hz.

When OSHA initially published its Hearing Conservation Amendment, most medical professionals used the 1959 criteria developed by the American Academy of Ophthalmology and Otolaryngology (AAOO), a subgroup of the American Medical Association (AMA). This criteria (AAOO 1959) defined hearing impairment as exceeding a 25 dB hearing level, referenced to audiometric zero, averaged over 500, 1000, and 2000 Hz in either ear (1959).

The American Academy of Otolaryngology Committee on Hearing and Equilibrium and the American Council of Otolaryngology Committee on the Medical Aspects of Noise (AAO–HNS) has since modified the 1959 criteria by adding the hearing level at 3000 Hz to the hearing levels at 500, 1000, and 2000 Hz (1979).

Unlike the OSHA/NIOSH criteria, the AAOO 1959 and AAO–HNS 1979 criteria are for all types of hearing loss, including noise-induced hearing loss (NIHL), and were mainly designed for hearing speech under relatively quiet conditions.

In its ANPRM, MSHA asked for comments on a definition of hearing impairment. Many commenters either directly or indirectly endorsed the OSHA/NIOSH definition of hearing impairment. One commenter suggested defining a significant material impairment as an average permanent threshold shift of 25 dB or more at 1000, 2000, 3000, and 4000 Hz in either ear. Other commenters supported the AAO–HNS 1979 criteria as the level where impairment begins. (Several commenters suggested that MSHA separately address a definition of hearing loss for reporting purposes; this has been done, as discussed in part III of this preamble in connection with proposed § 62.190(b).)

Discussion

MSHA has determined that with respect to mine safety and health, any definition of material impairment of hearing should relate to a permanent, measurable loss of hearing which, unchecked, will limit the ability to understand speech, as it is spoken in everyday social (noisy) conditions. This is because speech comprehension is essential for mine safety.

Measures of hearing impairment depend upon the frequencies used in calculating the hearing impairment. At relatively low sound levels (between 80 dBA and 90 dBA) the hearing loss is confined to the higher audiometric frequencies. In order to show the effect of noise below 90 dBA on hearing, inclusion of test frequencies above 2000 Hz is necessary. MSHA agrees with the many comments and studies cited to show that high frequency hearing is critically important for the understanding of speech and that every day speech is sometimes distorted and often takes place in noisy conditions.

Therefore, MSHA has determined that for purposes of mine safety and health, 3000 Hz should be included in any definition of material impairment. In addition, 500 Hz should be excluded from any definition, since it is not as critical for understanding speech and least affected by noise. Of the three generally utilized definitions of noise—the AAOO 1959, the AAO–HNS 1979, and the OSHA/NIOSH criteria—only the latter meets this test.

All three of the aforementioned definitions of noise use a 25 dB hearing level. As noted previously, this level of hearing loss relative to audiometric zero is actually well beyond that at which there is harm to health and also well beyond that at which workers suffer a loss of functional capacity. Nevertheless, this is the measure used in almost all of the studies of risk of noise exposure that have been done. This constrains the definition of material impairment the Agency utilizes to evaluate the available risk data.

Accordingly, solely for the purposes of evaluating the significance of the available risk studies for miners, MSHA is adopting the OSHA/NIOSH criteria, a 25 dB hearing level averaged over 1000, 2000, and 3000 Hertz (Hz) in either ear, as its definition of material impairment.

With respect to risk evaluations, the number of persons meeting the definition of impairment in any noise-exposed population will be higher under the OSHA/NIOSH criteria than under the other criteria (AAOO 1959 and AAO–HNS 1979). This is because noise does not affect hearing acuity equally across all frequencies. Typically, NIHL occurs first at 4000 Hz, then progresses into the lower and higher frequencies. The AAOO 1959 criteria is weighted toward the lower frequencies and was developed to determine an individual's ability to communicate under quiet conditions. Recognizing that an individual's ability to hear speech in a noisy environment depends upon that person's ability to hear sounds in the higher frequency range, the AAO–HNS added 3000 Hz to the frequencies used in the AAOO 1959 criteria. The impact of this modification is that the number of persons meeting the impairment criteria in any noise-exposed population will be higher under the AAO–HNS 1979 criteria than under the AAOO 1959 criteria. With the elimination of the hearing level at 500 Hz from the frequency range used, the OSHA/NIOSH definition is weighted even more toward the higher frequencies than the AAO–HNS 1979 criteria, and thus even more are determined to be impaired.

Moreover, selection of a criterion places some limitations on direct comparisons of data sources available for risk assessment. Data compiled using one definition of impairment are not readily translatable to the others. Since there is no reliable mathematical relationship among the three criteria for hearing impairment, it is not possible to accurately predict the impact on a population using the other two criteria when only the impact of one criterion is known. The ideal way to convert from one hearing impairment criterion to another would be to use the hearing level data for individual frequencies (raw data), if still available from the individual audiograms. It is also possible to crudely estimate the impact of one criterion to another provided that summary data on individual frequencies are available. Unfortunately, most of the data necessary to complete such conversions are no longer available.

In the discussion of risk that follows in the next section of this preamble, sources of data based on all three definitions of impairment are presented, so this caveat about translation needs to be kept in mind. As it turns out, however, data using all three definitions tend to demonstrate the same result.

Risk of Impairment

The studies of risk reviewed in this section consistently indicate that the risk of developing a material impairment (as defined in the prior section for purposes of this discussion) becomes significant over a working lifetime when workplace exposure exceeds average sound levels of 85 dBA. The data indicate that while lowering exposure from an average sound level of 90 dBA to one of 85 dBA does not eliminate the risk, it does reduce the risk by approximately half.

Measuring Risk

It is not possible to determine the risk to individual miners of particular levels of noise. Some miners will suffer harm long before other miners from the same level of noise, and it is not possible to measure susceptibility in advance. Risks can, however, be determined for entire populations. According to Melnick (1982), professor emeritus of audiology at Ohio State University:

> Experts agree that information is available for deriving the relationship of noise exposure to hearing loss. This information serves as the basis for development of damage risk criteria. * * * The relationship of noise to hearing is in the scientific domain. The decisions inherent in development of damage risk criteria are social, political, and economic. Damage risk criteria are statistical concepts. Use of these criteria should be limited to considerations of populations. Damage risk criteria are not appropriate for use with individuals no matter how tempting such an application might be.

The probability of acquiring a ''material impairment'' of hearing in a given population can be determined by extrapolating from data obtained from a test population exposed to the same sound levels. Three methods are generally used to express this population risk:

(1) the hearing level of the exposed population;

(2) the percent of an exposed population meeting the selected criteria; and

(3) the percent of an exposed population meeting the selected criteria minus the percent of a non-noise exposed population meeting the same criteria, provided both populations are

similar except for the occupational noise exposure.

The latter of these expressions is more commonly known as ''excess risk''. The excess risk method separates that percentage of the population expected to develop a hearing impairment from occupational noise exposure from that percentage expected to develop an impairment from non-occupational causes—for example, the normal aging process or medical problems. Hearing impairment risk data will be presented here using the excess risk method, because MSHA has concluded that this method provides the most accurate picture of the risk of hearing loss resulting from occupational noise exposure. OSHA also used this method in quantifying the degree of risk in the preamble to its Hearing Conservation Amendment.

Although studies of hearing loss consistently indicate that increased noise exposure (either level or duration) results in increased hearing loss, the reported risk estimates of occupational NIHL can vary considerably from one study to another. As noted in the prior section, the definition of ''material impairment'' used plays a role. But two additional factors can be involved: the screening of the control group (non-noise exposed group), and the threshold used to define that group.

Some researchers do not screen their study and control populations, while others use a variety of different screening criteria. Theoretically, screening would not have a significant impact on the magnitude of occupational NIHL experienced by given populations as long as the same criteria are used to screen both the noise and the non-noise populations being compared. However, when considering whether the subjects have exceeded an established definition of material impairment, failure to take into account any non-occupational noise exposure and/or presbycusis (loss of hearing acuity due to aging) can have a profound effect on the estimates of hearing acuity of an exposed population. For example, if both the exposed and control populations are screened to eliminate persons with a history of military exposure, use of ototoxic medicines, noisy hobbies, conductive hearing loss from acoustic trauma or illness, etc., the excess risk would be significantly different from that determined using unscreened populations.

The data presented here all use the same threshold. The threshold refers to that average sound level below which no adverse effects from noise exposure are expected to occur. Although researchers Kryter (1970) and Ambasankaran et al. (1981) have reported hearing loss from exposure to average sound levels below 80 dBA, most believe that the risk of developing a material impairment of hearing from exposure to such levels over a working lifetime is negligible. Accordingly, almost all noise risk studies consider the population exposed only to average levels of noise below 80 dBA as a ''non-noise exposed'' control group. In turn, this becomes the baseline from which the excess risk of being exposed to noise at higher levels is measured. When OSHA evaluated the risk of hearing loss for its hearing conservation amendment, it took the position that it was appropriate to consider the non-noise exposed control group to those exposed to sound levels below 80 dBA. MSHA, for the purpose of this proposal, agrees with OSHA's assessment.

As a result of these variations, the data available present a range of risk estimates. As discussed later in the ''Conclusions'' section of this part, for purposes of estimating the risks to miners, the Agency has determined it should properly utilize the range of risk in those studies based upon the OSHA/NIOSH definition of material impairment. As noted in that discussion, however, even using the full range of the data presented here would lead to a similar conclusion.

Review of Study Data

Table 1 is taken from the preamble to OSHA's Hearing Conservation Amendment (46 FR 4084). It displays the percentage of the industrial population expected to develop a hearing impairment meeting the AAOO 1959 criteria if exposed to the specified sound levels over a working lifetime (40 years). This is a compilation of data developed by the U.S. Environmental Protection Agency (EPA) in 1973, the International Standards Organization (ISO) in 1975, and NIOSH in 1972. EPA, ISO, and NIOSH developed their risk assessments using the AAOO 1959 criteria because this was the format used by the original researchers in presenting their data. OSHA's risk table was developed primarily from studies of noise exposed populations in many sectors of general industry.

TABLE II–1.—OSHA RISK TABLE

Sound level (dBA)	Excess risk (%)			
	ISO (1975)	EPA	NIOSH	Range
80	0	5	3	0–5
85	10	12	15	10–15
90	21	22	29	21–29

As seen in Table II–1, the excess risk of material impairment after a working lifetime at an average noise exposure of 80 dBA is low, at an average noise exposure of 85 dBA ranges from 10–15%, and at an average noise exposure of 90 dBA it ranges from 21–29%. Table II–2 presents further information on the risk assessments developed by NIOSH in their criteria document (1972), one portion of which was included in Table II–1. In Table II–2, data are based on both the AAOO 1959 criteria and the OSHA/NIOSH criteria.

TABLE II–2.—NIOSH RISK TABLE

Sound level (dBA)	Excess risk (%)	
	OSHA/NIOSH	AAOO 1959
80	3	3
85	16	15
90	29	29

As shown in Table II–2, NIOSH's risk assessment (1972) found little difference using OSHA/NIOSH criteria when compared to AAOO 1959 criteria. However, as previously noted, NIOSH recommends using the OSHA/NIOSH criteria for making risk assessments.

Several researchers have commented on how adjustments to the criteria used would affect such excess risk figures. Suter (1988) estimates that the excess risk would be somewhat higher if 500 Hz was excluded and 3000 Hz was included in the definition of material impairment. Sataloff (1984) also reported on the effect of adding 3000 Hz into the impairment criteria. He recalculated the effect of including hearing loss at 3000 Hz to the AAOO 1959 definition of hearing impairment and found that the prevalence of hearing impairment increased considerably. After 20 years of exposure to intermittent noise that peaked at 118 dBA, 3% of the workers experienced hearing impairment according to the AAOO 1959 definition of hearing impairment. If the AAO–HNS 1979 definition is used, the percentage increases to 9%. Royster et al. (1978) confirmed that the exclusion of 500 Hz and the inclusion of 3000 Hz increased the number of hearing impaired individuals during a study of potential

workers' compensation costs for hearing impairment. Using an average hearing loss of 25 dB as the criteria, Royster found that 3.5% of the industrial workers developed a hearing impairment according to AAOO 1959, 6.2% according to AAO–HNS 1979, and 8.6% according to OSHA/NIOSH.

Table II–3, II–4 and II–5 display another set of data on the working lifetime risk of material impairment, based upon the three different criteria commonly used for defining material impairment. Table II–3 is based on the AAO 1959 criteria, Table II–4 is based on the AAO–HNS 1979 criteria, and Table II–5 is based on the OSHA/NIOSH criteria. MSHA constructed these tables based on data presented in Volume 1 of the Ohio State Research Foundation report (Melnick et al., 1980) commissioned by OSHA. The hearing level data, used to construct the tables, were taken from summary graphs in the report. The noise exposed population is 65 years old with 40 years of noise exposure. The control group was not screened as to the cause of any hearing loss; therefore, the high level of non-occupational hearing loss may underestimate the excess risk from occupational noise exposure. The researchers added the noise-induced permanent threshold shift component to the control data. Noise-induced permanent threshold shift (NIPTS) is the actual shift in hearing level only due to noise exposure after corrections.

As expected, the three tables produce different results, reflecting that, for any given population, the excess risk for material impairment will be greater using the AAO–HNS 1979 criteria than using the AAOO 1959. Likewise, the excess risk for material impairment will be greater using the OSHA/NIOSH criteria than using the AAO–HNS 1979. All three tables produce a smaller excess risk than did the data presented in Table II–1.

TABLE II–3.—RISK OF IMPAIRMENT USING AAOO 1959 DEFINITION OF IMPAIRMENT USING MELNICK, ET AL., 1980 DATA

Exposure	Percent with impairment	Excess risk (%) with noise exposure
Non-noise	26.8	0.0
80 dBA	26.8	0.0
85 dBA	27.8	1.0
90 dBA	31.4	4.6

TABLE II–4.—RISK OF IMPAIRMENT USING AAO–HNS 1979 DEFINITION OF IMPAIRMENT USING MELNICK, ET AL., 1980 DATA

Exposure	Percent with impairment	Excess risk (%) with noise exposure
Non-noise	41.6	0.0
80 dBA	41.8	0.2
85 dBA	44.4	2.8
90 dBA	50.0	8.4

TABLE II–5.—RISK OF IMPAIRMENT USING OSHA/NIOSH DEFINITION OF IMPAIRMENT USING MELNICK, ET AL., 1980 DATA

Exposure	Percent with impairment	Excess risk (%) with noise exposure
Non-noise	48.5	0.0
80 dBA	48.7	0.2
85 dBA	51.5	3.0
90 dBA	57.9	9.4

Tables II–6 and II–7 present data derived by Melnick in *Forensic Audiology* (1982) for damage risk due to noise exposure. These tables use the AAO–HNS 1979 criteria. In these tables, the population is 60 years old with 40 years of exposure to the specified sound levels. In both tables, the data represent NIPTS (noise induced permanent threshold shift) calculated by Johnson, but the screening used in the two tables is different. Melnick's data in Table II–6 is based upon the screened presbycusis data (i.e. screened for non-occupational hearing loss) of Robinson and Passchier-Vermeer, whereas Table II–7 is based on unscreened non-occupational hearing loss data from the 1960–62 U.S. Public Health Survey.

Overall, the excess risk information presented in these tables is closer to that in Table II–1 than to that in Tables II–3, II–4, and II–5, but still different. Tables II–6 and II–7 directly illustrate the effect of screening populations in determining excess risk due to occupational noise exposure. As seen in these tables, the percent with impairment is greater in the table constructed with an unscreened population as the base.

TABLE II–6.—RISK OF IMPAIRMENT USING PRESBYCUSIS DATA OF PASSCHIER-VERMEER AND ROBINSON

Exposure	Percent with impairment	Excess risk (%) with noise exposure
75 dBA	3	0
80 dBA	5	2
85 dBA	9	6
90 dBA	21	18

TABLE II–7.—RISK OF IMPAIRMENT USING NON-OCCUPATIONAL HEARING LOSS DATA OF PUBLIC HEALTH SURVEY

Exposure	Percent with Impairment	Excess risk (%) with noise exposure
75 dBA	27	0
80 dBA	29	2
85 dBA	33	6
90 dBA	40	13

Chart ER1 displays the results of the various models. It should be noted that both the P/V/Robinson (data from Table II–6) and the PHS model (data from Table II–7) used the AAO–HNS 1979 criteria.

As noted in the History section of this preamble, the Agency is aware that NIOSH is currently working on revising its estimates using a different model and taking hearing loss at an additional frequency into account; but until such an approach is peer reviewed and finalized, MSHA has concluded it should not be considered here.

As illustrated by Chart ER1, the exact numbers of those at risk varies with the study—because of the definition of material impairment used, and because of the selection and threshold of the control group. Notwithstanding these differences, the data consistently demonstrate three points: (1) the excess risk increases as noise exposure increases; (2) there is a significant risk of material impairment of hearing loss for workers exposed over their working lifetimes to average sound levels of 85 dBA; and (3) lowering the exposure from average sound levels of 90 dBA to average sound levels of 85 dBA reduces the excess risk of developing a material impairment by approximately half.

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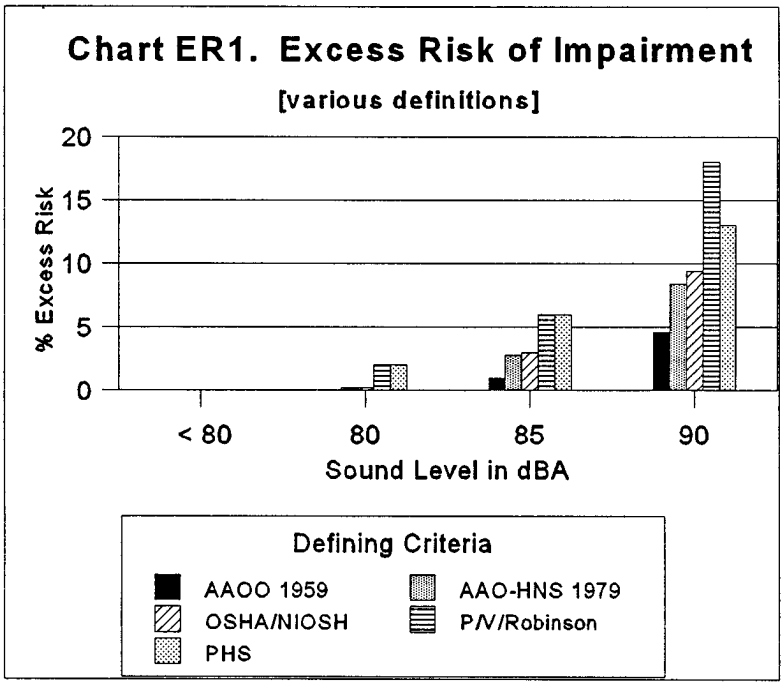

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Related Studies of Worker Hearing Loss

There is a large body of data on the effects of varying industrial sound levels on worker hearing. Some of these studies specifically address the mining industry; moreover, MSHA has determined that regardless of the industry in which the data were collected, exposures to similar sound levels will result in similar degrees of material impairment in the workers. These studies are supportive of the conclusions reached in the previous section about noise risks at different sound levels.

OSHA's 1981 preamble to its Hearing Conservation Amendment referred to studies conducted by Baughn, Burns and Robinson, Martin, et al., and Berger et al.

Baughn (1973) studied the effects of average noise exposures of 78 dBA, 86 dBA, and 90 dBA on 6,835 industrial workers employed in Midwestern plants producing automobile parts. Noise exposures for these workers were measured for 14 years and, through interviews, exposure histories were estimated as far back as 40 years. The control and the noise-exposed groups were not screened for anatomical abnormalities of the ear.

Baughn used his data to provide estimates of the hearing levels of workers exposed to 80 dBA, 85 dBA, and 92 dBA and extrapolated the exposures up to 115 dBA. Based upon the analysis, the researcher constructed an idealized graph which illustrated that 43% of 58-year old workers exposed for 40 years to noise at 85 dBA would meet the AAOO 1959 criteria for hearing impairment. However, 33% of an identical non-noise exposed population would be expected to meet the same impairment criteria. The excess risk from exposure to noise at 85 dBA, therefore, would be 10%. Using the same procedure, the excess risk for 80 dBA is 0% and for 90 dBA it is 19%.

Burns and Robinson (1970) studied the effects of noise on 759 British factory workers exposed to average sound levels between 75 dB and 120 dB with durations ranging between one month and 50 years. The control group consisted of 97 non-noise exposed workers. Thorough screening removed the workers with exposure histories which were not readily quantifiable, exposure to gunfire, ear disease or abnormality, and language difficulty.

For this study, Burns and Robinson analyzed 4,000 audiograms and found that the hearing levels of workers exposed to low sound levels for long periods of time were equivalent to other workers exposed to higher sound levels for shorter durations. From the data, the researchers developed a mathematical model that predicts hearing loss between 500 Hz and 6000 Hz in certain segments of the exposed population. Using Burns and Robinson's mathematical model, MSHA constructed Chart ER2. The chart shows that a noise exposure of 85 dBA over a 40-year career is clearly hazardous to the hearing acuity of 60-year-old workers.

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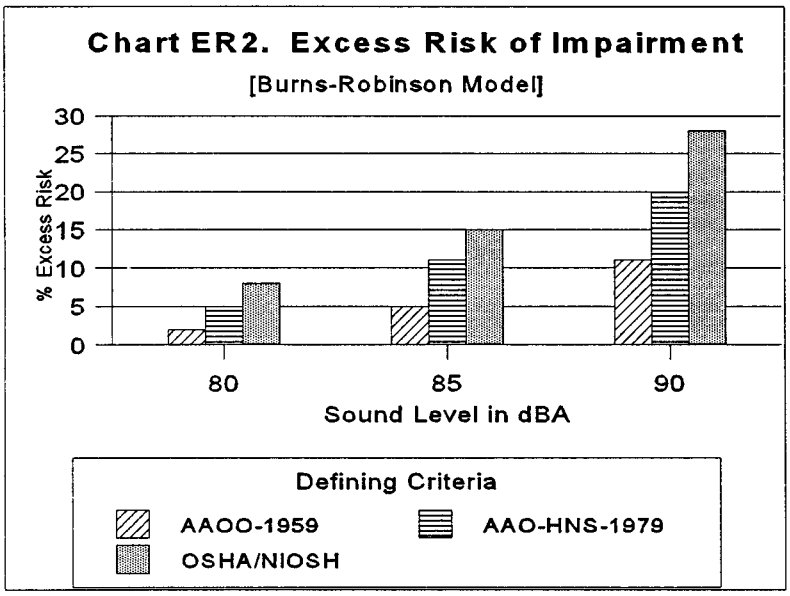

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Martin et al. (1975) studied the prevalence of hearing loss in a group of 228 Canadian steel workers, ranging in age from 18 to 65 years of age, by comparing them to a control group of 143 office workers. The researchers reported that the risk of hearing impairment (average of 25 dB at 500, 1000, and 2000 Hz) increases significantly between 85 dBA and 90 dBA. Up to 22% of the population would be at risk of incurring a hearing impairment with a 90 dBA PEL compared to 4% with an 85 dBA PEL. Both the noise exposed and the control groups were screened to exclude those workers with non-occupational hearing loss.

Berger, Royster, and Thomas (1978) studied 42 male and 58 female workers employed at an industrial facility. The study included a control group of 222 persons that was not exposed to occupational noise. Of the 322 individuals included in the study, no one was screened for exposures to non-occupational noise from past military service, farming, hunting, or shop work, since these exposures were common to all. The researchers found that exposure to a daily steady-state L_{eq} of 89 dBA for 10 years caused a measurable hearing loss at 4000 Hz. According to the researchers, the measurable loss was in close agreement with the predictions of Burns and Robinson, Baughn, NIOSH, and Passchier-Vermeer.

Passchier-Vermeer (1974) reviewed the results of eight field investigations on hearing loss among 20 groups of workers. About 4,600 people were included in the analysis. The researcher concluded that the limit of permissible noise exposure (defined as the maximum level which did not cause measurable noise-induced hearing loss, regardless of years of exposure) was shown to be 80 dBA. Furthermore, the researcher found that noise exposures above 90 dBA caused considerable hearing loss in a large percentage of employees and therefore, recommended that noise control measures be instituted at this level. The researcher also recommended that audiometric testing be implemented when the noise exposure exceeds 80 dBA.

NIOSH (Lempert and Henderson, 1973) published a report in which the dose-response relationship for noise-induced hearing loss was described. NIOSH studied 792 industrial workers whose average daily noise exposures were 85 dBA, 90 dBA, and 95 dBA. The noise-exposed workers were compared to a group of controls whose noise exposures were lower than 80 dBA. The subjects ranged in age from 17 to 65 years old. The exposures were primarily to steady-state noise but the exposure levels fluctuated slightly in each category. Both the noise-exposed and control groups were screened to exclude those exposed to gunfire as well as those who showed some sign of ear disease or audiometric abnormality. The report clearly shows that workers whose noise exposures were 85 dBA experienced more hearing loss than the controls. As the noise exposures increased to 90 dBA and 95 dBA, the magnitude of the hearing loss increased.

NIOSH (1976) published the results from a study on the effects of prolonged exposure to noise on the hearing acuity of 1,349 coal miners. From this study, NIOSH concluded that coal miners were losing their hearing acuity at a faster rate than would be expected from the measured environmental sound levels. While the majority of noise exposures were less than a TWA_8 of 90 dBA, the measured hearing loss of the older coal miners was indicative of noise exposures between 90 dBA and 95 dBA. Only 12% of the noise exposures exceeded a TWA_8 of 90 dBA. NIOSH, however, offered as a possible explanation that some miners are exposed to ''very intense noise'' for a sufficient number of months to cause the hearing loss.

Coal miners in the NIOSH (1976) study had a greater percent of impairment than the non-occupational exposed group (control group) at each age level. Using OSHA/NIOSH definition of impairment, 70% of 60-year-old coal miners were impaired while only a third of the control group were impaired. This would correspond to an excess risk of 37%.

NIOSH also sponsored a study, conducted by Hopkinson (1981), on the prevalence of middle ear disorders in coal miners. As part of this study, the hearing acuity of 350 underground coal miners was measured. The results of this study corroborated the results of the earlier NIOSH study on the hearing acuity of underground coal miners. In both studies the measured median hearing levels of the miners were the same. However, the study did not present statistics on the percent of miners incurring a hearing impairment nor the job classification of the miners.

Studies of Harm at Lower Sound Levels

As our knowledge about the effects of noise increases, there is increased need

to examine data that focuses on the harm that can occur at lower sound levels. This section reviews some of the studies, particularly those of workers from other countries, available in this regard.

The most recent data are derived using the International Standards Organization's publication ISO 1999 (1990). The information in that publication can be used to calculate the mean and various percentages of a population's hearing levels. The noise exposures for the population can range between 75 dBA and 100 dBA. Table II–8 presents the hearing level of a 60-year-old male exposed to noise for 40 years. The noise induced hearing permanent threshold shift was combined with presbycusis values to determine the total hearing loss. The presbycusis values were those from an unscreened population. The unscreened population is believed to more accurately represent the mining population since people with nonoccupational hearing loss would not be excluded from becoming miners.

TABLE II–8.—HEARING LEVEL FOR SELECTED NOISE EXPOSURES

Sound Level in dBA	Hearing level in dB			
	500 Hz	1000 Hz	2000 Hz	3000 Hz
80	12	6	10	30
85	12	6	11	33
90	12	6	16	42

Information about the effects on hearing of lower noise exposures can be particularly valuable in directing attention to the possibility of identifying subpopulations particularly sensitive to noise. The Committee on Hearing, Bioacoustics, and Biomechanics of the National Research Council (CHABA) (1993) reviewed the scientific literature on hazardous exposure to noise. The report, reaffirming many of the earlier findings of the Committee, suggests that exposures below 76 dBA to 78 dBA are needed to prevent a NIHL based upon temporary threshold shift (TTS) studies; moreover, the report suggests that the sound level be less than 85 dBA, and possibly less than 80 dBA, to guard against any permanent hearing loss at 4000 Hz based upon field studies. But of particular interest is the suggestion that therapeutic drugs, such as aminoglycoside antibiotics and salicylates, can interact synergistically with noise to yield more hearing loss than would be expected by either stressor. Given the increasing use of salicylates (aspirin) in heart maintenance regimens, the potential synergistic effect may warrant further study.

Few current studies of unprotected U.S. workers exposed to a TWA_8 between 85 and 90 dBA are available because the OSHA hearing conservation standard requires some protection at those levels for most industries. The difficulty in constructing new retrospective studies of U.S. workers has been noted by Kryter (1984) in his chapter on Noise-Induced Hearing Loss and Its Prediction. He believes that the retrospective studies of Baughn, Burns and Robinson, and the U.S. Public Health Service are the best available on the subject of NIPTS. Regarding current retrospective studies he states:

> Furthermore, imposition of noise control and hearing conservation programs in many industries in many countries over the past 10 years or so make somewhat remote the possibility of performing a meaningful retrospective study of the effects in industry of noise on the unprotected ear.

Kryter included a formula for deriving the effective noise exposure level for damage to hearing. This was used to determine, from a population of workers, NIPTS at different percentiles of sensitivity at various audiometric test frequencies.

Studies of workers from other countries can provide information of particular value in assessing the consequences of workplace noise exposure between 85 dBA and 90 dBA. MSHA has determined that while differences in socioeconomic factors (e.g., recreational noise exposure, use of ototoxic medicines, otitis media) make it difficult to directly apply the results of studies of workers from other countries to quantify the risk for U.S. workers, they can be used to establish the existence of a risk in the 80 to 90 dBA range.

Rop, Raber, and Fischer (1979) studied the hearing loss of 35,212 male and female workers in several Austrian industries, including mining and quarrying. The researchers measured the hearing levels of workers exposed to sound levels ranging from less than 80 dBA up to 115 dBA, and arranged them into eight study groups based upon average exposures. They assumed that exposure to sound levels less than 80 dBA did not cause any hearing loss and workers exposed to these levels were assigned to the control group.

Rop et al. reported that workers with 6 to 15 years of exposure at 85 dBA had significantly worse hearing than the control group. For the five groups exposed between 80 dBA and 103.5 dBA, hearing loss tended to increase steadily during their careers, but leveled off after 15 years. However, for workers exposed to sound levels above 103.5 dBA, hearing loss continued to increase beyond 15 years.

Using the data collected during the study, Rop et al. developed a statistical method for predicting hearing loss. The researchers predicted that 20.1% of the 55-year old males in the control group with 15 years of work experience would incur hearing loss. For a comparable group of males with exposures at 85 dBA the risk increased to 41.6%; at 92 dBA the risk increased to 43.6%; and at 106.5 dBA the risk increased to 72.3%. Rop et al. concluded that exposure to sound levels at or above 85 dBA damaged workers' hearing.

Schwetz et al. (1980) reported on a study of 25,000 Austrian workers. The study concluded that the workers exposed to sound levels between 85 dBA and 88 dBA experienced greater hearing loss than workers exposed to sound levels less than 85 dBA. Because of this, Schwetz recommended 85 dBA as the critical intensity (i.e., PEL). Furthermore, the study concluded that a lack of hearing recovery occurs at 85 dBA which is the ultimate cause of noise-induced hearing loss (NIHL).

Stekelenburg (1982) calculated the hearing loss due to presbycusis according to Spoor and due to noise according to Passchier-Vermeer. Based upon these calculations, Stekelenburg suggested that 80 dBA be the acceptable level for noise exposure over a 40 year work history. At this exposure, Stekelenburg calculates that impaired social hearing due to noise would be expected in 10% of the population.

Bartsch et al. (1989) studied 537 textile workers. These researchers defined hearing loss of social importance as a 40 dB hearing level at 3000 Hz. The researchers found that hearing loss resulting from exposures below 90 dBA mainly occurs at frequencies above 8000 Hz (these frequencies are not normally tested during conventional audiometry), and so concluded that this hearing loss was not of ''social importance.'' Nevertheless, they recommended a hearing loss risk criterion of 85 dBA be used to protect the workers' hearing.

These results are generally consistent with those of U.S. workers. MSHA would, however, note its disagreement with the characterization of the amount of hearing loss not being of ''social importance'' as expressed in the Bartsch et. al (1989) study. The Agency has concluded that a person will encounter hearing difficulty before their hearing level reaches 40 dB at 3000 Hz. Studies, discussed earlier in *Definition of Material Impairment,* address the importance of having good hearing

acuity at 3000 Hz in order to adequately understand speech in everyday noisy environments.

Reported Hearing Loss Among Miners

To confirm the magnitude of the risks of NIHL among miners, MSHA examined evidence of reported hearing loss among miners—audiometric data collected over the years tracking hearing acuity among miners, the comments received in response to the Agency's ANPRM, reports of hearing loss by mine operators pursuant to 30 CFR part 50, and workers' compensation data. Such data could provide a quantitative determination of material impairment.

With respect to audiometric data, MSHA asked NIOSH to examine a set of data on coal miners. The analysis (Franks, 1996) supports the data from scientific studies. It indicates that 90% of these coal miners have a hearing impairment by age 50 as compared with only 10% of the general population. Further, Franks stated that miners, after working 20 to 30 years, could find themselves in life threatening situations since safety signals and ''roof talk'' could go unheard. (For the purposes of the analysis, NIOSH used the definition of hearing impairment it is now considering, an average 25 dB hearing level at 1000, 2000, 3000, and 4000 Hz; MSHA conducted its own analysis of the data without the 4000 Hz, and the results are generally consistent with those of NIOSH).

This section also reviews several other sources of data that might provide direct information about the risks of hearing loss to miners: the comments received in response to the Agency's ANPRM, the reports of hearing loss provided to the Agency by mine operators pursuant to 30 CFR part 50, and workers' compensation data. In each case, the available data are too limited to draw any conclusions. The Agency is requesting the public to provide further information along these lines.

Audiometric Data Bases

Audiometric testing is not currently required in metal and nonmetal mining and is only required when an overexposure to noise is determined in coal mining. Certain mining companies conduct routine audiometric testing on their employees, but the results of these tests are confidential and are not published for public use. In addition, summary reports of these audiometric tests are generally not available.

MSHA, however, has obtained an audiometric data base consisting of 20,021 audiograms conducted on 3,433 individual coal miners, in connection with its ongoing efforts to assess the effectiveness of the current standards in protecting miner health. The audiometric evaluations were conducted between 1971 and 1994 with the bulk of the audiograms conducted during the latter years.

NIOSH (Franks, 1996) has analyzed this data base. Each audiogram was reviewed for validity and NIOSH audiologists directly reviewed more than 2,500 audiograms. The review reduced the number of audiograms by 8.8% and the number of miners by 8.3%.

After deleting those audiograms judged to be invalid, NIOSH's analysis indicates that 90% of these miners have a hearing impairment by age 50 as compared with only 10% of the general population. Even at age 69, only 50% of the non-noise exposed population acquire a hearing impairment. Franks defined material impairment as an average 25 dB hearing level at 1000, 2000, 3000, and 4000 Hz. This definition differs from the MSHA definition of hearing impairment by the inclusion of 4000 Hz in the average.

By age 35 the average miner has a mild hearing loss and 20% have a moderate loss. By contrast, fewer than 20% of the miners having marginally normal hearing by age 64 while the upper 80% have moderate to profound hearing loss. The lower 80% of the non-noise exposed population will not acquire a hearing loss as severe as the one obtained by the average miner regardless of how long they live.

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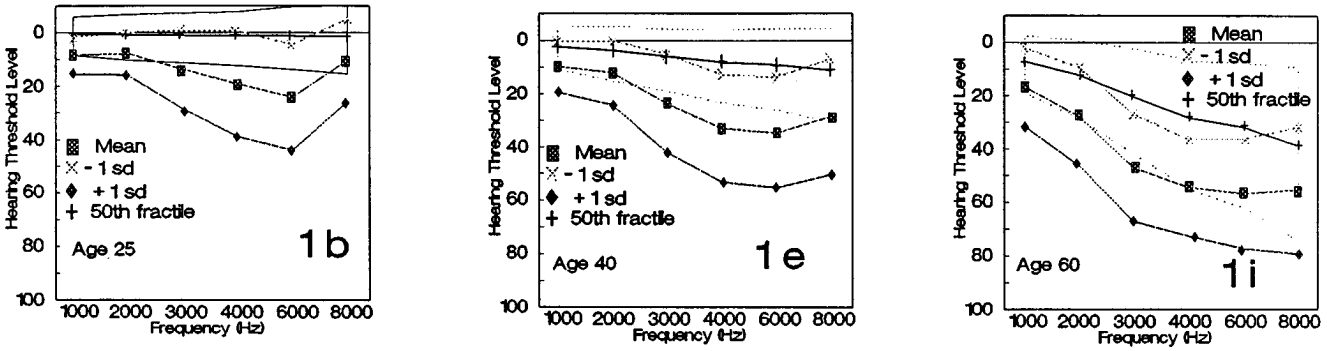

Franks, 1996. Audiograms showing mean hearing threshold level, + 1 standard deviation, - 1 standard deviation, of miners age 25 (1b), 40 (1e), and 60 (1i); other ages in original. Also shown are the 50th fractiles for Annex A of ISO-1999.

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Further, Franks stated that miners, after working 20 to 30 years, could find themselves in life threatening situations since safety signal and roof talk could go unheard.

MSHA separately conducted an elementary analysis of the data, using the definition of material impairment of hearing used throughout the analyses in this preamble: an average 25 dB hearing level at 1000, 2000 and 3000 Hz. For MSHA's analysis, all audiograms were considered to be valid (e.g., no contamination from temporary threshold shifts, sinus conditions, etc.). Information on years of mining experience, noise exposure, use of hearing protectors, and job function was not provided.

In order to reflect current trends, the percentage of current coal miners with a material impairment of hearing was compared to historical data (NIOSH's study on coal miners published in 1976). The audiometric data were placed into a compatible format, e.g., age and hearing loss criteria. Only those coal miners (2,861) whose latest audiogram was taken between 1990 and 1994 were included in the analysis. The results are shown in Chart R1 along with NIOSH's 1976 results for both the noise exposed miners and the non-noise exposed controls.

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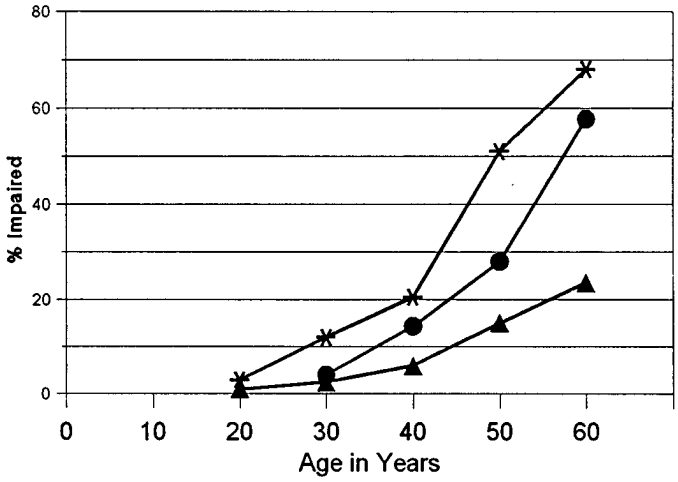
Chart R1. Percentage of Coal Miners Exceeding 25 dB Hearing Loss



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The data points for chart R1 are the mean of both ears at 1000, 2000 and 3000 Hz. The top line connects data points from the 1976 group, and the middle line connects points from the 1990–1994 group; the bottom line represents the non-noise exposed group.

As shown in Chart R1, it is obvious that many coal miners who had audiograms taken from 1990 through 1994 have a material impairment of hearing. These miners were still losing more of their hearing acuity than non-noise exposed workers. This remains true even if the analysis is limited to miners less than 40 years of age (i.e., those who have worked only under the current coal noise regulations). The fact that the loss is at a slower rate than shown in the 1976 data may indicate some progress under the existing regulations compared with no regulation.

Furthermore, MSHA analyzed the data for the number of standard threshold shifts (STS's) and reportable hearing loss cases in order to estimate the number of such events that may occur if the proposal is adopted. In the proposal, MSHA defines an ''STS'' as a change in hearing threshold level relative to the miner's original or supplemental baseline audiogram of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear. The importance of an STS is that it reveals that a permanent loss in hearing acuity has occurred relative to that miner's baseline. This is the type of loss that is deserving of mine operator intervention. When the change from the baseline averages 25 dB or more at the same frequencies, the hearing loss must be reported to MSHA so that the Agency can intervene if necessary. (MSHA discusses the definition of STS and reportable hearing loss in detail in the sections of this preamble dealing with proposed §§ 62.160 and 62.190.) In both cases, the data differ from that in Chart R1, which is looking at the hearing loss relative to audiometric zero—not the individual miner's baseline.

For a second analysis, the first audiogram was assumed to be the baseline. The last audiogram was compared to the baseline. Neither audiogram was corrected for presbycusis. Also, because of the lack of supporting data, no provision for excluding an STS as being non-occupational was possible. A total of 3,102 coal miners had a baseline and at least a second audiogram. However, only those miners whose latest audiogram was conducted between 1990 and 1994 were considered. The results are presented in Chart R2.

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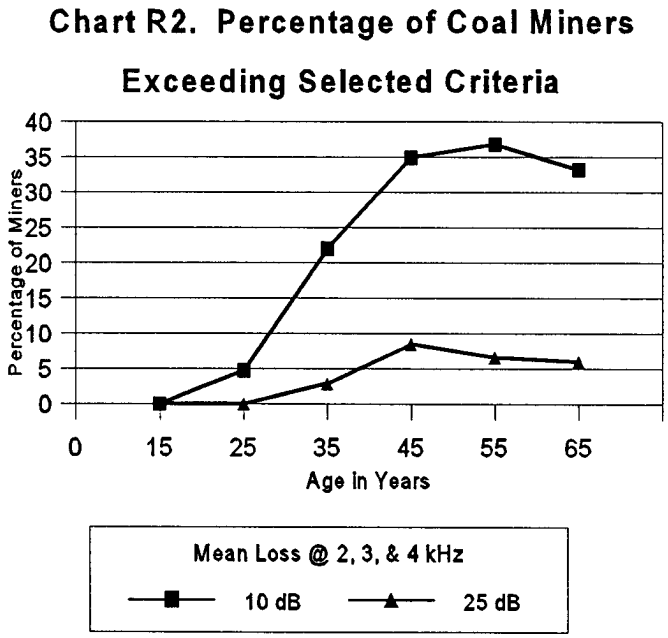

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Chart R2 clearly shows that many of the coal miners from 1990 through 1994 were found to have an STS. The likelihood of acquiring an STS generally increases with advancing age. The MSHA analysis was conducted in a conservative fashion. Because the intervening audiograms were excluded from this analysis, the number of STSs is probably low since only a single STS was recorded. There could be several explanations for the drop in the percentage of STS's for the 65 year old age group in chart R2, including, for example, changed work assignments.

In addition to this privately maintained audiological data, there have been two special NIOSH studies of the hearing acuity of coal miners. These studies were reviewed in detail in the Risk of Impairment section, above. The first study was published in 1976. Even though the majority of noise exposures were found to be less than 90 dBA, approximately 70% of the 60-year-old coal miners had a material impairment of hearing using the OSHA/NIOSH definition. Another NIOSH study, conducted by Hopkinson (1981), corroborated the results of the earlier NIOSH study on the hearing acuity of coal miners.

Commenter Data

In its ANPRM, MSHA solicited comments on the number of current miners with a hearing loss based on suggested criteria. Two commenters provided information on the hearing acuity of miners. The first commenter estimated that 45 to 50% of the employed miners have an STS and at least 25% have an STS if corrected for presbycusis. Further, this commenter estimated that about 25% of the miners have an average hearing loss of 25 dB or more at 1000, 2000, and 3000 Hz. However, when corrected for presbycusis, the percentage of miners with this level of hearing loss decreased to about 15%.

The second commenter referenced a paper presented by Smith et al. at the 1989 Alabama Governor's Safety and Health Conference. This commenter stated that Smith et al. reported on the evaluation of serial audiograms from 100 workers exposed to sound levels less than 85 dBA. Smith et al. had found that 15% of these workers would have some degree of hearing impairment using AAO–HNS 1979 impairment criteria. Smith et al. also reported that at least 26% of the mining population would have some degree of hearing impairment using the same criteria. Smith (1994) confirmed the prevalence of material impairment among miners in a letter to MSHA.

MSHA also requested information on hearing loss to individual miners in its ANPRM. Specific information was requested on each miner who had incurred a hearing loss, including the related noise exposure, state workers' compensation award, cost of the award, miner's age, occupation and degree of hearing loss. The Agency received few comments pertaining to the information requested. The Agency requests additional comment on these issues.

Reported Hearing Loss Data

Another potential body of information about hearing loss among miners comes from reports mine operators are required to submit to MSHA of such losses. At present, however, there is not a definition of ''reportable hearing loss'' linking what is reported to some particular measurement. Rather, under 30 CFR part 50, mine operators are only required to report cases of NIHL to MSHA when it is diagnosed by a physician or when the miner receives an award of compensation.

Nevertheless, between 1985 and 1995 mine operators reported a total of 2,402 cases of NIHL—and among these cases were a substantial number of miners who began working at a mine after the implementation of the current noise regulations.

Coal mine operators reported 608 cases among surface miners, 1,077 cases among underground miners, and 14 cases among miners whose work positions were not identified. According to coal mine operators, 662 of the 1,699 cases began working at a mine after the implementation of noise regulations for coal mines (1972 for underground and 1973 for surface). Workers with no reported mining experience were excluded from this analysis, because their noise exposure history in mining was unknown.

For the same period, metal and nonmetal mine operators reported 555 cases among surface miners and 148 cases among underground miners. According to mine operators, 142 of the 703 cases began working at a mine after the implementation of noise regulations for metal and nonmetal mines (1975). As with the coal data, workers with no reported mining experience were excluded.

Comparing the two types of mining, there were significantly more reported hearing loss cases at coal mines than at metal and nonmetal mines, and a higher proportion of those cases were to workers who began working after the implementation of the current standards. This is despite the fact that, at the present time, there are more metal and nonmetal miners than coal miners employed in the U.S. A possible explanation of the differences between reported cases of NIHL among coal, metal and nonmetal miners may be the more frequent use of engineering noise controls in metal and nonmetal mining.

MSHA reviewed the narrative associated with each NIHL case to determine the degree of hearing loss. Although many narratives contained information as to the reason for reporting the NIHL case, others only listed the illness as ''hearing loss.'' Approximately half the cases had no information on the severity of the hearing loss. Some narratives contained information on the severity of the hearing loss, such as an STS, OSHA reportable case, or percent disability. Based upon the information in the narratives it is not possible to determine an average severity for the NIHL cases.

However, at least 40% of the cases in coal mining were reported to MSHA as the result of the miner being compensated for NIHL. Another 7% of the cases filed a workers' compensation claim for NIHL. In metal and nonmetal, at least 19% of the cases were the result of the miner being compensated for NIHL. Nearly another 3% of the cases filed a workers' compensation claim for NIHL.

MSHA contends that the number of cases reported to the Agency are low because of the following factors: the lack of a specific definition of a NIHL in MSHA's part 50 regulations which may result in confusion on the part of mine operators about which cases to report; the lack of consistency among the states' requirements for awarding compensation for an NIHL and among physicians in diagnosing what constitutes a hearing loss caused by noise; and the lack of periodic audiometric testing in the mining industry.

In summary, current hearing loss reported to MSHA under part 50 cannot be used to accurately characterize the incidence, prevalence or the severity of hearing loss in the mining industry. However, the part 50 data clearly show that miners are incurring NIHL.

Workers' Compensation Data

Another source of information about hearing loss among miners is state workers' compensation agencies and insurance carriers. Many states do not keep detailed workers' compensation data themselves; categorization of data are inconsistent across the states; and there are privacy concerns in obtaining the detailed information needed for studies. MSHA would welcome information about studies of hearing loss that have been performed by the insurance industry or others based on this data.

Valoski (1994) studied the number of miners receiving workers' compensation and the associated indemnity costs of those awards. Despite contacting each state workers' compensation Agency and using two national data bases, he was unable to obtain data for all states. In fact, data were not available from a number of key mining states.

From the data that were available for study, Valoski reported that between 1981 and 1985 at least 2,102 coal miners and 312 metal and nonmetal miners were awarded compensation for occupational hearing loss. The identified total indemnity costs of those awards exceeded 12.5 million dollars excluding rehabilitation or medical costs.

In Niemeier's letter to MSHA, Chan et al. of NIOSH (1995) investigated the incidence of NIHL among miners using information from the Bureau of Labor Statistics' (BLS) Supplementary Data System. Like Valoski, he found the national data to be incomplete. Only 15 states participated in the BLS program between 1984 and 1988. In these 15 states, a total of 217 miners (93 coal miners and 124 metal and nonmetal miners) were awarded workers' compensation for NIHL. Chan et al. stated that because of differing state workers' compensation requirements, it is not possible to directly compare NIHL among the states. These factors limit the usefulness of the obtained data.

MSHA also reviewed reports on workers' compensation in Canada and Australia. The noise regulations and mining equipment used in these countries are similar to those in the U.S. A recent report on workers' compensation awards to miners in Ontario, Canada (1991) revealed that between 1985 and 1989, NIHL was the second leading compensable occupational disease. Approximately 250 claims for NIHL involving miners were awarded annually during that time.

Lescouflair et al. (1980) studied 278 metal and asbestos miners in Quebec, Canada, who claimed compensation for hearing loss. Of the 278 cases, 28.7% (80) were excluded as cases of non-mining NIHL. Approximately 50% (99) of those remaining cases diagnosed as having NIHL were shown to have a hearing impairment based upon the AAOO 1959 criteria and an estimated 63% (125) showed an impairment based upon AAO–HNS 1979 criteria. The miners were exposed to noise for 15 to 49 years and showed a similar occurrence of hearing loss in both surface and underground occupations. The researchers also reported that there was no significant difference in NIHL among the miners for those subjects exposed to a mixture of intermittent-continuous noise versus intermittent noise except at 2000 Hz.

Eden (1993) reported on the Australian mining industry's experience with hearing conservation. Eden quoted statistics from the Joint Coal Board which revealed that NIHL comprised 59% to 80% of the reported occupational diseases from 1982 to 1992. Eden also reported that in New South Wales 474 of 16,789 coal miners were awarded compensation for NIHL. The incidence rate for the total mining industry in New South Wales was about 23 cases per 1,000 workers during 1990–1991. This was the highest rate for any industry in New South Wales.

In conclusion, like reported cases of NIHL, the compensation data are too incomplete to be used for quantitative estimates of the prevalence of NIHL in the mining industry. But like the reported case data, the compensation data that are available do show that numerous cases are still being filed each year at considerable cost. Further, according to the data reported by mine operators, many miners who developed NIHL only worked in mining after the implementation of the current noise regulations. While limited, this evidence of continued risk supplements and supports the data previously presented from scientific studies.

The Agency would welcome the submission of additional data to supplement that which it has been able to gather to date.

Exposures in the U.S. Mining Industry

In this section MSHA presents information on noise exposure in the U.S. mining industry, so as to develop a picture of the mining population at a significant risk of incurring material impairment as a result of that exposure. The exposure levels are particularly high in the coal industry, where hearing protectors, rather than engineering or administrative controls, remain the primary means of miner protection against NIHL. But the data indicate that exposure levels remain high in all sectors of the mining industry even

though noise regulations have been implemented for some time.

Inspection Data

The first presentation, Tables II–9 and II–10, reviews noise exposure data collected by MSHA inspectors from thousands of samples gathered over many years to check compliance with the current permitted levels. Because the proposed rule would alter the way a miner's noise dose is calculated in one respect, MSHA conducted a special survey to obtain data that would reflect this change. The data are presented in Tables II–11 and II–12. The survey data are also presented by occupation in Tables II–13 and II–14. All the readings are in time-weighted 8-hour averages.

Tables II–9 and II–10 display samples which present readings exceeding the permissible exposure limit, a TWA_8 of 90 dBA.

Table II–9 shows noise dose trends in metal and nonmetal mines based on over 232,500 full-shift samples collected by MSHA from 1974 through 1995 using personal noise dosimeters.

TABLE II–9.—METAL AND NONMETAL NOISE DOSE TRENDS 1974 TO 1995 [a]

Year	Number of samples	Number of samples > 90 dBA	Percent of samples > 90 dBA
1974	363	139	38.3
1975	3,826	1,661	43.4
1976	9,164	3,725	40.6
1977	13,485	5,047	37.4
1978	17,326	6,415	37.0
1979	21,176	7,638	36.1
1980	15,185	5,203	34.3
1981	11,278	3,651	32.4
1982	3,208	876	27.3
1983	7,628	2,188	28.7
1984	8,525	2,311	27.1
1985	8,040	2,094	26.0
1986	9,213	2,402	26.1
1987	10,145	2,818	27.8
1988	10,514	2,417	23.0
1989	10,279	2,208	21.5
1990	13,067	2,721	20.8
1991	14,936	2,947	19.7
1992	14,622	2,809	19.2
1993	14,566	2,529	17.4
1994	15,979	2,627	16.4
1995	13,865	1,989	14.4

[a] Data from USBOM' MIDAS data base.

Table II–10 below presents noise dose trends in coal mines based on 75,691 full-shift samples collected by MSHA from 1986 through 1995 using personal noise dosimeters. MSHA actually began routine sampling in coal mines in 1978; however, its data base did not begin until 1986.

TABLE II–10.—COAL MINE NOISE DOSE TRENDS, FISCAL YEARS 1986 TO 1995

Fiscal year	Number of samples	Number of samples >90 dBA	Percent of samples >90 dBA
1986	2,037	593	29.1
1987	12,774	3,314	25.9
1988	11,888	2,702	22.7
1989	11,035	2,313	21.0
1990	10,861	2,388	22.0
1991	6,898	1,635	23.7
1992	6,636	1,660	25.0
1993	7,223	1,908	26.4
1994	6,339	1,656	26.1
1995	5,407	1,219	22.5

The inspection data for the two sectors have also been graphed in charts II–9 and II–10 for years in which MSHA collected data for both sectors.

As illustrated by the charts, the metal and nonmetal sector shows a gradual, but consistent, downward trend in the percent of samples exceeding the current PEL. However, there was no such clear trend for coal mines during the same time period. (It should be noted that while the data points on these 3–D graphs come from the last column of the tables, the shading may make them seem somewhat lower than they are in fact.)

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Chart II-9. U.S. M/NM Industry Noise Dose Trend

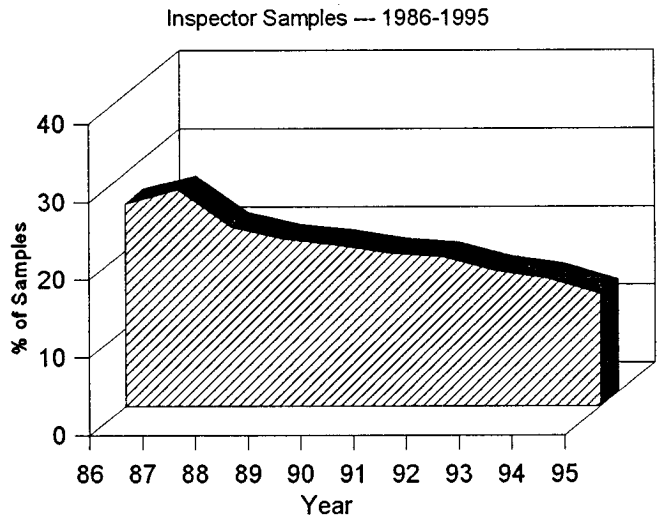
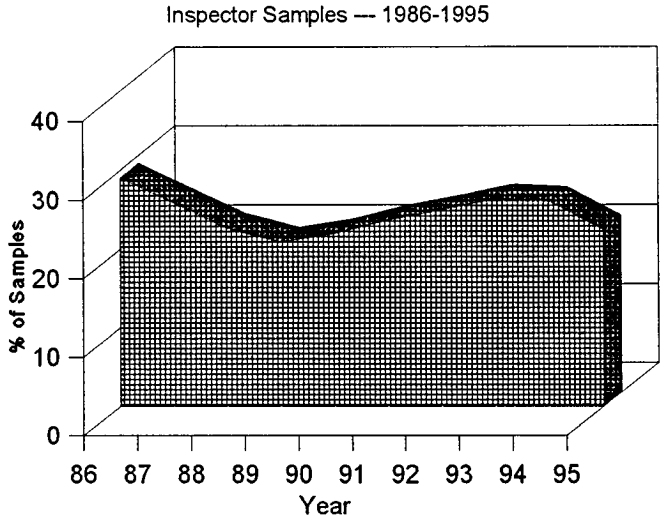


Chart II-10. U.S. Coal Industry Noise Dose Trend



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There are several factors which must be considered when drawing any conclusions from the data. MSHA sampling may be biased towards noisier mines and occupations. Additionally, when an overexposure is found during an initial survey, the data base includes both the initial overexposure and the results of any resampling to determine compliance after the mine operator has utilized engineering and/or administrative controls. While these biases may tend to offset each other, their specific impact cannot be quantified. These factors should, however, impact both sectors roughly equally.

Dual Survey Data

MSHA has concluded that the information contained in Tables II–9 and II–10 understates the actual noise exposures in the industry because the information was collected using a 90 dBA threshold level, i.e. sound levels of less than 90 dBA are not integrated into the results. As discussed later in part III of the preamble, in connection with proposed § 62.120(a), MSHA is proposing to change the threshold level to integrate sound levels of between 80 dBA and 130 dBA because MSHA has concluded that this is warranted by the weight of scientific evidence. Integrating the sound levels between 80 dBA and 90 dBA into the noise exposure will generally increase the measured noise dose. The greater the amount of noise between 80 dBA and 90 dBA the greater the impact on the measured noise dose.

Accordingly, MSHA conducted a special survey to compare noise exposures at different threshold levels. The survey, referred to hereinafter as the ''dual-threshold'' survey, involved the collection of personal noise dosimeter data by MSHA inspectors in coal mines and metal and nonmetal mines. Each sample was collected using a personal noise dosimeter with the capability of simultaneously collecting data at both a 90 dBA threshold and an 80 dBA threshold. All other dosimeter settings were the same as those used during normal compliance inspections (the 90 dB criterion level, 5-dB exchange rate, and A-weighting system which are not now being proposed by MSHA for change). The noise doses were mathematically converted to the appropriate TWA_8 using different criterion levels and threshold values.

Tables II–11 and II–12 display the dual-threshold data: respectively in metal and nonmetal mines, and in coal mines. Table II–11 specifically shows the dual-threshold data collected for metal and nonmetal mines from March 1991 through December 1994 using personal noise dosimeters. This data consisted of more than 42,000 full-shift samples.

TABLE II–11.—M/NM DUAL THRESHOLD SAMPLES AT OR EXCEEDING SPECIFIED TWA_8 SOUND LEVELS FROM MARCH 1991 THROUGH DECEMBER 1994

TWA_8 Sound Level (in dBA)	90 dBA thresholds		80 dBA threshold	
	Number of samples	Percent of samples	Number of samples	Percent of samples
90	7,360	17.4	11,150	26.5
85	.....	.....	28,250	66.9

Note: Two of the boxes in the table do not contain entries. This is to avoid the potential for making an inappropriate comparison of values. Direct comparison of TWA_8 values determined with different thresholds is not appropriate if the TWA_8 is less than one of the thresholds. An example may help to illustrate the point. A miner exposed to a constant sound field of 85 dBA for 8 hours would be determined to have a noise dose of 0%, or a TWA_8 of 0 dBA, if a 90 dBA threshold is used: none of the sound would be counted in the computation. If the exposure was measured using an 80 dBA threshold, the dose would be 50%, or a TWA_8 of 85 dBA. Contrasting the measures taken with the two thresholds would be inappropriate in such a case.

As indicated in Table II–11, 17.4% of all samples collected by MSHA in metal and nonmetal mines during the specified time period equaled or exceeded a TWA_8 of 90 dBA using a 90 dBA threshold—slightly less than the results of inspector sampling in Table II–9. In these instances, engineering and/or administrative controls were required to be implemented in the metal or nonmetal mines to reduce sound levels to the PEL: a requirement that would be retained under the proposed rule. When sound levels between 80 dBA and 90 dBA are taken into account, however, 26.4% of the readings indicated non-compliance. Thus, changing the threshold to properly reflect harmful sound levels indicates harmful noise exposures in this industry are more significant than revealed by the inspection data in Table II–9. Furthermore, 67% of the samples in metal and nonmetal mines exceeded a TWA_8 of 85 dBA using an 80 dBA threshold.

MSHA dual-threshold sampling data for coal mines is presented in Table II–12. This data consists of over 4,200 full-shift samples collected from March 1991 through December 1995 using personal noise dosimeters.

TABLE II–12.—MSHA COAL DUAL THRESHOLD SAMPLES AT OR EXCEEDING SPECIFIED TWA_8 SOUND LEVELS FROM MARCH 1991 THROUGH DECEMBER 1995

TWA_8 Sound Level (in dBA)	90 dBA threshold		80 dBA threshold	
	Number of samples	Percent of samples	Number of samples	Percent of samples
90	1,075	25.3	1,510	35.6
85	.....	.....	3,268	76.9

As indicated in Table II–12, 25.3% of all samples collected by MSHA in coal mines during the specified time period equaled or exceeded a TWA_8 of 90 dBA using a 90 dBA threshold. This percentage increases to 35.6% when an 80 dBA threshold is used. Furthermore, using an 80 dBA threshold, almost 77% of the survey samples from the coal

industry showed noise exposures equaling or exceeding 85 dBA.

Tables II–13 and II–14 present some of the MSHA dual-threshold sampling data by occupation for the most frequently sampled occupations in metal and nonmetal mines and coal mines, respectively. A note of caution: the only data presented in these tables is 90 threshold data at a TWA_8 of 90, and 80 threshold data at a TWA_8 of 85. Accordingly, the columns should not be compared. Perhaps the best way to think of this presentation is as two independent analyses at how the exposure levels of various job categories compare with each other.

TABLE II–13.—PERCENTAGE OF MSHA M/NM SAMPLES[a] BY SELECTED OCCUPATION, EXCEEDING SPECIFIED TWA_8 Sound Levels

Occupation	Number of samples	90 dBA threshold	80 dBA Threshold
		Percent of samples > 90 dBA	Percent of samples > 85 dba
Front-end-loader operator	12,812	12.9	67.7
Truck driver	6,216	13.1	73.7
Crusher operator	5,357	19.9	65.1
Bulldozer operator	1,440	50.7	86.2
Bagger	1,308	10.2	65.0
Sizing/washing plant operator	1,246	13.2	59.7
Dredge/barge attendant	1,124	27.2	78.7
Clean-up person	927	19.3	71.3
Dry screen operator	871	11.7	57.6
Utility worker	846	12.4	60.6
Mechanic	761	3.8	43.9
Supervisors/administrators	730	9.0	32.2
Laborer	642	17.1	65.7
Dragline operator	583	34.0	82.5
Backhoe operator	546	8.4	52.6
Dryer/kiln operator	517	10.5	55.5
Rotary drill operator (electric/hydraulic)	543	39.6	83.1
Rotary drill operator (pneumatic)	489	64.4	89.0

[a] These occupations comprise about 87 percent of the 42,206 MSHA dual-threshold samples collected in metal and nonmetal mines from March 1991 through December 1994. All samples were collected using a personal noise dosimeter over a miner's full-shift.

TABLE II–14.—PERCENTAGE OF MSHA COAL SAMPLES BY OCCUPATION, EXCEEDING SPECIFIED TWA_8 SOUND LEVELS[a]

Occupation	Number of samples	90 dBA threshold	80 dBA threshold
		Percent of samples > 90 dBA	Percent of samples > 85 dBA
Continuous miner helper	68	33.8	88.2
Continuous miner operator	262	49.6	96.2
Roof bolter operator (single)	234	21.8	85.5
Roof bolter operator (twin)	92	31.5	98.9
shuttle car operator	260	13.5	78.5
Scoop car operator	94	18.1	74.5
Cutting machine operator	22	36.4	63.6
Headgate operator	20	40.0	100.0
Longwall operator	34	70.6	100.0
Jack setter (longwall)	25	32.0	68.0
Cleaning plant operator	107	36.4	77.6
Bulldozer operator	225	48.9	94.2
Front-end-loader operator	244	16.0	76.6
Highwall drill operator	83	21.7	77.1
Refuse/backfill truck driver	162	13.6	78.4
Coal truck driver	28	17.9	64.3

[a] Above sampled occupations comprise about 71.0% of the 4,247 MSHA dual threshold samples collected in coal mines from March 1991 to December 1995. All samples were collected using a personal noise dosimeter over a miner's fullshift.

As shown in these tables, the percentage of miners exceeding the specified sound levels varied greatly according to occupation. For example, Table II–13 shows that only 8.4% of the backhoe operators in metal and nonmetal mines had noise exposures exceeding a TWA_8 of 90 dBA using a 90 dBA threshold, while 64.4% of the pneumatic rotary drill operators had similar exposures. When reviewing the same two occupations, 52.6% of the backhoe operators and 89.0% of the pneumatic rotary drill operators would have noise exposures exceeding a TWA_8 of 85 dBA using an 80 dBA threshold.

Conclusion; Miners at Significant Risk of Material Impairment

MSHA has prepared an exposure profile of miners based on the data presented in this part; the methodology is summarized in the following paragraphs and described in detail in the Agency's preliminary RIA. Based on this profile, MSHA has concluded that despite many years under existing standards, noise exposures in all sectors of mining continue to pose a significant risk of material impairment to miners over a working lifetime.

Specifically, MSHA estimates that 15% of coal miners will incur a material impairment of hearing under present exposure conditions, or 18,947 coal miners. The figures are 13% of metal and non-metal miners (26,977 metal and nonmetal miners) and 14% of miners as a group (45,924 miners). (The figures include contract miners but exclude certain office workers.)

To derive this information, MSHA began with the 80 dBA exposure data discussed in the prior section. The sampling data were sorted by exposure range: e.g., samples with a TWA_8 of between 80–84.9 dBA, those between 85–89.9 dBA, those between 90–94.9 dBA, and so on.

The sampling data were then adjusted by subtracting 5 dBA from the exposure readings for all samples that had a TWA_8 of 90 dBA at the 90 threshold. These are the samples that would be above the current PEL. MSHA assumed that mine operators currently issue personal HPDs to miners exposed at or above the PEL, that miners are using the HPDs, and that such protection reduces the miner's equivalent TWA_8 noise exposure by about 5 dBA. (There is an extended discussion in part III of this preamble about hearing protector effectiveness, and appropriate references, that shed further light on these assumptions.)

Then the percentage of adjusted samples within each range was multiplied by MSHA's estimates of the total number of mine employees. Those estimates are based on information gathered by the former USBOM (and are presented in part IV of this preamble as part of the Agency's industry profile).

Finally, to establish the number of miners expected to incur a material impairment of hearing, the Agency multiplied the number of miners in each exposure range by the risk of impairment of exposure at that range for a lifetime. For this purpose, the Agency used the 1972 NIOSH risk estimates discussed earlier in this part. (The Agency is aware that NIOSH is currently working on revising its estimates using a different model and taking hearing loss at an additional frequency into account; but until such an approach is peer reviewed, MSHA has concluded it should rely upon the 1972 estimates.)

Based on these assumptions, Table II–15 presents MSHA's profile of the projected number of miners currently at significant risk of developing a material impairment of NIHL under existing exposure conditions.

TABLE II–15.—PROJECTED NUMBER OF MINERS LIKELY TO INCUR NIHL IMPAIRMENT UNDER EXISTING STANDARDS AND EXPOSURE CONDITIONS

	<80	80–84.9	85–89.9	90–94.9	95–99.9	100–104.99	≧105	Total*
Coal	0	599	11,956	5,622	643	111	16	18,947
M/NM	0	1,225	16,910	7,580	1,190	62	10	26,977
Total*	0	1,825	28,866	13,201	1,833	173	26	45,924

*Includes contractor employees. Does not include office workers. Discrepancies are due to rounding.

When MSHA promulgated noise standards in 1971 for underground coal mines, in 1972 for surface coal mines, and in 1974 for metal and nonmetal mines, compliance with the requirements was thought to be adequate to prevent the occurrence of NIHL in the mining industry. Since that time, however, there have been numerous awards of compensation for hearing loss among miners.

Moreover, MSHA's requirements are dated in light of the Agency's experience, that of other domestic and foreign regulatory agencies, and the recommendations of experts on what it takes to have an effective prevention program. NIOSH, for example, currently recommends a comprehensive program which includes the institution of an HCP to prevent NIHL; MSHA's current standards do not include such protection.

In light of current scientific evidence demonstrating that NIHL constitutes a serious hazard, the evidence of continuing harm to miners, and the fact that MSHA standards no longer reflect experience and expert advice, MSHA has concluded that there is a need to replace its existing noise standards with new standards that would provide additional protection to miners. Section 101(a)(6)(A) of the Federal Mine Safety and Health Act of 1977 (Mine Act), states that MSHA's promulgation of health standards must:

> * * * [A]dequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life.

Significant NIHL clearly is the type of material impairment of health, which Congress has directed the Secretary of Labor (Secretary) to prevent. MSHA has concluded that the new requirements in this proposal are necessary to prevent large numbers of miners from suffering material impairment of health resulting from exposure to noise. Compliance will reduce NIHL among miners and the costs associated therewith.

Based on these studies and MSHA's own calculations and analysis presented above, the Agency has concluded that regulatory action is necessary to address the continued excess risk of NIHL resulting from mining employment.

III. Discussion of Proposed Rule

Summary

This part of the Supplementary Information reviews the provisions of the proposed rule, along with the information, comments and alternatives considered by MSHA in developing each feature of the proposal.

While the Agency is seeking to present a complete picture of the basis for its preliminary decisions, so as to facilitate comment, space considerations preclude a full presentation of all of the sources reviewed by the Agency. Part V is a complete reference list of those sources. Among other things, part V contains a list of publications by the former USBOM that were reviewed by the Agency. Many of these describe methods for controlling noise for particular types of mining equipment or facilities, and thus supplement the discussion in this part about feasible engineering controls. All constitute part of the Agency's rulemaking record.

In addition to the materials cited in part V, the Agency researched the noise regulatory codes of a number of other jurisdictions—including those of the military and of other countries. While these codes are noted in this part in a few summary tables, and discussed in connection with certain key requirements being proposed by the Agency, the Agency has determined there is no need to elucidate their requirements in each and every section of this part. Nevertheless, these codes also constitute part of the Agency's rulemaking record.

Section 62.100 Purpose and Scope; Effective Date

Purpose

The purpose of the standards in proposed part 62 is the prevention of occupational noise-induced hearing loss among miners. It is important to clearly state the purpose of the regulations: to clarify it to the regulated public and Agency personnel, and so that the effectiveness of the regulations over time can be measured consistent with principles under the Government Performance Results Act.

Scope

Part 62 would set forth health standards for all coal, metal and nonmetal mines, both surface and underground, subject to the Federal Mine Safety and Health Act of 1977. MSHA currently has four sets of noise standards: for surface metal and nonmetal mines (30 CFR 56.5050), for underground metal and nonmetal mines (30 CFR 57.5050), for underground coal mines (30 CFR part 70, subpart F), and for surface coal mines and surface work areas of underground coal mines (30 CFR part 71, subpart I). In fact, however, there are really two groups of standards: those applicable to coal mines and those applicable to metal and nonmetal mines. This is because the surface and underground standards for noise in metal and nonmetal mines are identical; the same is true of the surface and underground standards for noise in coal mines. The differences between the standards applicable in the coal industry and in other mining industries are discussed in detail in the following pages.

Part 62 would establish a single, uniform noise standard applicable to all mines. This approach is favored by many. Those who responded to MSHA's ANPRM generally agreed that consolidation and simplification of multiple standards into one may help to facilitate understanding of, and thus compliance with, regulatory requirements. Such an approach is also traditional with noise: OSHA's standards apply uniformly to hundreds of industries.

The proposed standard is not identical to the existing coal standard nor to the existing metal and nonmetal standard. Nor is the proposal identical to the noise standard which has been applicable to most other industries since 1983 pursuant to the Occupational Safety and Health Act (29 CFR 1910.95). Conditions in the mining industry, experience with the current standards, MSHA's review of the latest scientific information, the comments submitted in response to the ANPRM, and the requirements of the Mine Safety and Health Act have led the Agency to propose a standard that is unique in some respects. Nevertheless, many key features in the proposal are identical to features in one or more of the existing noise standards.

Several charts comparing the features of the proposed standard to the features of existing MSHA and OSHA noise standards are included in the ''Question and Answers'' in part I of the Supplementary Information accompanying this notice.

Effective Date

MSHA recognizes that successful implementation of these new and uniform health rules will require new training of MSHA personnel and guidance to employees and mine operators, particularly small mine operators. Accordingly the Agency is proposing that the new standards take effect one year after the date of publication of the final rule. An alternative would be to phase in the new requirements. The Agency believes some could be phased in quickly, but wants to avoid confusion. The Agency requests comment on whether a phased-in approach is appropriate and how it might most effectively be designed.

Section 62.110 Definitions

The proposal would include some definitions to facilitate understanding.

The definitions include some technical terms universally used in noise measurement, e.g., criterion level.

The definitions also include some terms used in the mining industry in a way that differs from usage in other contexts, e.g., usage under the OSHA standard. One example is the term ''hearing conservation program'' or ''HCP.'' Under the proposal, requirements for hearing protectors and training are not always linked to audiometric testing results as they are under the OSHA standard. To avoid confusion, the proposal defines a hearing conservation program as a generic reference to those sections of the proposal that set forth the requirements for an audiometric testing program. Another example is the definition of ''qualified technician''.

The definitions also include some terms which are non-standard. In particular, the Agency is proposing to use the term ''supplemental baseline audiogram'' instead of the more commonly used ''revised audiogram''; MSHA believes its terminology will make it easier for the mining industry to understand the requirements of the proposal.

The discussion which immediately follows summarizes the salient features of the definitions. A more detailed discussion of the definitions is contained in those sections of the preamble which review the context in which each definition is to be used.

Access

Access is the right to examine and copy records. This is consistent with the use of this term in several of MSHA's and OSHA's existing health standards.

Audiologist

A professional, specializing in the study and rehabilitation of hearing, who is certified by the American Speech-Language-Hearing Association or licensed by a state board of examiners. MSHA has included this definition primarily to indicate which organizations certify or license audiologists. MSHA has decided that all practicing audiologists should be either licensed or certified by one or both of the above organizations. This term is considered in the section of this preamble that discusses proposed § 62.140 *Audiometric testing program*.

Baseline Audiogram

The audiogram against which future audiograms are usually compared. By comparing an annual audiogram to the baseline audiogram the progression of noise-induced hearing loss can be determined. This term is considered in the section of this preamble that discusses proposed § 62.140, *Audiometric testing program*.

Criterion Level

This refers to the sound level which if applied for 8 hours results in a dose of 100% of that permitted by the standard. Under proposed § 62.120(a), the criterion level would be a sound level of 90 dBA. If applied for 8 hours, this sound level would result in a dose of 100% of the permissible exposure limit (PEL), established by proposed § 62.120(c) as an 8-hour-time-weighted average of 90 dBA. The PEL and the

criterion level are not the same thing. While the PEL is a sound level of 90 dBA for 8 hours, it is also a sound level of 95 dBA for 4 hours; the criterion level is always a constant, derived from what the PEL is at 8 hours of exposure.

Decibel (dB)

Unit of measurement of sound. Decibel is used to describe environmental/occupational sounds and hearing acuity.

Decibel, A-weighted (dBA)

Sound levels measured using the A-weighting network. There are several frequency response networks which have been developed, as noted in the section of the preamble discussing proposed § 62.120(a). A-weighting refers to the frequency response network closely corresponding to the frequency response of the human ear. This network attenuates sound energy in the upper and lower frequencies (<1000 and >5000 Hz) and slightly amplifies those frequencies between 1000 and 5000 Hz. The characteristics of the A-weighting network are found in ANSI S1.25–1991, ''Specification for Personal Noise Dosimeters''.

Designated Representative

A designated representative is an individual or organization to whom a miner gives written authorization to exercise a right of access to records, pursuant to proposed § 62.200.

Exchange Rate

The amount of increase or decrease in sound level which would require halving or doubling the allowable exposure time to maintain the same noise dose. In this proposal, a 5-dBA increase in the sound level would correspond to a halving of the allowable exposure time. Exchange rate is discussed in detail in the section of this preamble discussing proposed § 62.120 *Noise exposure levels.*

Hearing Conservation Program (HCP)

An HCP is designed to detect early changes in a miner's hearing acuity so that corrective action can be instituted to minimize future hearing loss. In general parlance, an HCP is a system of audiological examinations that provide guidance for the use of hearing protectors, other controls, and training. In the proposed rule, however, hearing protector use and training linked to audiological examinations are only a limited subset of the hearing protector and training requirements. Accordingly, to avoid confusion, the term ''hearing conservation program'' in the proposed rule is defined as a generic reference to the requirements of §§ 62.140 through 62.190 of part 62, the requirements dealing with audiological examinations and the corrective actions linked thereto.

Hearing Protector

The purpose of this definition is to clarify that not all devices or materials inserted in or that cover the ear to reduce the noise exposure can qualify as a hearing protector. For example, MSHA does not consider a hearing aid as a hearing protector.

A hearing protector must meet two requirements. First, to be a hearing protector a device must be sold wholly or in part on the basis of its ability to reduce the level of sound entering the ear. Thus, cotton would not be an acceptable hearing protector. Second, the device must have a scientifically accepted indicator of noise reduction value.

MSHA's definition encompasses that used in the Environmental Protection Agency's (EPA) labeling standards for hearing protectors (40 CFR § 211.203(m)). The EPA defines a hearing protector as:

> * * * any device or material, capable of being worn on the head or in the ear canal, that is sold wholly or in part on the basis of its ability to reduce the level of sound entering the ear. This includes devices of which hearing protection may not be the primary function, but which are nonetheless sold partially as providing hearing protection to the user.

EPA requires that all hearing protector manufacturers include labeling information with their products that indicate their Noise Reduction Rating (NRR). Thus, if a hearing protector has such a label, the mine operator can be confident that it meets MSHA's definition of a hearing protector. As noted in the discussions of proposed § 62.120(a), MSHA does not believe the NRR ratings are meaningful in workplace situations; moreover, other organizations have recommended that the EPA reconsider the rating system it uses. MSHA is therefore not proposing to delimit the range of hearing protectors that may be offered to only those with an NRR as such; rather, any scientifically accepted indicator of noise reduction value will be acceptable evidence of the product's purpose.

The Agency is interested in comments on this definition.

Hertz (Hz)

A unit of measurement of frequency, numerically equal to cycles per second. The range of audible frequencies is 20 to 20,000 Hz.

Medical Pathology

A condition or disease affecting the ear. The term is used in the proposed rule in contexts which do not require actual diagnosis and treatment; see specifically the discussion of proposed §§ 62.125 and 62.170. Medical conditions of this type should ultimately be diagnosed and treated by a physician specialist, e.g., an otolaryngologist.

Qualified Technician

A technician who has been certified by the Council for Accreditation in Occupational Hearing Conservation (CAOHC) or by another recognized organization offering similar certification. MSHA has decided that requiring a technician to be certified would ensure that audiometric tests are administered by a competent person. The definition of ''qualified technician'' is discussed in connection with proposed § 62.140 *Audiometric testing program.*

Reportable Hearing Loss

This defines the extent of hearing loss which must be reported to MSHA so the Agency can intervene to prevent further hearing loss. Such reporting is already required pursuant to 30 CFR part 50. This definition clarifies how the requirements of 30 CFR part 50 apply in the case of noise.

The definition in the proposed rule would require that hearing loss be calculated by subtracting the current hearing levels from those on the baseline audiogram at 2000, 3000, and 4000 Hz; when the permanent hearing losses at each frequency are averaged (added up and divided by three), the hearing loss must be reported if the average loss in either ear has increased by 25 dB. In making this calculation, a supplemental baseline audiogram would be used in lieu of the baseline audiogram in those cases in which the supplemental audiogram was created because of a significant improvement in hearing acuity, in accordance with the provisions of proposed § 62.140(d)(2).

The definition of reportable hearing loss is discussed in connection with proposed § 62.190, *Notification of results; reporting requirements.* As discussed therein, the Agency is specifically seeking comment on two points: (a) an appropriate definition of reportable hearing loss in those cases in which operators lack an audiometric test record; and (b) the nature of the hearing loss that MSHA should capture through its part 50 reporting system.

Sound Level (in dBA)

The sound pressure level measured in decibels using the A-weighting network and exponential time averaging. Pursuant to proposed § 62.120(a)(3)(iv), sound pressure levels would be measured using the A-weighting network and the slow-response time constant. Sound consists of pressure changes in air caused by vibrations. These pressure changes produce waves that move out from the vibrating source. The sound level is a measure of the magnitude of these pressure changes and is generally perceived as loudness.

Standard Threshold Shift (STS)

This defines the extent of hearing loss which requires intervention by a mine operator pursuant to proposed § 62.180.

An STS is a measure of permanent change for the worse—relative to a miner's baseline audiogram, or relative to the most recent supplemental audiogram where one has been established pursuant to proposed § 62.140(d). The definition in the proposed rule would require that hearing loss be calculated by subtracting the current hearing levels from those measured by the baseline (or supplemental) audiogram at 2000, 3000, and 4000 Hz; when the hearing losses at each frequency are averaged (added up and divided by three), the hearing loss would be considered an STS if the average loss in either ear has reached 10 dB.

MSHA discusses this definition in detail in connection with proposed § 62.160, *Evaluation of audiogram*.

By contrast with an STS, a temporary threshold shift (TTS) is a temporary change in hearing acuity, which corrects itself after sound levels are decreased and does not permanently impair hearing. The latter term is used frequently in the preamble, but is not needed in the proposed rule.

Supplemental Baseline Audiogram

This is an annual audiogram used in certain specific cases in lieu of the baseline audiogram to measure reportable hearing loss or standard threshold shift. Some professionals prefer the term ''revised'' baseline audiogram; in this proposal, ''supplemental'' is used to ensure mine operators are clear that the integrity of the original ''baseline'' audiogram must be preserved.

A supplemental baseline audiogram is established under the circumstances set forth in proposed § 62.140(d)(1) or 62.140(d)(2). See the discussion of those sections in this preamble, as well as the related discussions of ''reportable hearing loss'' and ''standard threshold shift.''

Time-Weighted Average-8 Hour (TWA_8).

That sound level, which if constant over an 8-hour time period, would result in the same noise dose as is measured. This yardstick measurement is used in the rule in connection with various limitations; for example, the proposed PEL would be a TWA_8 of 90 dBA.

Not all noise measurement instruments give readouts in terms of time-weighted 8-hour averages. Many personal noise dosimeters, for example, measure noise as a percentage of permitted dosage, with the PEL equated to 100%. Mine operators therefore need to convert noise dose to an equivalent TWA_8 to determine if the action level or the PEL has been exceeded, and to evaluate the impact of engineering controls. Accordingly, MSHA has provided a list of TWA_8 conversion values in Table 62–2, included in proposed § 62.120. The table has been compiled by equating a dose of 100% to the proposed PEL. For example, a dose of 50% equals a TWA_8 of 85 dBA—the level at which some protective action must be taken under the proposal.

The TWA_8 and the dose are to be used interchangeably. Since the noise exposure will be measured for the entire shift, compliance with the noise standard will be based upon the measured dose. If the measured dose exceeds 100%, regardless of the length of the workshift, the miner will be considered to be overexposed to noise. It would thus be improper to adjust a TWA_8 reading for an extended work shift.

Care should be taken not to assume that those models of personal noise dosimeters which give readouts in both the noise dose and the ''average sound level'' in dBA are giving a TWA_8 readout. The ''L_{avg}'', or average sound level, is the constant sound level which equals the dose over the measurement period. The value of the TWA_8 is the same as the L_{avg} if the measurement period is 8 hours.

It should be noted that the TWA_8 is a term used in the context of a 5-dB exchange rate. In the context of a 3-dB exchange rate, the equivalent term is the ''$L_{eq,8}$''. The latter term is used occasionally in the preamble—in discussing the possible use of a 3-dB exchange rate, and in those studies performed with data from countries using a 3-dB exchange rate.

Section 62.120 Limitations on Noise Exposure

Introduction

The provisions of this section of the proposed regulation deal with some critical subjects: how to compute a miner's noise dose; the hierarchy of controls at different noise exposure doses; and the monitoring of noise exposure.

Specifically, paragraph (a) of proposed § 62.120 provides the parameters for computing the amount of noise to which a miner is exposed—a miner's noise dose. Paragraphs (b) through (d) establish a series of noise exposure limitations, and the specific mine operator actions required if noise exceeds that level. Paragraph (e) establishes a ceiling on sound levels to which a miner may be exposed. Paragraph (f) establishes a mine operator's obligation to evaluate each miner's noise exposure to determine if it exceeds any of the limitations established by this section, and to notify miners at risk.

A short summary of each subsection follows. Thereafter, a more detailed presentation is provided.

§ 62.120(a)

Proposed paragraph (a) sets forth a formula for dose computation which corresponds to the measurements made by most current personal noise dosimeters. It further specifies that: all sound levels from 80 dBA to at least 130 dBA be integrated into the dose measurement, including impact/impulse noise in that range; noise be measured over a full shift; a 5-dB exchange rate be used; and that measurements be made using the A-weighting network and slow response instrument settings. This paragraph also clarifies that measurement of noise dosage is to be made without regard for the effect of a hearing protector.

The exchange rate is the measure that reflects how much of a decrease in exposure time is required when the sound level increases. The proposed 5-dB exchange rate is the same as under current standards. Using that rate, the exposure permitted at a sound level of 90 dBA is half that permitted at a sound level of 85 dBA—a miner gets the same noise dose in 4 hours at 90 dBA as at 8 hours at 85 dBA.

The Agency currently uses a 5-dB exchange rate. There appears to be a consensus in the recent literature for an exchange rate of 3-dB. Moreover, the current 5-dB exhange rates incorporates an assumption that there is significant time for hearing to recover from high sound levels. MSHA has concluded that

noise exposure under mining conditions does not warrant such an assumption. A 3-dB exchange rate does not incorporate this assumption.

Nevertheless, the Agency is proposing to retain the existing 5-dB exchange rate because of feasibility considerations. Changing to a 3-dB rate from a 5-dB rate would significantly reduce the amount of time that miners could be exposed to higher sound levels without exceeding the permissible exposure limit. For example, MSHA estimates that the percentage of miners whose exposure would be in violation of a PEL set at a $L_{eq,8}$ of 90 dBA would be just about double that of a PEL set at a TWA_8 of 90 dBA. This means mine operators would have to utilize controls to reduce exposures to the PEL more frequently—and the controls required to reduce exposures that much would be more expensive. Furthermore, it is extremely difficult to reduce the noise exposures to below a $L_{eq,8}$ of 90 dBA using currently available engineering or administrative noise controls or a combination thereof. Accordingly, moving the industry to a 3-dB exchange rate may be infeasible at this time. (Part IV contains a further discussion of feasibility issues.)

Two features proposed with respect to noise measurement of particular significance are: lowering the threshold at which sound levels are integrated into a miner's noise dose, and prohibiting the adjustment of noise measurements to provide credit for hearing protector attenuation.

MSHA is proposed that the threshold for integrating noise into dose measurements be expanded to cover sounds as low as 80 dBA. This decision is based on strong evidence that such exposures do contribute to hearing impairment. While more protective than the present threshold of 90 dBA, this change will generally result in higher dose readings in both the coal and metal and nonmetal sectors than at present. For example, MSHA's dual-threshold survey indicated that in the metal and nonmetal industry, the percentage of samples above the PEL increased from 17.4% at a 90 dBA threshold to 26.4% at an 80 dBA threshold; in coal the figures increased from 25.3% to 35.6%.

Moreover, the proposed regulation would not allow dose measurements to be adjusted in those cases in which miners are wearing hearing protectors. This is consistent with the thrust of the proposal to establish for all mining sectors a hierarchy of controls for noise in which primary reliance will be upon engineering and administrative controls.

§ 62.120(b)

Proposed paragraph (b) establishes an ''action level'' at a TWA_8 of 85 dBA.

The need for an action level reflects two facts: (1) There is a significant risk of material impairment to miners from a lifetime of exposure to noise at this level; and (2) the Agency believes it may not be feasible at this time to lower the PEL to this level, since that would require that mine operators use all feasible engineering and administrative controls to reduce noise exposures to this level.

The proposal would require that all miners exposed above the action level be provided special instruction in the hazards of noise and protective methods. The training is to be provided annually for as long as exposure exceeds the action level. (The nature of this instruction, how it is to be provided, and how it can be coordinated with other required miner training are subjects discussed in connection with proposed § 62.130.)

If a miner's exposure exceeds the action level but is below the PEL, an operator will also be required to enroll a miner whose exposure exceeds the action level in a hearing conservation program (HCP). While enrollment in the HCP would require the operator to make annual audiometric testing available to the miner, miners exposed to noise below the PEL would have the right to decline taking any annual audiometric testing. The requirements for such testing are discussed in connection with proposed § 62.140, audiometric test procedures. MSHA is seeking comments on how to minimize the burden on mine operators of providing audiometric examinations for those miners with only a temporary attachment to the mining work force (e.g., summer employees), while recognizing the importance of detecting and tracking hearing loss among those who switch jobs.

In addition, the operator must provide properly fitted hearing protection—before the initial hearing examination, if a significant threshold shift in hearing acuity is detected, and at any other time upon miner request. Should it take more than 6 months to provide the initial hearing examination because of the need to wait for a mobile test van, or should a significant threshold shift in hearing acuity be detected, the operator would also be required to ensure that the miner wear the hearing protection—even if the miner's noise exposure remains under the PEL. (A discussion of the timeframes for audiometric tests, and the use of mobile test vans, is included in the discussion of proposed § 62.140, audiometric test program. The definition of a significant threshold shift is discussed in connection with proposed § 62.160, evaluation of audiogram).

An action level currently exists under OSHA but would be new to the mining industry. As discussed herein, MSHA proposes to build upon the requirements which have been used by OSHA while giving due regard to implementation approaches appropriate to the circumstances of the mining community.

§ 62.120(c)

Proposed paragraph (c) would establish the permissible exposure limit (PEL) to noise for a miner as a TWA_8 of 90 dBA during any workshift. (This is also referred to as a dose measurement of 100%; the action level TWA_8 of 85 dBA is half this dose of noise.) The proposal further provides that if the PEL is exceeded, in addition to the controls required at the action level, the mine operator shall use all feasible engineering and administrative controls to reduce the miner's noise exposure to the PEL. The mine operator has a choice of whether to use engineering controls, administrative controls, or both; but if administrative controls are utilized, a copy of the procedures involved must be posted, and copies given to the affected miners.

If reducing the dose to this level with such controls is not feasible, the proposal requires the mine operator to use such controls to lower the noise exposure as much as is feasible.

In addition, in such cases, the proposal requires that the operator take extra steps to protect miner hearing. The operator must ensure all miners so exposed take the annual hearing examinations, must provide properly fitted hearing protection to all miners so exposed, and must ensure the hearing protection is used by all miners so exposed.

Under the proposal, a consistent hierarchy of controls is established for all mines. Mine operators must first utilize all feasible engineering and administrative controls to reduce sound levels to the PEL before relying on other controls to protect against hearing loss. This approach is consistent with that currently in place for metal and nonmetal mines, but would be a change for coal mines. As discussed herein (in connection with proposed § 62.125, hearing protectors), MSHA has considerable evidence that primary reliance upon hearing protectors, as is the current case in the coal industry, is misplaced.

As under the present standards, the proposal would require a mine operator

to use only such engineering controls as are technologically feasible, and to use only such engineering and administrative controls as are economically feasible for that mine operator.

As noted, the proposed rule provides for supplemental controls in those cases in which the Agency concurs with a mine operator that the use of all feasible engineering and administrative controls cannot reduce noise to the PEL. MSHA believes that when a miner is exposed to such high levels of noise, these supplemental obligations are necessary to protect miner hearing. Hearing protectors are not without their discomforts; but the risk of hearing loss at such exposure levels ought to be the controlling factor. While audiometric testing is not an invasive procedure, the Agency is concerned that there may be economic pressures and personal reasons that may lead miners to decline to take hearing examinations. The information generated by these tests is necessary, however, to trigger investigation of potentially serious flaws in the layers of noise controls required at these high exposure levels. In addition, the Agency believes that miners operating under such high noise conditions should be aware of the severity of any hearing loss; in a mining environment, this knowledge could have implications for the safety of the miner and the safety of others. Comments on this provision are specifically solicited.

§ 62.120(d)

Proposed paragraph (d) provides that should a miner's noise exposure exceed a TWA_8 of 105 dBA during any workshift, a dose of 800% of the PEL, the mine operator shall, in addition to taking all of the actions required when exceeding the PEL, require the miner to use dual hearing protection—i.e. both a plug type and a muff type hearing protector. In this context, the Agency presents information about the mining jobs at which the exposures of this level are occurring; and requests comment on whether there should be an absolute dose ceiling, regardless of the feasibility of control by an individual mine operator.

§ 62.120(e)

Proposed paragraph (e) would provide that at no time shall a miner be exposed to sound levels exceeding 115 dBA.

§ 62.120(f)

Proposed paragraph (f) consists of two parts. First, it would require mine operators to establish a system of monitoring which effectively evaluates each miner's noise exposure. This will ensure that mine operators have the means to determine whether a miner's exposure exceeds any of the limitations established by this section, as well as to assess the effectiveness of noise controls. The proposed rule is performance oriented in that the regularity and methodology used to make this evaluation are not specified. Specific requirements for periodic monitoring now applicable to the coal sector would be revoked.

Proposed paragraph (f) would also require that miners be notified in writing should their exposure exceed any of the levels specified by this section—whether based on operator or MSHA evaluations of noise. Notice would be required within 15 calendar days.

The proposal has been designed to ensure that miners are made aware of the hazards they currently face. Miners exposed above the action level should be notified of that fact so, for example, they can consider the importance of using provided, properly fitted and maintained hearing protectors. On the other hand, the proposal does not require notification of a particular miner if an exposure measurement indicates that the miner's exposure has not changed and the miner has within the last year been apprised of the same information.

The proposal has no provision for requiring the posting of warning signs.

Dose Computation

Proposed § 62.120(a) sets forth important technical specifications on computing noise dose. These specifications were utilized in the establishment of the limitations set forth in this section; they therefore must be utilized in dose measurements taken to determine compliance.

Using a Personal Dosimeter

The dose itself is usually read directly from a personal noise dosimeter. The dosimeter is set to the specifications required by the proposed standard (e.g. 80 dB threshold), attached to the miner, and the total dose read out at the end of the full work shift.

Using a Sound Level Meter

Some operators may prefer to take a series of individual readings with sound level meters, and derive the dose from these readings. Accordingly, the proposal also sets forth the formula for determining the dose in this fashion.

Proposed § 62.120(a)(1) would specify that noise dose is to be computed by combining the sound levels during various periods of time during the miner's measurement period, in accordance with the formula:

$D=100(C_1/T_1 + C_2/T_2 + * * * + C_n/T_n)$,

where:

D=the percent of permissible exposure,
C_n=the total time of exposure at a specified sound level, and
T_n=the reference duration of exposure at that level, as listed in Table 62–1.

Table 62–1 contains reference durations for sound levels from 85 to 115 dBA. The sound levels to be integrated into the dose measurement pursuant to this proposal actually range from 80 to 130 dBA. Reference durations for sound levels not in the table can be calculated pursuant to the formula in the table note. (For a detailed discussion of this topic see the section of this preamble entitled *Threshold and range of integration*.)

As noted, current personal noise dosimeters automatically compute a miner's noise exposure essentially using the above formula. In fact, noise dose is relatively simple to compute when the sound level is constant throughout the work shift. For example, a miner is exposed to 95 dBA for 2 hours and has no additional noise exposure. The reference duration, from Table 62–1, for 95 dBA is 4 hours. Substituting the values into the above formula yields:

D=100 (2/4) or equivalently 50%.

When a miner is exposed to fluctuating sound levels, the total noise dose can be computed using the same formula. For example, a miner is exposed to 90 dBA for 1 hour, 95 dBA for 2 hours and 100 dBA for 1 hour. The reference durations from Table 62–1 are 8 hours, 4 hours, and 2 hours, respectively. Substituting the values into the above formula yields:

D=100 (1/8+2/4+1/2) or 100 (0.125+0.50+0.50) or equivalently 112.5%.

Conversion of Dose to TWA_8

Table 62–2, included in proposed § 62.120(a)(2), has been constructed to permit dosage measurements to be converted readily into time-weighted average 8-hour (TWA_8) measurements.

The TWA_8 is the sound level which if constant over an 8-hour time period, would result in the same noise dose as is measured. This yardstick measurement is the one used to establish the action level, PEL, and double-hearing protection supplemental control level in the proposed regulation. Since personal noise dosimeters measure noise as a percentage of permitted dosage, with the permissible exposure limit (PEL) equated to 100%, this table allows for ready conversion of

those measurements into a form that measures compliance.

As stated previously, the TWA_8 and the dose are to be used interchangeably. It is intended that the TWA_8 not be adjusted for extended work shifts. Since the noise exposure will be measured for the entire shift, compliance with the noise standard will be based upon the measured dose. If the measured dose exceeds 100%, regardless of the length of the workshift, the miner will be considered to be overexposed to noise. MSHA requests commenters to review the proposed rule and offer suggestions to help the Agency ensure that this intention is clearly conveyed in the rulemaking language.

The table has been constructed by equating the proposed PEL to a dose of 100%. More specifically, the TWA_8 conversion values in Table 62–2 are based on the use of a 90 dBA PEL, 80 dBA threshold, and a 5-dB exchange rate. Interpolation for values not found in this table can be determined from the following formula: $TWA_8=16.61 \log_{10}(D/100)+90$, where D is the percent dose.

It is important to understand that the exposure is interpreted as if averaged over 8 hours. Thus, if a miner only works for 5 or 6 hours, the sound levels can be higher during those hours than if the miner works for 8 hours. Conversely, if a miner works an extended shift (greater than eight hours), the sound levels would need to be lower. Some current models of personal noise dosimeters will provide readings in both dose and the average sound level (L_{avg}) over the sampling period. Although the L_{avg} is useful in some circumstances, it is only equal to the TWA_8 when the period sampled is 8 hours.

Consideration of Hearing Protector Attenuation

Proposed § 62.120(a)(3)(i) would require that when determining a miner's noise dose, the attenuation of hearing protectors not be considered. This provision would supplement the intent of proposed § 62.120(c) to preclude the current practice in the coal industry of not issuing a citation based upon a noise exposure that exceeds the PEL when the miners are wearing hearing protection.

Several commenters recommended that no credit be given for hearing protector attenuation in determining the miner's noise dose. These commenters believed that engineering or administrative controls should be given primacy over hearing protectors.

Other commenters, however, supported an allowance for hearing protector attenuation. Their recommendations varied from allowing the full NRR value, to allowing only a 5 decibel attenuation for all makes and models of hearing protectors.

Field studies in mining by Giardino and Durkt (1996), Kogut and Goff (1994), Giardino and Durkt (1994), Durkt (1993), Goff, et. al. (1986), Durkt and Marraccini (1986), and Goff and Blank (1984) have shown that the measured hearing protector attenuation at mines is far less than the attenuation measured in the laboratory and is in some cases minimal. Furthermore, the measured attenuations were highly variable. These two factors make it virtually impossible to accurately predict the in-mine effectiveness of hearing protectors in reducing noise exposures. A more detailed discussion of hearing protector performance and attenuation rating methods is presented in the *Hearing protector effectiveness* section of this preamble.

Table III–1 presents three types of information from various jurisdictions. These items are—

(1) the consideration of hearing protector attenuation when determining the occupational noise exposure;

(2) the weighting network used for measuring occupational noise exposure; and

(3) the instrument response time for measuring non-impulse/impact occupational noise.

TABLE III–1.—FEATURES OF SELECTED LEGISLATION OR GUIDELINES FOR EVALUATING NON-IMPULSE/IMPACT NOISE TABULATED FOR VARIOUS ENTITIES

Entity	Credit for hearing protector attenuation	Weighting network	Response times
U.S. Army	No	A-weighting	Slow.
U.S. Navy	Implied	A-weighting	Slow.
U.S. Air Force	No	A-weighting	Slow.
Canada (consensus)	Not addressed	A-weighting	Slow (SLM only).
EEC	No	A-weighting	Slow or fast.
Australia (consensus)	No	A-weighting	Fast (integrating SLM) or slow (SLM)
Australia (national)	No	A-weighting	Fast (integrating SLM) or slow (SLM).
Western Australia	No	A-weighting	Fast (integrating SLM) or slow (SLM).
South Africa	Implied no	A-weighting	Slow.
ISO (consensus)	Implied no	A-weighting	Fast (SLM).
ACGIH (consensus)	Implied no	A-weighting	Slow.

In reviewing the procedures for exposure measurement in regulations and codes of practice (mandatory or recommended) from the selected branches of the U.S. armed services, international communities, the ISO, and the ACGIH, MSHA found that some diversity exists among the methods used (See Table III–1). Nearly all of the entities either specify or imply that attenuation provided by hearing protectors should not be considered in determining a worker's noise exposure.

Based on this information, MSHA has concluded that it would be inappropriate to consider the attenuation of hearing protectors in determining a miner's noise dose. As computed, the noise dose provides a measurable foundation upon which can be built a noise control program: including, as discussed herein, the use of hearing protectors to attenuate that noise dose.

This provision would supplement the intent of proposed § 62.120(c) to preclude MSHA's current practice in the coal industry of not issuing a citation based upon a noise exposure that exceeds the PEL when the miners are wearing hearing protection. This is consistent with the thrust of the proposal to establish for all mining sectors a hierarchy of controls for noise in which primary reliance will be upon engineering and administrative controls. These issues are discussed at length in connection with proposed § 62.120(c) under *Hierarchy of controls* and *Hearing protector effectiveness.*

Threshold and Range of Integration

Proposed § 62.120(a)(3)(ii) would require that all sound levels from 80 dBA to 130 dBA be integrated into the

miner's noise dose for determining compliance with the PEL. Sound levels less than 80 dBA would not be included in the noise exposure computation. By not excluding any particular types of sound from the requirement, MSHA intends that the term ''all sound levels'' include, but is not limited to, continuous, intermittent, fluctuating, impulse, and impact noise.

MSHA currently uses a threshold of 90 dBA for all purposes. OSHA, however, uses a dual threshold: a 90 dBA threshold for measuring whether a dose exceeds its PEL (TWA_8 of 90 dBA), and an 80 dBA threshold for determining whether a dose exceeds its action level (TWA_8 of 85 dBA).

Many of the commenters to MSHA's ANPRM supported a threshold of 80 dBA. Some specifically supported a single threshold. One of these commenters stated the following:

> It was an undue burden on employers when OSHA adopted a dual threshold level (90 dBA when sampling for PEL and 80 dBA when sampling for a Hearing Conservation Program). Few employers in our practice understand the difference, and in fact, very few service providers in our area understand the dramatic differences these two threshold levels can create. MSHA has the opportunity to correct this [oversight] by OSHA, and would be wise to adopt the 80-dBA threshold.

Another commenter stated:

> MSHA should use an 80-dBA threshold for integrating noise on dosimeters for both compliance with the PEL and the action level. The exposure characterization of levels between 80 dBA and 130 dBA would be more accurate using an 80-dBA threshold dosimeter versus a 90-dBA integrating dosimeter.

A third commenter recommended the following:

> One threshold level should be used for all measurements—80 dBA. A single threshold level of 80 dBA, as compared to separate thresholds of say, 90 dBA and 80 dBA, would greatly simplify and reduce the costs of measuring noise exposure levels and would provide an additional margin of safety.

Several commenters recommended that the current threshold of 90 dBA be retained. One of these commenters stated the following:

> * * * multiple thresholds would be extremely burdensome and costly and would require companies to purchase and use meters that integrate at different levels. * * * the requirement that more than one threshold be used is unsupported by reliable and widely accepted scientific data and is unnecessary for protection of the health of miners.

Two commenters supported the use of a dual threshold consistent with OSHA's current standard, while another commenter recommended a threshold of 75 dBA, because EPA had said that 75 dBA equates to no risk.

One mining association commented that a member company had collected about 4,500 samples between 1985 and 1988 using personal noise dosimeters set at an 80 dBA threshold and found that about 20% of the measurements equalled or exceeded the PEL. MSHA notes these results are comparable to the results of the dual-threshold survey conducted by the Agency and reviewed in part II.

According to ACGIH (1994) all sound levels exceeding 80 dBA should be integrated into the daily noise exposure. Because permissible durations are presented for sound levels up to 139 dBA, the range of integration can be inferred to be 80 to 139 dBA.

ANSI S1.25–1991, ''Specification for Personal Noise Dosimeters'', recommends that the threshold level be set at least 5 dB below the criterion level. Although ANSI S1.25–1991 specifies personal noise dosimeters to have an operating range of at least 50 dB, most currently manufactured personal noise dosimeters have an operating range greater than 50 dB. In addition, these personal noise dosimeters will integrate sound levels up to 140 dBA to include impulse/impact noise at pre-selected thresholds of 80 dBA, 85 dBA, and 90 dBA.

There is general agreement among the EEC, the ISO, the international community, and selected branches of the U.S. armed services that all types of noise be integrated in the worker's noise dose; however, a threshold is not always specified.

Moreover, based on its review of the available evidence, MSHA has determined that the use of a single 80 dBA threshold for determining a miner's noise exposure is necessary for miner protection. Its many advantages include:

(1) it would address the risk of hearing impairment from prolonged exposure (greater than 8 hours) above 80 dBA;

(2) it would improve the accuracy of exposure measurements, ensuring that at-risk miners would be accurately identified;

(3) it is consistent with OSHA's 80 dBA threshold for HCP requirements, allowing for comparison data;

(4) it would be less burdensome than using dual thresholds, allowing the use of a single, less complex personal noise dosimeter to collect the required information rather than a more expensive instrument or two separate instruments; and

(5) a single threshold is appropriate in as much as MSHA's proposed approach to hearing conservation is linked closely to other parts of its proposal.

Several consequences should be noted of switching to a threshold of 80 dBA from the present threshold of 90 dBA. As noted in part II of this preamble, MSHA inspectors conducted comparative sampling for several years, simultaneously collecting readings at both the 90 dBA and 80 dBA thresholds. Tables II–11 and II–12, located in part II of the Preamble, show the effect of using an 80 dBA threshold versus a 90 dBA threshold with a criterion level of 90 dBA. Of the more than 42,000 samples collected in metal/non-metal mines, for example, 7,360 (17.4%) exceeded a criterion of 90 dBA using a 90 dBA threshold; whereas, 11,150 (26.4%) exceeded the 90 dBA criterion using an 80 dBA threshold. Hence, the use of an 80 dBA threshold will result in a higher proportion of samples exceeding the PEL. Also, an 80 dBA threshold means that in the case of an extended workshift of more than 8 hours, sound levels that average below 90 dBA can result in a dose that exceeds the PEL. For example, the PEL for a 16-hour workshift is 85 dBA, which equates to a TWA_8 of 90 dBA.

Further, based upon research conducted by MSHA, the Agency has determined that the effect of switching to a lower threshold is not linear. Sound levels just under 90 dBA will have a much greater impact on the dose computation than those nearer 80 dBA.

Full-Shift Sample

Proposed § 62.120(a)(3)(ii) would also require that compliance with the PEL or action level be based on the determination of a miner's full-shift noise exposure. Typically, a full-shift measurement would be taken with a personal noise dosimeter. This procedure would be consistent with MSHA's existing noise standards and sampling procedures.

OSHA's noise standard does not specify a sampling duration, other than to require personal monitoring where circumstances such as high worker mobility, significant variation in sound level, or a significant component of impulse noise make area monitoring generally inappropriate. OSHA does require that the sample be representative of the worker's exposure.

In response to MSHA's ANPRM, numerous commenters addressed sampling duration, including the question of novel work shifts (work shifts differing from 8 hours). Many commenters stated that the noise measurement should encompass the entire work shift regardless of duration. For those shifts which exceed 8 hours,

a number of commenters suggested that the PEL be adjusted to account for the longer work shift. Others suggested that the noise exposure be adjusted.

Several commenters advocated the use of a 40-hour noise exposure instead of a daily 8-hour noise exposure because of the widely varying noise exposure of miners. These commenters believed that the 40-hour exposure would present a better representation of the noise exposure.

A few commenters addressed partial shift sampling. At many small mines, miners may be involved with several different jobs with different noise exposures. Because of this, one commenter believed that partial-shift sampling was more representative of a miner's noise exposure. The commenter did not want the highest partial-shift noise exposure projected to a full-shift and reported as the typical exposure for that shift. Another commenter suggested that the survey duration encompass at least two-thirds of the shift in order to represent a full-shift sample.

Lancaster (1986), in a study of noise exposure of British coal miners, reported that the variation in the day-to-day occupational noise exposure of compressed air drillers and electricians had a range that exceeded 30 dBA. The smallest range for any of the fifteen occupations was 8 dBA. Lancaster reported that five-shift samples greatly reduced the chance of getting an unrepresentative high or low result. Further, Lancaster concluded that a five-shift sample was not a reliable routine method for determining the long-term noise exposure. In order to determine the long-term average noise exposure to within an accuracy of 2 dBA, Lancaster stated that 4 to 57 samples are needed depending upon the occupation.

MSHA concurs with the majority of commenters that full-shift sampling is more representative of the noise exposure than partial-shift sampling. Therefore, MSHA has determined that a full-shift measurement is necessary because partial-shift noise surveys do not account for such factors as: variable work tasks, worker mobility, and no set production pattern for many mining situations. These occurrences are commonplace in the mining industry.

The Agency did not include a long-term sampling requirement in the proposal. Such a requirement would be burdensome to the mining industry and is not relevant to compliance with the proposed standard, which will be based upon a single full-shift sample by the Agency. (For further consideration of MSHA compliance policy in this regard, see the last of the Questions and Answers in part I.)

Impulse/Impact Noise

MSHA's proposal does not include a specific limit on impulse or impact noise. Rather, it provides that all noise in the range from 80 dBA to 130 dBA be integrated into a miner's noise dose, including any impulse/impact noises measured in those ranges. Most personal noise dosimeters cover this range of sound levels. MSHA has concluded that, currently, there is not a sufficient scientific consensus to support a separate impulse/impact noise standard. Further, existing procedures, for identifying and measuring such sound, lack the practicality to enable its effective enforcement: for example, many personal noise dosimeters do not permit use of the fast response settings needed to isolate sounds of this type. Since industrial impulses are almost always superimposed on a background of moderate-to-high levels of continuous noise, and since both may be harmful, MSHA has determined that it is only reasonable to consider their effect together, rather than to treat each separately. As indicated below, there is ample justification for this approach in the studies reviewed by MSHA and comments submitted to the record.

MSHA's existing noise standards for coal mines do not include a limit for impulse/impact noise. Both OSHA's and MSHA's Metal and Nonmetal existing noise standards limit impulse/impact noise to a peak level of 140 dB. Neither standard, however, specifically defines impulse/impact noise nor procedures to measure it.

OSHA, in its Hearing Conservation Amendment, determined that impulse noise should be combined with continuous noise to calculate employee noise exposure for purposes of the HCP. OSHA's standard, however, retains the 140 dB peak limit on impulse and impact noise. The OSHA preamble to its Hearing Conservation Amendment (46 FR 4099) stated:

> Since industrial impulses are almost always superimposed on a background of moderate to high levels of continuous noise * * * and since both may be harmful, it is only reasonable to consider their effects together rather than to treat each separately * * *. The decision to measure all noise exposures for purposes of the hearing conservation program is a pragmatic approach to the whole problem of impulse noise. For, while there is some dispute as to the precise definition and effect of impulse noise, there is general agreement that impulse noise is damaging.

Impulse/impact noise is typically characterized by a rapid rise time, high peak value of short duration, and rapid decay.

In 1974, OSHA proposed the following definition for impulse noise (39 FR 37775):

> * * * a sound with a rise time of not more than 35 milliseconds to peak intensity and a duration of not more than 500 milliseconds to the time when the level is 20 dB below the peak. If the impulses recur at intervals of less than one-half second, they shall be considered as continuous sound.

At that time, OSHA proposed to limit exposure to impulses at 140 dB to 100 per day, and to permit a tenfold increase in the number of impulses for each 10-dB decrease in the peak pressure of the impulse. OSHA stated that this proposal was in accordance with the criterion proposed by McRobert and Ward (1973). OSHA's proposal on impulse noise exposure limits was identical to that recommended by the ACGIH (1986).

Currently, there is no uniformly accepted definition of impulse or impact noise. ANSI S12.7–1986, ''Methods for Measurement of Impulse Noise'', defines impulse noise as ''a single short burst or a series of short bursts of sound pressure. The pressure-time history of a single burst includes a rise to a peak pressure, followed by a decay of the pressure envelope.''

The ACGIH (1986) states that:

> Impulsive or impact noise is considered to be those variations in noise levels [sound levels] that involve maxima at [time] intervals of greater than one per second. Where the intervals are less than one second, it should be considered continuous.

Integrating impulse/impact noise into the miner's noise dose is broadly supported by many of the commenters. One commenter stated that currently there is not enough scientific information to promulgate a separate standard on impulse/impact noise. Several commenters advocated retaining the current MSHA Metal and Nonmetal 140 dB peak limit. However, two commenters indicated that exposure to this peak be limited to 100 occurrences per work shift. One commenter on this issue recommended that MSHA adopt the measurement methods described in ANSI S12.7–1986, ''Methods for Measurement of Impulse Noise''. This ANSI document, however, does not specify a criterion level for such noise. Another commenter stated that 156 dB is most likely the critical point at which the sensory components of the human ear disintegrate.

Defining impulse/impact noise, and setting an appropriate limit, has proven to be an arduous task mainly because of the difficulty in measuring such sound and differentiating it from non-impulse/impact noise that may occur simultaneously. Impulse/impact noise

seldom occurs alone in the mining environment. Several commenters on this issue indicated that current instrumentation, including in particular the personal noise dosimeter, cannot distinguish between impulse/impact and continuous noise occurring simultaneously. Some commenters stated that although personal noise dosimeters cannot distinguish between impulse/impact noise and continuous noise, newer models of personal noise dosimeters are capable of accurately integrating the two types of noise into a single combined dose.

The studies reviewed by MSHA and discussed below indicate that even though there is no consensus as to a definition of impulse/impact noise, all researchers and regulators agree that this type of noise is damaging to hearing.

Ward (1990) stated that both impulse and impact noises involve high sound pressure levels and short durations, so in a sense, they jointly represent an extreme type of intermittent noise. He believed, however, that there is considerable evidence that a distinction should be made between impulse noise and impact noise, and that they should be treated separately. Ward characterized impulse noise as ''A-duration,'' such as that from gunfire. Whereas he characterized impact noise as ''B-duration,'' having multiple, nearly equal peaks and a sustained reverberation that may endure for a second or even longer.

Ward believed that recent research tends to support the conclusion that impact noise can reasonably be expected to behave in a manner similar to that of intermittent exposure to short bursts of otherwise continuous but high-intensity noise. He stated that any predictive scheme that accurately estimates the hazard of intermittent noise in the range of time-weighted averages (TWA_8) or $L_{eq,8}$ of 110 dBA to 130 dBA also would be successful in predicting the hazard from impact noise, and no ''correction for impulsiveness'' should be necessary. He further stated, the same is true of impulse noise as long as the level of the pulse does not exceed some ''critical'' value. If the impulse exceeds this critical level, however, Ward believed that the hazard increases rapidly with further increases in level or in the number of impulses.

Ward stated that the most hazardous impulse would be one that has its maximum energy in the most sensitive region of the human auditory system: namely 2000 to 3000 Hz. This occurs when the A-duration is around 0.2 milliseconds (ms). For pulses whose A-duration is in this vicinity, he believed the critical level to be around 150 dB for the average individual and around 140 dB for the most susceptible ears. He believes, however, that his limit results in overprotection against pulses whose A-duration is short (as in the case of cap guns) or long (as with cannons or sonic booms).

Ward concluded that impulse noise may be the most important cause of NIHL in the general population, not by a gradual erosion of auditory sensitivity through repeated daily exposure, but rather by a single event causing acoustic trauma. He emphasized, however, that the determination of valid exposure limits for specific impulses is still a major problem.

In the American Industrial Hygiene Association (AIHA) *Noise & Hearing Conservation Manual,* Ward (1986) also expressed concern regarding an impulse/impact noise limit. He stated:

> Just where, if anywhere, this type of limit should be placed is still undecided. Although the present OSHA regulations state: ''Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure'' (Anon., 1971), this number was little more than a guess when it was first proposed in the CHABA document (Kryter et. al., 1966), and no convincing supportive evidence has since appeared. While 140 dB may be a realistic ceiling for impact noises, it is inappropriate for impulses, so exposure limits in which the permitted peak level increases as the duration of the pulses becomes shorter should continue to be used (Anon., 1968).

Volume II of the Ohio State University Research Foundation report (Melnick et al., 1980) discussed the effects of single, high-level impulses and stated:

> There are insufficient data to develop distributions of hearing loss as the function of the parameters of single, high-intensity impulses. The very nature of the stimulus makes these effects on man difficult to quantify.

This report, however, stated the following regarding single impulse levels that could cause damage:

> * * * In experiments with laboratory animals, impulses having peak levels in the range of 150 to 160 dB were capable not only of producing damage to the inner ear but also showed evidence of trauma to the structures of the middle ear, including perforation of the tympanic membrane (Eames et al., 1973). Pfander (1975) reports that, in humans, perforations of the tympanic membrane were observed when the peak level for an explosive impulse was in the range of 180 dB. In his experiments with the effects of sonic booms on mice using peak levels that range from 126 to 146 dB, with durations in excess of 100 msec, Reinis (1976) reported that five such booms delivered at the rate of 1 every 10 seconds are capable of producing bleeding in the cochlea of the experimental animals.

The Committee on Hygiene Standards of the British Occupational Hygiene Society (1976) developed standards for impulse noise. Their recommendation referenced a study by Kryter and Garinther which ''showed that temporary hearing loss after exposure to 100 impulses increased rapidly at sound pressure levels exceeding 170 dB.'' Kryter and Garinther, however, recommended limiting instantaneous sound pressure levels to 150 dBA, because special measurement techniques and instruments would be needed to measure levels in excess of 150 dBA.

Shaw (1985) recommended, in the interest of simplicity and in keeping with ISO/DIS 1999–1984, that the use of hearing protectors be mandatory where there is exposure to noise at the work place with instantaneous peak sound pressures exceeding 200 pascals (140 dB relative to 20 micropascal). Shaw stated, however, that exposure to many simple non-reverberant impulses (''clicks'') at that level would be required to produce significant temporary threshold shift even in the most sensitive ears. Shaw further discussed the concept of ''critical level'' and stresses that ''the relationship between peak sound pressure level and mechanical or physiological stress * * * is exceedingly complex.'' Shaw quoted McRobert and Ward (1973) who urged that ''* * * damage risk criteria incorporate a more complicated criterion for impulse and impact noise than a simple ceiling or peak level * * *.''

ISO/DIS 1999–1990 (1990) also supported combining continuous noise with impulse/impact noise in conjunction with the use of a 3-dB exchange rate.

In discussing the combined effects of continuous and impulse/impact noise, the ACGIH (1986) stated that:

> Some studies have shown that the effects of combined impulse and continuous noise are additive [Okada et al., *Int. z Angew. Physiol.,* 30:105–111 (1972)]. Other studies have shown that rapidly repeated impulses [Coles and Rice, *Occupational Hearing Loss,* pp. 71–77 (1971)] and simultaneously continuous noise [Cohen et al., *J. Acoust. Soc. Am.,* 40:1371–1379 (1966)] in some cases provide up to 10 dB of protection.

Evans and Ming (1982) and Sulkowski and Lipowczan (1982), however, supported the theory that impulse noise superimposed on steady-state noise is more hazardous than the same levels of either separately. Cluff (1982), professor of audiology at Arizona State University, believed that the combined

continuous/impulse noise dose procedure should be approached with a degree of caution. He stated that:

> The procedure involves some knotty issues; not the least of which is the issue of equal energy (3-dB doubling rule) vs equinocivity (the principle embodied in the 5-dB doubling rule). One other issue deserves mention also. What is impact/impulse noise? It is a simple matter to describe impact/impulse noise in terms of its source when the source is obvious and individual events are spaced far apart temporally. It is quite another matter to describe it differentially from continuous noise when the source is not obvious and when individual events are repeated rapidly (as with the case of gear trains, pneumatic chisels, conveyor belts, grinders, internal combustion engines, etc.). Indeed, this difficulty may be central to the heretofore tendency to class it as continuous noise when the repetition rate exceeds one or two events per second. Were it not that the weight of evidence appears to argue against this approach, the simple thing would be to call it continuous noise and treat it as such.

As shown in Tables III–4 and III–5 (in the section entitled *Permissible exposure level (PEL)*, discussing proposed § 62.120(c)), the majority of international communities and selected branches of the U.S. armed services have adopted 140 dB peak as the upper limit for sound levels in their respective regulations. However, there is no consensus among these regulators as to a definition of impulse/impact noise.

In reviewing the literature on impulse/impact noise, MSHA found that such noise frequently is divided into two general categories: ''A-duration'' impulses are short duration (measured in microseconds) and non-reverberant in that they usually occur outside or in a sound deadening environment; and ''B-duration'' impacts are of longer duration (measured in milliseconds) and are reverberant mainly because they occur inside where the sound is augmented by reflections from hard surfaces. MSHA's experience indicates that there is seldom impulse noise of A-duration in mills and underground mines, because of the reverberant field. Scheduled blasting at surface mines would not be impulse noise of A-duration because of the multiple detonations several milliseconds apart in a semi-reverberant field when considering the rock walls and floor.

MSHA is concerned about the practicality of enforcing an impulse/impact noise limit in mining. Distinguishing impact/impulse noise from continuous noise, according to most of the definitions discussed above, would require sophisticated, delicate laboratory instrumentation. This equipment is: cumbersome, not intrinsically safe, not readily available, and not capable of withstanding the harsh mining environment.

As pointed out by some commenters, there have been many technological advances in the capabilities of noise measuring instruments, and equipment now exists that can integrate impulse/impact noise into the dose. The ability of personal noise dosimeters to accurately integrate sound levels above 130 dBA into the noise dose, however, may be questionable. ANSI S1.25–1991, ''Specification for Personal Noise Dosimeters'', specifies that personal noise dosimeters must have an operating range of 50 dB. ''Operating range'' is defined by ANSI as the range between threshold and an upper sound level within which a personal noise dosimeter operates within stated tolerances. Accordingly, if an 80 dBA threshold is used, current personal noise dosimeters would be required to meet ANSI tolerances up to 130 dBA.

As stated previously, MSHA has determined that there is little noise in mining that could be characterized as impact or impulse given their prevailing definitions. One source of impact noise that may exceed the existing 140 dB criteria is that caused by blasting in underground mines. MSHA has determined that noise from blasting in underground mines would be considered impact noise rather than impulse noise because of the highly reverberant environment.

In Volume II of the Ohio State University Research Foundation report (Melnick et al., 1980), Melnick et al. states the following with regard to measuring impulse/impact noise, such as that produced by blasting:

> Under conditions sufficient to produce measurable hearing loss, it would be extremely fortuitous if measuring instruments were in place to permit the assessment of the actual exposure of the single impulsive event. Generally, these exposures are accidental in nature.

Because blasting occurs at irregular intervals, with most miners removed from the blast site prior to its initiation, it would be difficult for MSHA to measure such exposures and to enforce a limit designed to protect against such exposures.

MSHA considered many factors in determining the merit of proposing an impulse/impact noise limit for the mining industry. Although there is much evidence in the literature on the harmful effects of impulse/impact noise, MSHA concluded that, currently, there is not a sufficient scientific consensus to support a separate impulse/impact noise standard. Further, existing procedures for identifying and measuring such sound lack the practicality to enable its effective enforcement. This is due, in part, to the complexity of the phenomena, where consideration must be given to such factors as: the peak sound pressure level; the wave form and crest factor; the rise and decay time; whether it is A-duration or B-duration; the number of impulses per day; the presence or absence of steady-state sound; the frequency spectrum of the sound; and the protective effect of the middle ear acoustic reflex.

In conclusion, studies discussed above indicate that when impulse/impact noise is combined with continuous noise, hearing loss is exacerbated. Therefore, MSHA has determined that, for purposes of this proposal, impulse/impact noise should be combined with continuous noise for purposes of calculating a miner's noise exposure. Since industrial impulses are almost always superimposed on a background of moderate-to-high levels of continuous noise, and since both may be harmful, it is only reasonable to consider their effect together, rather than to treat each separately. There is ample justification for this approach in the studies reviewed by MSHA and comments submitted to the record.

MSHA, however, requests further comment on this issue, particularly on impulse/impact noise sources in mining which may not be integrated adequately into the miner's noise dose. Additionally, MSHA requests data addressing a critical level to prevent traumatic hearing loss; what this critical level should be; whether it should be based on a single event; and a practical scientifically validated method for its discrete measurement.

Exchange Rate

The exchange rate is another factor which is involved in the determination of noise dose. The exchange rate is the change in sound level which corresponds to a doubling or a halving of the exposure duration. For example, using a 5-dB exchange rate, a miner who receives the maximum permitted noise dose over an 8-hour exposure to 90 dBA would be determined to have accumulated the same dose as a result of only a 4-hour exposure at 95 dBA. If the exchange rate were reduced to 3-dB, the same dose would be received with a 4-hour exposure at only 93 dBA. Other terms for exchange rate include ''doubling rate,'' ''trading ratio,'' and ''time-intensity tradeoff.''

The Agency currently uses a 5-dB exchange rate. There appears to be a concensus in the recent literature for an exchange rate of 3-dB, although the Agency is seeking additional

information on this point. Moreover, the current 5-dB exchange rates incorporates an assumption that there is significant time for hearing to recover from high sound levels. MSHA has concluded that noise exposure under mining conditions does not warrant such an assumption. A 3-dB exchange rate does not incorporate this assumption.

Nevertheless, the Agency is proposing to retain the existing 5-dB exchange rate because of feasibility considerations. Changing to a 3-dB rate from a 5-dB rate would significantly reduce the amount of time that miners could be exposed to higher sound levels without exceeding the permissible exposure limit. For example, MSHA estimates that the percentage of miners whose exposure would be in violation of a PEL set at a $L_{eq,8}$ of 90 dBA would be just about double that of a PEL set at a TWA_8 of 90 dBA. This means mine operators would have to utilize controls to reduce exposures to the PEL more frequently—and the controls required to reduce exposures that much would be more expensive. Furthermore, it is extremely difficult to reduce the noise exposures to below a $L_{eq,8}$ of 90 dBA using currently available engineering or administrative noise controls or a combination thereof. Accordingly, moving the industry to a 3-dB exchange rate may be infeasible at this time. (Part IV contains a further discussion of feasibility issues.)

OSHA, in its 1974 proposed noise standard (39 FR 37774), stated the following regarding its decision to use a 5-dB exchange rate:

> EPA recommended [in response to OSHA's proposal] a doubling rate [exchange rate] of 3 dB. While the 3-dB doubling rate is hypothetically correct for uninterrupted noise exposure, noise exposure in industry is normally interrupted since there are several breaks in the day's work. OSHA agrees with the Advisory Committee [Standards Advisory Committee on Noise, appointed by the Assistant Secretary for OSHA] that the doubling rate should be adjusted to take into account the various breaks which occur in a workday. Therefore, OSHA believes that a doubling rate of 5 dB is more appropriate than the 3 dB.

MSHA received numerous comments regarding this particular issue. Many refer to scientific studies showing the ability of the ear to recover from temporary shifts (temporary threshold shifts, or TTS) incurred during noise exposure. TTS should not be confused with PTS, which refers to permanent theshold shifts—i.e., loss of hearing acuity. Whether TTS and PTS are inexorably linked is a subject of debate, as noted below.

Many commenters advocated retaining the existing 5-dB exchange rate. Two of these commenters believed that there is sufficient support in the scientific literature for a 3-dB exchange rate, but recommended that MSHA retain using the 5-dB exchange rate so as to maintain consistency between MSHA and OSHA.

A number of commenters, however, recommended a 3-dB exchange rate. Several stated that it has greater scientific and technical validity. Others supported the 3-dB exchange rate because it would be in agreement with regulations in many countries outside the United States and with the recently issued international standards [International Standards Organization, ISO 1999.2] which the U.S. endorsed. One commenter asserted that the ''use of the 3-dB, rather than a 5-dB, exchange rate facilitates the calibration/characterization and the interpretation of the performance of such [noise measuring] instruments.'' Another commenter criticized the theory that the 3-dB exchange rate only applies to steady state noise, stating the following:

> First, steady and intermittent noise merely identifies the extremes of episodes of noise and quiet that most workers experience in the course of a day. It is the rare exception to find workers who experience either continuous or steady state noise. Recovery from noise-induced damage, therefore, is unpredictable in the real world. Second, the hypothesis of recovery during intermittent noise exposure has not been empirically verified.

Other commenters stated that the use of the 3-dB exchange rate is not appropriate in mining because exposures in the mining industry are intermittent and, therefore, miner recovery from temporary threshold shifts occurs during the working day. Finally, two commenters stated that if the exchange rate were lowered, many of the personal noise dosimeters currently in use would become obsolete and would have to be replaced.

MSHA reviewed several recent studies relating to the selection of an exchange rate. Kryter (1984) in his discussion of interruptions in and durations of daily noise exposures, asserts that even short periods of reduced noise exposure during the workday facilitate recovery, and that a 5-dB exchange rate is thus appropriate to take this into account. He states:

> * * * it does not matter whether the off time is continuous or interrupted during the 8-hour day. In either case, the recovery process continues and is equally effective. For example, the level of a noise of 8 hours duration per workday could be increased by 6 dB and cause no additional PTS provided its duration is decreased to 4 hours, either by reducing the total work period by 4 hours or by introducing ''off'' periods (longer than 10 sec each) which total 4 hours. This, of course, is in reasonably close agreement with the ''5 dB exchange'' that would be allowed in some noise assessment procedures, such as the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) regulations.

Dear (1987) supported retaining the 5-dB exchange rate based upon the studies of Sulkowski (1980), Gosztonyi (1975), Scheiblechner (1974), Schneider (1970) and Pell (1973). Further, Dear believed that the studies of Passchier-Vermeer (1973) and Burns and Robinson (1970), which formed the basis for Shaw's recommendation to adopt a 3-dB exchange rate (discussed below), were critically flawed and furthermore the findings of Passchier-Vermeer did not agree with those of Burns and Robinson. Dear asserted that Shaw discounted other studies which showed that the 5-dB exchange rate correlated well with hearing loss. Dear claimed that for every study which supports the 3-dB exchange rate, another supports the 5-dB exchange rate. Dear further contended that a 3-dB exchange rate was valid only for workplaces with no intermittent noise exposure, which is a condition that rarely exists in American workplaces.

Sataloff et al. (1984) studied the effect of intermittent noise exposure on the hearing acuity of workers. This study corroborates an earlier report, done by Sataloff et al. (1969) on the hearing acuity of rock-drilling miners, that intermittent noise is not as hazardous as continuous noise of the same intensity. In the more recent study, 295 industrial workers who did not use hearing protectors were exposed to non-impact sound levels from 99 dBA to 118 dBA with quiet periods less than 90 dBA. Most of the workers were exposed to the higher sound levels. The researchers concluded that intermittent noise exposure produced little hearing loss at frequencies below 3000 Hz; however, it produced substantial damage at the higher frequencies. The pattern of damage, exhibited by workers exposed to continuous noise, was also realized at the lower audiometric frequencies. The researchers attributed the difference in patterns of damage to the recovery of the hair cells in the cochlea during quiet periods in the workers exposure to intermittent noise.

Sataloff et al. (1984) also compared the hearing loss of a population of 295 workers exposed to intermittent noise to other studies on workers exposed to continuous noise conducted by Royster et al., Botsford, and Johnson and Harris'

review of Baughn's findings. Sataloff et al. asserted that the comparison indicated that workers exhibited more hearing loss when exposed to continuous noise than from exposures to intermittent noise. Although research showed that the loss caused by intermittent noise differs substantially from the effects of continuous noise of the same intensity, Sataloff et al. did not state an opinion as to which exchange rate is most appropriate.

Hodge and Price (1978), in their review of damage risk criteria, summarized that the 3-dB exchange rate was proposed to account for variations in exposure time to both intermittent and continuous noise and that the 5-dB exchange rate was proposed to account for the ''beneficial effect of recovery'' during quiet periods between such exposures. They stated, however, that the sound level would need to fall below 60 dBA to effect recovery. They concluded that neither the 3-dB nor 5-dB exchange rate fits the hearing loss at all frequencies or under all conditions and there will be controversy in this area for many years to come.

Cluff (1982), professor of audiology at Arizona State University, states that:

> * * * while equinocivity (the principle embodied in the 5-dB doubling rate) may be an applicable basis for determining noise dose for lower levels of noise, its credibility suffers as the level of the noise increases above 90 dBA. * * * The only justification for equinocivity, in lieu of equal energy [3-dB exchange rate], is that on-the-job exposure to noise will probably be intermittent. * * * Applying the above logic to very high noise levels [sound levels], intermittent exposure may be claimed for noise levels of 115 dBA, for instance, only if the duration of each individual exposure is substantially shorter than the approximately two minute maximum that would be allowed under equal energy.

Bies and Hansen (1990) developed an equation fitting a 6-dB exchange rate to the ISO 1999: 1990(E) data, instead of the 3-dB exchange rate as presented by ISO. Essentially, they showed that the mathematical solution fitting an equation to the hearing loss data contained in ISO 1999: 1990(E) is not unique.

Macrae (1991) published an article which refutes Bies and Hansen's findings. Macrae studied people with a sensorineural hearing loss at 4000 Hz to determine the progression of the loss in relation to presbycusis. Macrae's data supported ISO 1999 which uses a 3-dB exchange rate. Macrae believed that Bies and Hansen erred by assuming that hearing loss, due to presbycusis and noise exposure, was additive on an antilogarithmic basis at 4000 Hz. Because the progression of hearing loss at other frequencies was not studied, Macrae could not reach any definite conclusions as to the progression of hearing loss at frequencies other than 4000 Hz.

According to the Committee on Hearing, Bioacoustics, and Biomechanics of the National Research Council (CHABA) (1993), the data for specifying an exchange rate were not conclusive.

Compared to steady-state noise data, little data exist on the effect of intermittent or time varying noise exposure. Depending upon the length of time of the exposure, an exchange rate of between 0-dB and 8-dB is appropriate. Each of these single number exchange rates is valid for a limited set of exposure conditions. Therefore, CHABA did not recommend an exchange rate. Additionally, CHABA concluded that the maximum sound level for effective quiet is approximately 80 dBA at most frequencies.

NIOSH (1995) recommends a 3-dB exchange rate based upon the latest scientific data. This recommendation represents a change in NIOSH's position on exchange rate from that included in the 1972 *Criteria for Recommended Standard * * * Occupational Exposure to Noise.*

NIOSH presents many reasons for this change in position. In their 1972 criteria document, NIOSH based the recommendation for a 5-dB exchange rate on earlier recommendations of CHABA (Kryter et al., 1966). CHABA's 1966 recommendations were predicated on three postulates, which included—

(1) TTS_2 (temporary threshold shift measured two minutes after cessation of the noise exposure) is a valid predictor of permanent threshold shift (PTS);

(2) equivalent TTS_2's obtained from exposures were equally hazardous; and

(3) TTS_2 is a consistent measure of the effects of a single day's exposure to noise.

Since that time, NIOSH believes that more recent scientific studies have proven these postulates to be erroneous. Another assumption that NIOSH found for justifying the 5-dB exchange rate was that interruptions will be of ''equal length and spacing so that a number of identical exposure cycles are distributed uniformly throughout the day.''

Although NIOSH found that intermittent noise exposure is less harmful than continuous noise exposure, NIOSH has determined that the beneficial effects of intermittency which allow for recovery from TTS are not found in industry today. The quiet periods are too loud and too short to permit recovery of TTS before the next exposure to harmful noise.

NIOSH cites field studies by Sataloff et al. (1969), Holmgren et al. (1971), Johansson et al. (1973), and Institut National de Recherche et de Securite (1978), to show the beneficial effect of intermittency of noise exposure in mining and forestry. Studies by NIOSH (1976), NIOSH (1982), Passchier-Vermeer (1973) and Shaw (1985), not supporting this finding were also cited. NIOSH, however, concludes that ''the ameliorative effect of intermittency does not support the use of the 5-dB exchange rate.''

The Shaw study (1985) supports the 3-dB exchange rate based on the premise that a 3-dB exchange rate better fits the epidemiological data on the relationship between noise exposure and hearing loss. Shaw also criticizes the use of the 5-dB exchange rate because it was based upon the assumption that a permanent threshold shift (PTS) is related directly to temporary threshold shift (TTS). Shaw believes that no researcher has adequately demonstrated a relationship between PTS and TTS. Furthermore, he states that the 5-dB exchange rate does not take into account variations in the temporal pattern of exposure.

Suter (1983) conducted a comprehensive review of the literature on exchange rate. She concluded that the 5-dB exchange rate is under-protective in many situations and that the 3-dB exchange rate is more firmly supported by the scientific evidence for assessing hearing impairment as a function of sound level and duration. Suter, however, stated that:

> The situation becomes more complex when noise becomes truly intermittent, in other words, when there are large differences between high and low levels, and levels in between occur rarely. The studies of forestry workers and miners [Sataloff et al. 1969; Holmgren 1971; Johansson 1973; and Institute National de Recherche et de Securite 1978] indicate that the frequent periods of quiet between noise bursts *can* in *some* circumstances, ameliorate the effects of noise exposure.

Regarding the literature review, Suter explained that the researchers' findings have been refuted by two NIOSH studies of intermittently exposed coal miners (NIOSH, 1976) and firefighters (NIOSH, 1982). In addition, the researchers' studies suffer from various methodological problems such as inadequate characterization of exposure, sporadic wearing of hearing protectors, small sample size, etc. Nevertheless, Suter believed that these studies show a valid trend, in that the intermittency of exposure can offset the effects of noise exposure, especially in view of

some of the animal studies (Ward and Turner, 1982). Suter further stated that:

> The logical consequence of such a trend [intermittent noise exposure being less hazardous than continuous noise exposure] would be to allow an adjustment to the maximum permissible exposure limit for outdoor, intermittent noise exposure. This is by contrast to a 5-dB exchange rate, for which there is virtually no scientific justification * * *.

Suter suggested using a 3-dB exchange rate along with an adjustment of 2 dB to the PEL for outdoor noise. She stated that ''The exact amount of such an adjustment should await clarification by further scientific evidence.''

According to Sliney (1993), chair of the ACGIH Physical Agents TLV Committee, (ACGIH) revised its exchange rate from 5-dB to 3-dB, on the basis that the use of a 5-dB exchange rate is not wise for short exposure periods. The ACGIH stated that allowable durations for high sound levels which are permitted with a 5-dB exchange rate are excessive. In addition, ACGIH believed that, with a 3-dB exchange rate, an upper limit for the TLV was capped by a 140 dBC impulse peak sound pressure level. Both the 1971 and 1990 versions of the ISO 1999 standard employ the 3-dB exchange rate.

Evans and Ming (1982) studied five groups of employees in noisy occupations using personal noise dosimeters which integrated sound levels based on a 3-dB exchange rate. The noise exposures ranged from 80 dBA to 102 dBA. They used a mathematical model developed by Robinson and Shipton based upon a 3-dB exchange rate for predicting hearing loss among exposed workers. Evans and Ming stated that the observed noise-induced hearing loss (NIHL) of workers in the spinning, weaving, and bottling industries agreed with those predicted by Robinson and Shipton's model. The hearing loss of workers in the metal-work industry, however, tended to be greater than those predicted. The authors believed that the significant amount of impulse noise contributing to the noise exposures in this industry explained the difference. Evans and Ming concluded that the use of Robinson and Shipton's prediction method is valid for predicting the hearing loss risk for various noise exposures.

As will be displayed later in Tables III–4 and III–5, the 3-dB exchange rate is also used by many international communities and selected branches of the U.S. armed services.

Although occupations in the mining industry are typically exposed to varying sound levels, most miners are continuously exposed to noise above 80 dBA. Because the majority of exposures are continuously above 80 dBA, little or no time is available to permit ''recovery time'' from TTS. Thus, miners experience little recovery from the effects of these noise exposures. ''Recovery time'' is a basic tenet of the current 5-dB exchange rate; thus, the Agency has concluded the continuous nature of noise exposure in the mining industry is more realistically characterized by the 3-dB exchange rate.

Although the Agency has reached this conclusion, and although there appears to be a growing consensus supporting the use of a 3-dB exchange rate among the scientific community, international regulators, and the U.S. armed services, MSHA has chosen to retain a 5-dB exchange rate for its proposal because there are significant feasibility implications of adopting a 3-dB rate—both economic and technological.

With respect to economic feasibility, MSHA conducted a study of the effect of a 3-dB exchange rate on the measured noise exposure of U.S. metal and nonmetal miners. The mine inspectors collected measurements during the course of their regular inspections using personal noise dosimeters which collected data using 5-dB and 3-dB exchange rates simultaneously. These data are presented in Table III–2.

TABLE III–2.—M/NM SAMPLES[a] EXCEEDING SPECIFIED SOUND LEVELS COLLECTED BY MSHA FROM MAY 1995 TO OCTOBER 1995

Sound level (in dBA)	5-dB exchange rate		3-dB exchange rate	
	Number of samples	Percent of samples	Number of samples	Percent of samples
90	491	16.5	1483	49.9
85	.....	.....	2543	85.5

[a] Total of 2974 samples. Two of the boxes in the table do not contain entries. This is to avoid the potential for making an inappropriate comparison of values. Direct comparison of TWA_8 values determined with different thresholds is not appropriate if the TWA_8 is less than one of the thresholds. An example may help to illustrate the point. A miner exposed to a constant sound field of 85 dBA for 8 hours would be determined to have a noise dose of 0%, or a TWA_8 of 0 dBA, if a 90 dBA threshold is used: none of the sound would be counted in the computation. If the exposure was measured using an 80 dBA threshold, the dose would be 50%, or a TWA_8 of 85 dBA. Contrasting the measures taken with the two thresholds would be inappropriate in such a case.

The measurements in Table III–2 for a 5-dB exchange rate were made using a 90-dBA threshold while the 3-dB exchange rate data were obtained without a threshold. To get a better picture of the impact of moving from a 5-dB exchange rate to a 3-dB exchange rate if, as proposed, the Agency adopts an 80-dBA threshold, Table III–3 has been constructed. The data for the 5-dB exchange rate comes from the Agency's dual-threshold survey for metal and nonmetal mines, presented in Table II–11. This also allows for the analysis of data at values below a TWA_8 of 90 dBA, something which is not possible with a 90 dBA threshold. The data for the 3-dB exchange rate come from Table III–2—switching to an 80 dB threshold does not significantly change the 3-dB readings in Table III–2.

TABLE III–3.—METAL/NONMETAL SAMPLES EXCEEDING SPECIFIED SOUND LEVELS AT DIFFERENT EXCHANGE RATES

	5-dB	3-dB percent
Sound level (in dBA)	Percent	
90	26.9	49.9
85	67.6	85.5

As indicated in Table III–3 the selection of an exchange rate substantially affects the measured noise

exposure. The percentage of miners whose noise exposure would exceed a PEL set at a TWA_8 of 90 dBA (or an $L_{Eq,8}$ of 90 dBA in the case of a 3-dB exchange rate) increases from 26.9% to 49.9% when the exchange rate changes from 5-dB to 3-dB. Looking at the numbers another way, as compared with using a 5-dB exchange rate, using a 3-dB exchange rate would result in the need to utilize engineering or administrative controls to limit the exposure of twice as many miners. Moreover, the engineering controls required would be more expensive since it would take a more stringent control to bring down, to the PEL, exposures that double every 3-dB. The table also reveals that to switch to a 3-dB exchange rate and setting the PEL at an $L_{eq,8}$ of 85 dBA would increase the percentage of miners whose exposure is out of compliance with the PEL from 67.6% to 85.5%.

MSHA has not compiled similar data for coal mining, although the consequences would be similar. Accordingly, MSHA believes that using a 3–dB exchange rate would have significant implications for the U.S. mining industry.

With respect to technological feasibility, it is extremely difficult to reduce the noise exposures to a $L_{eq,8}$ of 90 dBA using currently available engineering or administrative noise controls or a combination thereof. For many pieces of existing equipment it is not practical to apply engineering controls without seriously compromising the equipment's operational capacity.

Accordingly, as discussed in part IV of this preamble, moving the industry to a 3-dB exchange rate may be infeasible at this time.

MSHA believes that the determination of an appropriate exchange rate is one of the more noteworthy issues in the proposed rule. Accordingly, MSHA requests further comment and data on this issue. In particular, MSHA notes that the studies supportive of a 5-dB rate are generally dated, and requests information about any more current study supporting that exchange rate.

A-weighting, slow-response

Proposed § 62.120(a)(3)(iv) requires that the instruments used for measuring noise exposures be set for the A-weighting network and slow-response (exponential time averaging). This is identical to the existing MSHA regulations for exposures to non-impulse/impact noise. OSHA also uses the A-weighting network and the slow-response time for evaluating exposure to noise.

Weighting networks were designed to approximate the response of the human ear to tones of equal loudness. The human ear does not respond to all levels of tones in the same way. At low sound pressure levels (e.g., 50 dB) the ear discriminates against low-frequency and high-frequency tones. At higher sound pressure levels (e.g., 90 dB), the ear no longer discriminates against low- and high-frequency tones. Although the human ear does not discriminate against low-frequency tones at high sound levels, the low-frequency tones are less damaging to hearing than mid-frequency tones.

Several weighting networks have been developed to take these differences into account: known as A, B, and C. Early researchers suggested using them all in combination: the A-weighting network when the sound pressure level was less than 55 dB, the B-weighting network between 55 and 85 dB, and the C-weighting network for sound pressure levels exceeding 85 dB (Scott, 1957). Since that time, however, concensus has developed on the use of the A-weighting network.

Response time, also known as a time constant, refers to the speed at which the instrument responds to a fluctuating noise.

There are five responses defined in ANSI S1.4–1983, ''Specification for Sound Level Meters''. They are fast, slow, impulse, exponential, and peak. The quickest response is the peak response and the slowest is the slow. Originally the slow response (1000 milliseconds) was used to characterize occupational noise exposure. This response was used since it was easier to read the needle deflections on a meter in rapidly fluctuating noise. For this type of noise the needle deflections using the fast response (125 milliseconds) were too difficult for the human eye to follow. ANSI S1.25–1991, ''Specification for Personal Noise Dosimeters'', prescribes only the slow and the fast responses for personal noise dosimeters. Many of the older, but not obsolete, personal noise dosimeters only have the slow response. Furthermore, the slow response was used for characterizing the noise exposure when most damage risk criteria were developed.

Many commenters suggested that MSHA adopt OSHA's instrumentation requirements. This would imply that noise is to be measured on the A-weighting network and the slow response. However, one commenter suggested that MSHA use the fast response for evaluating noise exposure, because ''Use of fast response will result in a more accurate assessment of employee exposure.''

Prior to the adoption of the A-weighting network to evaluate noise exposure, the scientific community used more complex methods (e.g., octave bands and speech interference levels).

ACGIH (1986) reports that:

> * * * Botsford demonstrated that A-weighted levels are as reliable as octave band levels in the prediction of effects on hearing in 80% of the occupational noises considered, and slightly more conservative in 16% of the cases. Passchier-Vermeer and Cohen et al. similarly demonstrated that A-weighted levels provide a reasonable estimate of the hazard to hearing in most industrial environments.

The National Safety Council's Book, *Fundamentals of Industrial Hygiene*, Fourth Edition (Plog et al., 1995) states that:

> The A-weighted sound level measurement has become popular in the assessment of overall noise hazard because it is thought to provide a rating of industrial broadband noises that indicates the injurious effects such noise has on the human ear.

NIOSH (1972) recommended the continued use of the A-weighted sound level measurement in its criteria document for a recommended standard on occupational noise exposure. In this criteria document they state:

> As a result of its simplicity and accuracy in rating hazard to hearing, the A-weighted sound level was adopted as the measure for assessing noise exposure by the American Conference of Governmental Industrial Hygienist (ACGIH) and by Intersociety Committee consisting of representatives from the American Academy of Occupational Medicine, American Academy of Ophthalmology and Otolaryngology, ACGIH, Industrial Hygiene Association, and the Industrial Medical Association. A-weighted sound level measurement was adopted by the U.S. Department of Labor as part of the *Occupational Safety and Health Standards* and by the British Occupational Hygiene Society in its *Hygiene Standards for Wide-Band Noise.*

In reviewing the procedures for exposure measurement in regulations and codes of practice (mandatory or recommended) from the EEC, the ISO, the international community, and selected branches of the U.S. armed services (see Tables III–4 and III–5), MSHA found that there is general agreement among these groups that measurements be taken using the A-weighting network and most agree to use the slow-response instrument settings. ISO 1999 (1990) recommends that if sound level meters are used to measure noise exposure, then the instrument should be set on A-weighted, fast-response. In Australia, integrating sound level meters should be

set to fast-response while other sound level meters should be set to slow-response.

The scientific community and most regulatory entities around the world accept the A-weighting network and slow-response time as appropriate measurement parameters for characterizing noise exposures. These parameters have been used by the U.S. Department of Labor, since the adoption of the Walsh-Healey Public Contracts Act noise regulations of 1969.

Based upon comments and the good correlation between hearing loss and A-weighted noise exposures, MSHA proposes to continue using A-weighting and slow-response when determining a miner's noise exposure.

Action Level

Proposed § 62.120(b) establishes an ''action level'' at a TWA_8 of 85 dBA.

The need for an action level reflects two facts: 1) there is a significant risk of material impairment to miners from a lifetime of exposure to noise at this level; and 2) the Agency believes it may not be feasible at this time to lower the PEL to this level, since that would require that mine operators use all feasible engineering and administrative controls to reduce noise exposures to this level.

The proposal would require that all miners exposed above the action level be provided special instruction in the hazards of noise and protective methods. The training is to be provided annually for as long as exposure exceeds the action level. (The nature of this instruction, how it is to be provided, and how it can be coordinated with other required miner training are subjects discussed in connection with proposed § 62.130.)

If a miner's exposure exceeds the action level but is below the PEL, an operator will also be required to enroll a miner whose exposure exceeds the action level in a hearing conservation program (HCP). While enrollment in the HCP would require the operator to make annual audiometric testing available to the miner, miners exposed to noise below the PEL would have the right to decline taking any annual audiometric testing. MSHA's proposed testing requirements related to the action level are consistent with those of the OSHA HCP. The requirements for such testing are discussed in connection with proposed § 62.140, audiometric testing program.

MSHA is seeking comments on how to minimize the burden on mine operators of providing audiometric examinations for those miners with only a temporary attachment to the mining work force (e.g. summer employees), while recognizing the importance of detecting and tracking hearing loss among those who switch jobs.

In addition, the operator must provide properly fitted hearing protection—before the initial hearing examination, if a significant threshold shift in hearing acuity is detected, and at any other time upon miner request. Should it take more than 6 months to provide the initial hearing examination because of the need to wait for a mobile test van, or should a significant threshold shift in hearing acuity be detected, the operator would also be required to ensure that the miner wears the hearing protection—even if the miner's noise exposure remains under the PEL. (A discussion of the time frames for audiometric tests, and the use of mobile test vans, is included in the discussion of proposed § 62.140, audiometric testing program. The definition of a significant threshold shift is discussed in connection with proposed § 62.160, evaluation of audiogram.)

An action level currently exists under OSHA but would be new to the mining industry. As discussed herein, MSHA proposes to build upon the requirements which have been used by OSHA while giving due regard to implementation approaches appropriate to the circumstances of the mining community.

Comments on Action Level

Several commenters recommended an action level of 85 dBA for triggering the requirements of an HCP.

Many of those who commented in response to MSHA's ANPRM discussed hearing protection and audiometric testing. Some of these comments shed light on the relationship and comparative benefits of these approaches.

Some commenters supported the use of hearing protectors as an integral part of an HCP, while other commenters recommended that hearing protectors be supplied even when not required so as to afford greater protection. Other commenters expressed three common concerns over the use of hearing protectors—

(1) difficulty with speech communication and the masking of warning signals (roof talk, backup alarms, etc.), especially for those miners with a pre-existing hearing loss;

(2) miner acceptance, including comfort; and

(3) personal hygiene.

The latter two issues of miner acceptance and personal hygiene are discussed in detail in the sections of the preamble entitled *Selection of hearing protectors* and *Maintenance of hearing protectors*, respectively (in connection with proposed § 62.125).

Several commenters suggested alternatives for dealing with communication problems associated with the use of hearing protectors by those with a hearing loss or in the presence of background noise. These alternatives included use of a ''buddy'' system, visual warnings, communication headsets, vitro-tactile warning systems, flat-frequency response hearing protectors, and notch-amplification earmuffs.

Many commenters specifically mentioned the problem of miner acceptance of hearing protectors. One of these commenters stated: ''* * * there is anecdotal reporting to suggest that miners resist wearing hearing protective devices.''

One commenter stated: ''Another [usage] problem may be the use of muffs with additional safety equipment, e.g. hard hats and safety glasses, that may be required for use by the miners.'' Other commenters either had no problems with hearing protectors or felt that any problems could be overcome with the proper training.

In addition to the comments received in response to MSHA's ANPRM on this issue, several researchers and organizations have taken a position in regard to the use of hearing protectors.

Shaw (1985) reviewed much of the same literature as OSHA when the 1983 Hearing Conservation Amendment was prepared. Shaw's study supports requiring both hearing protectors and an HCP for exposures exceeding 85 dBA.

In *Communication in Noisy Environments* (Coleman et al., 1984), the authors state that:

> * * * excessive attenuation needs to be minimized and the frequency response of the protector is of particular importance in this respect. * * * (S)everal authors * * * suggest that a protector which passed relatively more low frequencies could increase remote masking and produce potential communication difficulties for some members of the population. This effect has been demonstrated to be of practical significance for coal mining conditions * * * A flat frequency response for a protector is necessary to counter the effect.

Michael (1991) recommends that the hearing protector attenuate the noise with an adequate margin of safety; however, the hearing protector should not unnecessarily reduce important aural communications. To accomplish this goal, the hearing protector's attenuation characteristics should be matched to the noise exposure spectra as close as possible. This way the hearing protector will minimally change

the worker's perception of the noise. Michael also points out that overall noise reduction achieved by a hearing protector can be substantially influenced by the spectra of the noise.

Chiusano et al. (1995) reported that a communication headset, without gain limiters, can expose communication workers to hazardous sound levels. The noise exposures ranged from 79.9 dBA to 103.8 dBA, with the average exposure being 87.0 dBA. Furthermore, the peak sound pressure levels ranged from 119.2 dB to 148.8 dB, with the average being 140.8 dB. Some recommendations presented by the authors to control the noise exposure were to include peak clipping, bandwidth limitations, signal compression, computerized gain control, and improving the signal to noise ratio.

In the *CAOHC Manual*, Miller (1985) states that many authorities consider OSHA's requirement on who must wear hearing protectors to be ''unwieldy.'' This manual states further that ''A more practical and workable approach is to require all workers exposed to levels of 85-dBA or higher to use PHPD's [personal hearing protection devices] regardless of whether the audiograms show an STS.''

According to Suter (1986): ''Because hearing loss may occur in people chronically exposed to levels of 85-dBA and above, it is wise to use protectors that attenuate to 85-dBA in all cases.''

The U.S. Armed Services, as well as the European Economic Community and other foreign countries, require the use of hearing protection when sound levels exceed 85 dBA.

General Discussion of Action Level and Requirements

The Agency has concluded that there is a significant risk of material impairment to miners from a lifetime of exposure to noise at a TWA_8 of 85 dBA. In mining, the first line of defense against risks has always been training. Accordingly, the proposal provides for annual instruction—to enhance awareness of noise risks, operator requirements, and available controls. This training would be required for any miner whose exposure is above the action level.

MSHA's requirements for this training, and a discussion of how it can be coordinated with existing training requirements, are in proposed § 62.130. As discussed below in connection with that section, MSHA received many comments in response to its Advance Notice of Proposed Rulemaking that supported the value of an annual training requirement. Studies have shown that the effectiveness of a hearing protection program is highly dependent on the proper use of hearing protectors and the commitment of both management and employees, and annual training is critical to reinforce both the knowledge and commitment.

The Agency believes it may not be feasible at this time to require mine operators to reduce noise exposures to a TWA_8 of 85 dBA. A detailed discussion on this point can be found in Part IV of this preamble. Thus, for exposures between a TWA_8 of 85 dBA (the action level), and a TWA_8 of 90 dBA (the PEL), the available tools to supplement training are limited to hearing protectors and annual audiometric examinations.

Hearing protectors offer only limited noise protection. As discussed in detail in connection with proposed § 62.125, studies indicate that hearing protectors may provide significantly less than their rated protection under actual mining conditions. Nevertheless, MSHA believes that if hearing protection is properly utilized—that is, if the requirements under proposed § 62.125 are implemented—they generally can be relied on to provide at least 5 dBA attenuation, and thus could realistically protect the majority of miners whose noise exposure falls between the action level and the PEL.

The comments that MSHA received in response to its ANPRM, however, suggest that ensuring the protectors are properly fitted, maintained and utilized may continue to prove difficult—even once the proposed new standards in this regard (see the discussion of proposed § 62.125) are taken into account. For example:

(1) The mining environment presents hazards which require a miner to be aware of his/her surroundings. Many underground miners claim that the use of hearing protectors interferes with their ability to hear warning signals or roof talk. This interference may be particularly pronounced among miners who already have a significant degree of hearing loss, and such miners may justifiably be reluctant to use hearing protectors;

(2) Hearing protectors (earmuffs and earplugs) are difficult to keep clean in the mining environment which can lead to irritation or infection of the ear(s);

(3) Earmuffs are often uncomfortable when worn in hot environments (e.g., surface mines during periods of extreme heat or some deep underground mines);

(4) Hearing protectors experience a degradation of attenuation when moved from their original position. This condition can occur often when hearing protectors are worn by a miner operating vibrating equipment (e.g., pneumatic drills, continuous mining machines, mobile equipment), wearing certain types of personal protective gear (e.g., safety glasses, hardhats, respirators, welder's hood, etc.), or sweating;

(5) The effectiveness of hearing protectors is highly dependent upon proper fit and use by the miner. While the amount of protection afforded by engineering controls can be easily measured, the attenuation of hearing protectors under actual working conditions can only be estimated; and

(6) Generally, hearing protectors are not effective in reducing low frequency noise. As most mining machinery emits predominantly low frequency noise, the use of hearing protectors may have a negligible effect in reducing the overall sound level.

To alleviate these problems, both operators and miners must be committed to working through individual concerns about hearing protection. MSHA believes that the best way to facilitate this process—at exposure levels between the action level and the PEL, and with a few exceptions—is to have operators provide instruction and make suitable hearing protectors available to miners upon request. If protectors are requested, they would have to be provided in accordance with the requirements of § 62.125—i.e. a choice of plug or muff type, properly fitted, maintained, and replaced under certain conditions. An operator would generally not, at such exposure levels, have an obligation to enforce the use of hearing protection. MSHA believes that the combination of knowledge, availability, and properly selected, fit and maintained equipment may be the best way to encourage hearing protector use.

MSHA would require an operator to provide a miner with a hearing protector while awaiting a baseline audiometric examination; but with the exception noted below, the operator would not have to enforce the use of the protector as long as the miner's exposure does not exceed the PEL.

In two cases, however, MSHA proposes to require operators to enforce hearing protector use at exposures below the PEL. The first case would be in the event a miner exposed above the action level has to wait more than 6 months for a baseline audiometric examination. As noted in proposed § 62.140, the baseline examination is normally to take place within 6 months of a determination that a miner is at risk because his or her exposure exceeds the action level; however, the time frame can be extended for an additional 6 months if the operator has to wait for a

mobile test van. In such cases, the miner is exposed to harm for an extended period of time without the benefit of audiometric test data, and MSHA believes it would be appropriate to require protection to be worn. This is the approach taken under OSHA's noise requirements.

In addition, an operator would be obligated to ensure the miner uses provided hearing protection when audiometric examinations indicate a significant threshold shift (STS) in hearing acuity has occurred and the miner's exposure exceeds the action level. (The evaluation of audiograms, and the determination of whether or not there is an STS, is the subject of proposed § 62.160.) MSHA believes that once there is evidence from the tests that the miner is incurring hearing loss, it is appropriate to require that hearing protectors be worn as long as exposure exceeds the action level.

Annual audiometric examinations cost more than providing hearing protection—but as already recognized by many in the mining industry, and all the industries which operate under OSHA's requirements, such examinations provide important information, especially in an environment in which hearing protector use has the problems noted previously. The act of enrolling miners in a ''hearing conservation program'' (HCP) can help emphasize to those individuals that they should pay more attention to the training and available controls. It also helps miner representatives, operators, and MSHA focus available resources on those miners who have actually suffered an STS at lower noise exposures. While MSHA is not proposing to require operators to compel miners to take the annual examinations at exposure levels below the PEL, and expects that many miners may be reluctant to take examinations out of concern about how the information would be used, MSHA anticipates that over time the required training would lead to growing use of such examinations within the mining industry. (MSHA's preliminary RIA assumes only limited participation at such exposure levels during the initial years of the rule's implementation.)

Participation in an HCP

MSHA has no standards addressing hearing conservation plans or programs in its existing metal and nonmetal regulations. However, an indeterminate number of mines have voluntarily established HCP's. MSHA estimates that 5% of small mines, and 20% of large mines, have such programs.

Existing MSHA coal noise standards require mine operators to submit ''* * * a plan for the administration of a continuing, effective hearing conservation program,'' within 60 days following the issuance of a notice of violation [citation] for subjecting a miner to a noise exposure exceeding the PEL. This plan must include provisions for pre-employment and periodic audiograms. The regulation, however, does not specify the procedures nor the time frame for obtaining these audiograms. Additionally, due to coal's policy of considering hearing protector attenuation in determining compliance with the PEL, few miners are found overexposed.

OSHA's noise standard requires that all employees exposed above the action level (TWA_8 of 85 dBA) be enrolled in an HCP. OSHA's HCP requirements include provisions addressing exposure assessment, training, audiometric testing, hearing protectors, notification, and recordkeeping.

Several commenters recommended requiring an HCP whenever a miner's exposure exceeds a TWA_8 of 85 dBA, or equivalently a noise dose of 50%.

Under MSHA's proposal, participation in an HCP would be provided by the mine operator at no cost to the miner. OSHA also specifies that audiometric testing and hearing protectors be provided at no cost to the employees. MSHA intends that the audiometric testing be given during normal working hours (on-site or off-site) and that miners participating in these activities receive wages for the time spent in their involvement. If the audiometric testing is provided off-site, MSHA intends the mine operator to compensate the miners for the additional costs, such as mileage, meals, and lodging, that they may incur.

Elements of an HCP

Some of the elements often considered to be part of an HCP are handled through separate, free-standing requirements under MSHA's proposal. These include hearing protection and training, and an employer's obligation to evaluate the noise to which miners are exposed to determine if specified levels are exceeded. Accordingly, the proposal uses the term HCP to refer essentially to annual audiometric testing and required follow up examinations and actions.

Under OSHA's noise standard, the elements of an HCP include:

(1) monitoring employee noise exposure;

(2) wearing hearing protectors;

(3) education and training; and

(4) audiometric testing and medical evaluation.

In its ANPRM, MSHA requested information concerning the elements which would be appropriate for inclusion in an HCP for mining. MSHA received numerous comments concerning this issue. Of these, many supported MSHA's adoption of HCP requirements similar to OSHA's, including:

> * * * Assessment, monitoring, engineering and/or administrative controls, hearing protective devices, employee education, audiometric testing, interpretation of audiometric tests and follow-up, and appropriate record keeping.

Although there was a consensus among commenters on the elements of an HCP, there was considerable variation in the substantive aspects of these elements. Commenters ranged from wanting more performance oriented requirements to wanting more specific requirements with fewer exceptions than in the existing OSHA rule.

One commenter wanted ''* * * a more stringent program than the present OSHA HCP * * *''. Another felt that no program should be implemented until ''* * * sufficient evidence and testing demonstrates a need for the program to protect the hearing of miners.'' Another commenter believed that audiograms were a needless expense, but that hearing protectors should be required for all miners exposed to hazardous sound levels. Several commenters believed that HCP's were of no value, stating ''Our experience with HCP's indicates they are wasted bureaucratic red tape and present no benefit to the employees.''

''Guidelines for the Conduct of an Occupational Hearing Conservation Program'' (1987) developed by the American Occupational Medical Association's Noise and Hearing Conservation Committee of the Council on Scientific Affairs presents the basic elements of an HCP. They recommend that each program include: (1) measurement of exposure; (2) engineering controls; (3) use of hearing protectors; (4) audiometric testing and medical evaluation; (5) education and training; (6) assessment of program effectiveness; and (7) management support.

MSHA agrees with the majority of the commenters to the ANPRM. However, as noted, MSHA proposes to require some of these elements through free-standing requirements. Accordingly, the proposal uses the term HCP to refer essentially to annual audiometric testing and required follow up examinations and actions. Overall, the requirements of MSHA's proposal are generally

consistent with OSHA's current HCP requirements and with the requirements of the U.S. armed services and the international community.

MSHA reviewed HCPs in effect at a variety of organizations. The HCPs consist mainly of monitoring employee noise exposure, controlling the noise, training employees, and conducting audiometric testing. The Agency believes that when engineering and administrative controls are not able to reduce a miner's exposure to within the PEL, annual audiometric testing and medical evaluation would enable mine operators and miners to take proper precautions to identify early hearing loss and thereby prevent further deterioration of hearing. This is discussed in more detail in those sections of the preamble reviewing the proposed HCP requirements (proposed § 62.140 et. seq.).

Effectiveness of HCP's

Although many commenters to MSHA's ANPRM stated that an HCP is needed, only a few commenters specifically addressed the effectiveness of an HCP.

One commenter referenced a study (ANSI, 1990; Royster and Royster, 1988) which indicated that the HCP at five out of 17 companies, or less than 30%, could be considered effective/adequate. This inadequacy, however, could be attributed to a lack of commitment by the companies in carrying out all of the necessary components of the HCP. This study found that, for the HCP to be successful, it is critical that a single individual have control over the program and its implementation. Furthermore, management must make a commitment to ensure that the program is fully implemented.

Another commenter, representing nonmetal mining companies, indicated that its members have not experienced large numbers of claims for hearing loss and this may be a reflection of program effectiveness.

In addition to the above comments, MSHA reviewed several studies regarding the effectiveness of HCP's. Villeneuve and Caza (1986) reported on the HCP for a Canadian mining company. Under this HCP, miners undergo audiometric evaluations, receive training, and wear hearing protectors. After ten years, the incidence of workers' compensation claims for hearing loss has diminished.

After obtaining audiometric data from three Ontario employers who had HCP's, Abel and Haythornthwaite (1984) investigated the progression of NIHL. Workers for the first employer (public utility) had their maximum hearing loss between 2000 and 6000 Hz. Further, 78% of the workers who reported never wearing their hearing protectors experienced 25 dB of hearing loss at 4000 Hz. For those workers who wore their hearing protectors at least half of the time, 38% had the same degree of hearing loss.

At the second employer (mining company) about half the drillers incurred a hearing loss of 1 dB per year or more at 4000 Hz. Motorman chute blasters incurred an average change of hearing of a little over 1 dB per year. This compares to a hearing loss of 0.5 dB per year for the control group. Further, in subjects who were over 50 years of age, 100%, 88% and 38% of the drillers, the motorman chute blasters, and the controls respectively had a hearing loss that exceeded 25 dB at 4000 Hz.

Finally, workers at a foundry and steel mill showed a 0.13 dB per year hearing loss at 1000 Hz and 1.3 dB per year at 4000 Hz. Their hearing loss was similar to the miners.

Abel (1986) reported on the progression of NIHL among three groups of workers, including miners. All noise-exposed workers had exposures exceeding 85 dBA and were enrolled in an HCP. One requirement of the HCP was mandatory use of hearing protectors. At 4000 Hz, the noise-exposed workers lost their hearing acuity at 1.5 dB per year compared to 0.5 dB per year for the control group, who were office workers.

Despite mandatory use of hearing protectors, most workers in the Abel study admitted to wearing their hearing protectors less than 50% of the time. Further, many modified their hearing protectors to provide greater comfort. Many of the modifications had a deleterious effect on the attenuation.

Gosztonyi (1975) reported on his evaluation of an HCP at a large manufacturing plant. The study covered a 5-year period (1969–1974) shortly after the passage of the Walsh-Healey Public Contracts Act noise regulations. The study covered 213 employees with a median age of 43 years. The workers were divided into three groups based on their noise exposure. These were: (1) 71 office workers exposed to sound levels of 50 to 70 dBA; (2) 71 workers in the machine shop exposed to sound levels of 80 to 85 dBA; and (3) 71 workers (wearing hearing protectors) in the chipping and grinding areas of the iron and steel foundry exposed to sound levels of 100 to 110 dBA. Gosztonyi found that, over a 5-year period, the hearing loss incurred by workers in group (3) were no greater than the losses exhibited by the other groups at each frequency, regardless of the baseline hearing thresholds. He concluded that an HCP (consisting of periodic noise exposure assessments, annual audiometric testing, and the mandatory use of hearing protectors) instituted when noise exposures exceed a hearing conservation criterion of approximately 90 dBA adequately protects the hearing of noise-exposed workers.

Pell and Dear (1989) reported the following:

> Two longitudinal studies of changes in hearing threshold levels and one study of the prevalence of hearing impairment in noise exposed and non-exposed workers have clearly indicated that DuPont's hearing conservation program has been effective in preventing occupationally noise-induced hearing loss [NIHL].

Several reports on the effectiveness of DuPont's HCP have been published. DuPont's HCP requires the wearing of hearing protectors in high noise areas, audiometric testing, and monitoring of noise exposure. In the first study Pell (1972) showed, via a retrospective study, that the hearing of workers was being protected. The hearing levels of workers in high noise areas were compared to the hearing levels of workers in quieter areas (below approximately 90 dBA). Both groups of workers had comparable hearing levels at frequencies between 500 and 2000 Hz. At higher frequencies the median hearing level of quieter area workers was slightly better than the median hearing level of high noise area workers. Although the differences were statistically significant, the author believed that the small differences lacked practical importance. Moreover, the difference was much less than the hearing loss which occurred due to presbycusis and other non-occupational factors. Comparing the results to a study published by Nixon and Glorig (1961) on unprotected workers, Pell concluded that the DuPont workers experienced much less hearing loss.

Later, Pell (1973) published the initial results of a 5-year longitudinal study on the same workers. The sound level to which workers were exposed in the quiet areas could approach 90 dBA, but most exposures were between 50 and 70 dBA. The workers in the highest noise areas were required to wear hearing protectors and most of the workers in the moderate noise areas chose to wear hearing protectors. A comparison of workers' hearing levels at 3000, 4000, and 6000 Hz revealed that there was no increased hearing loss among workers who wore hearing protectors in high noise areas versus the workers in the quiet areas. The researcher concluded that:

The analysis of changes in hearing threshold levels over a 5-year period has clearly indicated that persons who work in areas where noise levels (sound levels) exceeded 90 dBA showed hearing losses that were no greater than those experienced by persons who worked in areas where the noise levels (sound levels) were less than 90 dBA. It is evident, therefore, that a hearing conservation program in which the hearing conservation criterion is approximately 90 dBA can successfully protect the hearing of noise-exposed workers.

Pell believed that his study confirmed the earlier conclusion that DuPont's HCP was effective in preventing occupational hearing loss. Pell emphasized, however, that this study cannot reveal the effects of these sound levels on hearing acuity but is intended only to evaluate the effectiveness of the HCP. The third study is a continuation of the second study. In this study, Pell and Dear (1988) evaluated the effectiveness of DuPont's HCP over 20 years. However, the study did not involve the same workers over the entire time frame for many reasons. Furthermore, the researchers divided the workers into three categories: workers exposed to noise under 85 dBA; between 85 to 94 dBA; and 95 dBA or higher. The mean differences, over a 3-year period between workers in noisy (over 85 dBA and wearing hearing protectors) and quiet areas, were small. Evaluating the prevalence of hearing impairment using the AAO–HNS 1979 definition showed that the high noise areas had slightly higher prevalence rates of hearing impairment. After adjusting for presbycusis, only 7.1% of the workers in the high noise areas developed a hearing impairment. Pell and Dear concluded that presbycusis was by far the major factor in developing a hearing impairment. Furthermore, independent clinical evaluations of the non-presbycusis cases revealed that socioeconomic factors, (e.g., differences in off-the-job noise exposures and otological disease), may account for much of the excess hearing impairment of the noise-exposed workers. Pell and Dear attributed the effectiveness of DuPont's HCP to educating the workers to the hazards of noise, hearing protector fitting, and supervision. Because of these components, DuPont workers received greater noise reduction from foam earplugs than did workers in other industries. Pell and Dear believe that effective use of hearing protectors is the overwhelming factor in approaching avoidance of problem hearing loss. In addition, Pell and Dear believe that employees exposed above 90 dBA are better protected by using appropriate hearing protectors rather than implementing engineering controls to reduce the noise to 89 dBA or even 84 dBA.

Savell and Toothman (1987) studied the HCP at a factory. The workers whose time-weighted average noise exposures ranged from 86 to 103 dBA were required to wear hearing protectors as a condition of employment which was strictly enforced. These workers were employed between 8 and 12 years. Only the employees with more than 25 months off the job during the course of the study were excluded in order to obtain a large sample (265 workers). The group mean hearing levels from the latest audiograms were compared to the initial audiograms. Savell and Toothman did not find any significant change in hearing acuity over the course of the study. Therefore, they concluded that mandatory use of hearing protectors in an HCP can protect the hearing acuity of workers.

Bruhl and Ivarsson (1994) conducted a longitudinal study of the HCP at an automobile stamping plant over a 15-year period. The researchers evaluated workers' hearing levels over the frequency range of 2000 to 8000 Hz. Workers' hearing levels were compared to the hearing levels of a ''highly screened'' non-noise exposed male population. For sheet metal workers, the HCP reduced the noise-induced permanent threshold shift. Bruhl and Ivarsson concluded that the HCP, which included effective use of hearing protectors and reduction of sound levels, can eliminate occupational NIHL.

Franks et al. (1989) examined the hearing conservation records of a large printing company with multiple facilities. They examined the records for factors associated with the development of an STS. Franks et al. indicated that ''* * * statistically significant factors associated with Standard Threshold Shift [STS] were from medical and non-occupational noise exposure histories, and not occupational noise exposure.'' In other words, the HCP was effective since the hearing loss developed by the workers was from non-occupational exposures.

Moretz (1990), reporting on the work of the ANSI S12.12 working group, stated that ''A pilot analysis of industry's audiometric data found that fewer than 20 percent of the programs [HCP's] are effective.'' Moretz further reported that Alice Suter, a member of this ANSI working group, had stated that ''the actual percentage of companies with effective programs is probably even lower * * *,'' because the ANSI working group had looked at data from relatively large companies. Suter thought that smaller companies are less likely to have the resources necessary to operate an effective HCP.

The National Institutes of Health (NIH), in its Consensus Statement on Noise and Hearing Loss (1990), states that ''many existing hearing conservation programs remain ineffective due to poor organization and inadequately trained program staff.''

Although evidence indicates that a properly supervised and operated HCP can provide effective protection, in many instances, HCP's have failed due to the lack of necessary supervision and adherence to proper procedures and principles. Furthermore, the studies which showed HCP's to be effective were mainly of short term durations (five years or less). There is a lack of evidence that long term HCP's protect the hearing acuity of workers. Pell and Dear's 20 year study (1988) was in actuality two shorter longitudinal studies covering a five-year period at the beginning of the study and a three-year period at the end. In both of these shorter studies the hearing level of the participants did not change at a rate different from the non-noise exposed controls.

The two other long-term studies, Bruhl and Ivarsson (1994) and Bruhl et al. (1994) demonstrated that HCP's were effective in reducing noise-induced permanent threshold shift. At the plant both engineering noise control and hearing protectors were utilized to reduce worker's exposure to noise. Therefore, these studies indicate engineering noise control is a necessary component of an effective long-term HCP.

Rink (1996) studied the hearing loss of workers enrolled in HCPs. Between 1991 and 1995 nearly 590,000 audiograms were given. During the years the percentage of STSs decreased each year—from 4.69% to 1.22%. Further, Rink reported that about 50% of the STS consistent with noise exposure were persistent (confirmed STSs). The remainder were not permanent. Rink concluded that aggressively adhering to and enforcing the hearing conservation policies proposed by OSHA in 1983 can reduce and effectively control NIHL.

Many of the above studies indicate that an HCP can be effective in preventing hearing loss, but only if management and workers strictly adhere to its requirements. Several of these studies also concluded that engineering controls were a necessary part of an effective HCP. This is not inconsistent with MSHA's conclusions about the

importance of commitment by both operators and miners.

Evaluation of HCP Effectiveness

MSHA has not included a methodology or a requirement for mine operators to test the effectiveness of their HCP's. Currently, both MSHA's Coal and OSHA's noise standards require an effective HCP, but do not specify a procedure for evaluating the effectiveness of the program. Further, Metal and Nonmetal's noise standard has no requirement for an HCP.

In its ANPRM, MSHA also requested information concerning appropriate methods or requirements for evaluating the effectiveness of HCP's. One commenter felt that evaluation criteria are unnecessary and that the HCP is effective if exposures are reduced. Another commenter stated that uniform evaluation criteria have not been adopted. Another suggested that NIOSH be given the task of evaluating the effectiveness of HCP's for the mining industry.

A number of commenters believed that it was essential for MSHA to address procedures for evaluating the effectiveness of HCP's. Several of these commenters suggested that MSHA monitor the activities of the ANSI S12.12 Working Group for Evaluation of HCP's and consider using the guidelines established by this group, once they were finalized. ANSI has published a draft standard, ANSI S12.13–1991 Audiometric Database Analysis (ADBA), which describes techniques for evaluating the effectiveness of the HCP's.

Adera et al. (1993) studied the effect of using ADBA to determine the effectiveness of a utility company's HCP which had 2,317 participants. The hearing acuity of the utility workers was compared to the hearing acuity of tobacco company employees (control population). The tobacco company employees were one of the control populations used in developing the draft ANSI standard S12.13–1991. The control population's noise exposure was approximately 87 dBA and they wore hearing protectors consistently. While the ADBA method deemed the HCP acceptable, epidemiological techniques showed the workers to be at risk of developing a hearing loss. The age-adjusted risk of developing a hearing loss was 2.3 times that of the control population.

Simpson, Stewart, and Hecksel (1992) studied HCP's at 28 small companies representing 2,183 employees of which 865 qualified for ANSI analysis. The researchers concluded that companies with less than 100 employees may have difficulty in meeting ANSI S12.13–1991 data requirements for more than two consecutive years of data analyses due to employee turnover and absenteeism. Sample sizes smaller than 30 employees are likely to be more sensitive to outlier scores. Smaller sample sizes were also more likely to be rated marginal or unacceptable due to biasing effects of sample size. For 1990, the percent of STS's ranged from 0% to 3.8% at the individual plants. The rate of STS's across all 28 plants was 1.5%.

Simpson, Stewart and Kaltenbach (1994) investigated early indicators of HCP performance. A total of 27,047 employees (3,245 controls and 23,802 subjects) in 21 HCP's were included in the study. The rate of STS in the control groups ranged from 2.5 to 5.7% while the exposed groups had a rate between 4.6 and 28%. Comparing the incidence of STS's with ANSI S12.13–1991 indicators, the researchers concluded that the incidence of STS's was as good as the ANSI test criteria as an early indicator of the effectiveness of an HCP from the first two audiograms.

NIOSH (1995) recommended a simple method of determining the effectiveness of an HCP. According to NIOSH, if less than 5% (1 out of 20) of the noise-exposed workers enrolled in an HCP incur an occupationally-induced STS, the HCP is deemed effective. According to NIOSH, this method should be used to continually monitor the results of audiometric testing to indicate the effectiveness of the HCP before many individuals incur permanent shifts in hearing acuity.

While MSHA recognizes that the ADBA technique may be promising, the Agency is concerned that it may not be practical for the majority of mine operators. The ADBA technique may not be applied reliably to populations of fewer than 30 individuals and about 90% of the 15,000 mines under MSHA's jurisdiction employ less than 30 miners. Even if every miner was placed in an HCP, regardless of noise exposure, less than 10% of the mines could consider using the ANSI draft ADBA procedures to evaluate their HCP. ADBA analysis also may not be appropriate if the workforce being analyzed is not stable, exhibiting a high turnover rate. MSHA has determined that this may be the case for many small mines which operate seasonally, are portable, or change geographic locations. Currently, the annual turnover rate in mining ranges from 2% in large coal mines to 11% in small metal and nonmetal mines.

In addition, ADBA requires several years of data before the analysis can be conducted. Consequently, ADBA cannot be used to immediately determine the effectiveness of an HCP unless audiograms were collected prior to the effective date of the rule.

Finally, existing procedures for conducting ADBA call for the use of audiograms taken without observing a quiet period. Both OSHA's existing standard and this proposal require a 14-hour quiet period before conducting a baseline audiogram. These standards, however, do not address a quiet period for annual audiograms, leaving the choice to the employer or the mine operator. Consequently, where a quiet period is used, those audiograms could not be used in conducting ADBA.

MSHA also is concerned that the statistical methods employed by ADBA require the use of a computer, which many small mine operators may not have. Consequently, many mine operators may need to employ outside consultants to conduct this analysis. Because the ADBA techniques are relatively new, a sufficient number of consultants, who fully understand and can utilize this analytical technique, may not be available. Despite the problems with ADBA analysis for the mining industry, MSHA recognizes that it may be a valuable tool for identifying and correcting problems in an HCP before an STS occurs. MSHA does not wish to discourage mine operators from using this technique.

The analysis of an HCP's effectiveness can be as simple as comparing a current audiogram with prior audiograms. This simple approach, however, can be extremely time consuming and may not identify trends among miners.

Further, international communities and selected branches of the U.S. armed services require the effectiveness of the HCP's to be evaluated even though they do not include specific methods for the evaluation.

MSHA, however, is not specifying a methodology to determine the effectiveness of an HCP for several reasons. First, there is not a consensus among researchers and commenters as to a method even though a draft ANSI standard (ADBA) has been published on this issue. Secondly, the techniques for evaluating the effectiveness of an HCP that have been developed are not appropriate to an HCP with few participants. MSHA estimates that most HCP's in the mining industry would not have a sufficient number of participants to be tested. Further, MSHA contends that there are few consultants and fewer mine operators with the expertise to evaluate the effectiveness of an HCP.

MSHA requests specific suggestions on practical methods which could be used in the mining industry, particularly among small mine

operators, to evaluate the effectiveness of HCP's. MSHA also requests comments on NIOSH's above stated recommendations.

Temporary or Seasonal Miners

The proposal would not provide any exemption from the requirements to provide audiometric examinations for temporary or seasonal miners.

OSHA has no such explicit requirement. Moreover to create such an exemption would mean that workers who change jobs—within a single industry, or between industries—might end up never having a check on hearing loss even if working in very noisy conditions.

The proposal does include certain provisions that might in practice exclude some miners from examinations otherwise required. A mine operator has up to 6 months to conduct a baseline audiogram—up to 12 months if a mobile van is used. Thus in practice, the operator's obligation to provide examinations does not extend to those miners who leave employment before this time and who do not subsequently return to work for the same operator. Many summer employees might fall into this category.

MSHA solicits further comment on this issue.

Permissible Exposure Level (PEL)

Proposed § 62.120(c) provides as follows:

No miner shall be exposed to noise in excess of a TWA_8 of 90 dBA (PEL) during any workshift, or equivalently a dose of 100%.

(1) If a miner's noise exposure exceeds the PEL, the operator shall, in addition to taking the actions required under paragraph (b) of this section, use all feasible engineering and administrative controls to reduce the miner's noise exposure to the PEL. When administrative controls are used to reduce a miner's exposure, the operator shall post these procedures on the mine bulletin board and provide a copy to affected miners.

(2) If a miner's noise exposure exceeds the PEL despite the use of the controls required by paragraph (c)(1) of this section, the operator shall take the actions required by this paragraph for that miner.

(i) The operator shall use the controls required by paragraph (c)(1) of this section to reduce the miner's noise exposure to as low a level as is feasible.

(ii) The operator shall ensure that a miner whose exposure exceeds the PEL takes the hearing examinations offered through enrollment in the hearing conservation program.

(iii) The operator shall provide hearing protection to a miner whose exposure exceeds the PEL and shall ensure the use thereof. The hearing protection shall be provided and used in accordance with the requirements of § 62.125.

This paragraph would establish the permissible exposure limit (PEL) to noise for a miner as a TWA_8 of 90 dBA during any workshift. (This is also referred to as a dose measurement of 100%; the action level TWA_8 of 85 dBA is half this dose of noise.)

The PEL is a time-weighted average sound level to which a miner may be exposed that establishes the maximum dose of noise permitted. Under the proposal, this is established as a TWA_8 of 90 dBA—the same as at present. TWA_8 refers to a time-weighted-8-hour average, a term defined in proposed § 62.110. The exposure needed to reach the PEL varies by sound level and time. For example, the PEL would be reached as a result of exposure to a sound level of 90 dBA for 8 hours, but also reached by exposure to a sound level of 95 dBA for only 4 hours or 92 dBA for 6.1 hours.

The Agency considered proposing a different PEL. As noted in part II of the preamble, MSHA has concluded that there is a significant risk of material impairment from noise exposures at or above a TWA_8 of 85 dBA. MSHA considered setting the PEL at this level, but as discussed in part IV of this preamble believes that this may not be feasible at this time for the mining industry. Accordingly, the Agency is proposing to keep the PEL at a TWA_8 of 90 dBA—the level in effect for the mining industry and under OSHA. The PEL is a dose twice that which would be received at the level at which there is a significant risk of material impairment.

While the PEL would not change, the actions required if noise exposure exceeds the PEL would in many cases be different from those currently required.

Under the proposal, a hierarchy of controls is established for all mines. Mine operators must first utilize all feasible engineering and administrative controls to reduce sound levels to the PEL. This approach is more consistent with MSHA's existing noise standards for metal and nonmetal mines than for coal mines. Under the current metal and nonmetal regulations, mine operators have to utilize either engineering or administrative controls to reduce noise to the PEL or as close thereto as feasible. In the coal industry, MSHA inspectors do not cite for noise without first deducting the attenuating value of hearing protectors being worn by the miners subjected to excessive exposures of noise. In practice, this means personal protective equipment is in most cases accepted as a substitute for engineering and administrative controls.

As under the present standards, the proposal would require a mine operator to use only such engineering controls as are technologically feasible, and to use only such engineering and administrative controls as are economically feasible for that mine operator.

Moreover, the proposed rule spells out explicit requirements that will supplement these controls in those cases in which the Agency concurs with a mine operator that the use of all feasible engineering and administrative controls cannot reduce noise to the PEL. All sectors of the mining industry will, in such cases, have to provide all miners exposed above the PEL with a properly fitting hearing protector, ensure the miners use those protectors, and ensure that miners take their annual hearing examinations.

Existing Standards

MSHA's existing metal and nonmetal noise standards require the use of feasible engineering and administrative controls when a miner's noise exposure exceeds the PEL. Hearing protectors are also required if the exposure cannot be reduced to within the PEL. The existing metal and nonmetal standards do not, however, require the mine operator to post the procedures for any administrative controls used, to conduct specific training, or to enroll miners in hearing conservation programs.

MSHA's existing noise practices for coal mines are significantly different from those for metal and nonmetal mines. The difference stems from the circumstances under which the Agency is authorized to issue citations. In metal and nonmetal mines, a citation is issued based exclusively on the exposure measurement—when MSHA measures an exposure at a TWA_8 of 90 dBA. But in coal mines, a citation is not issued in such a case if the miners are wearing hearing protection judged to be appropriate. The appropriateness is based on the EPA noise reduction rating minus 7 dB; in practice, most hearing protectors have ratings which meet this official test for many coal mine exposures. Accordingly, citations are seldom issued.

When coal mine operators do receive a citation for a miner's noise exposure exceeding the PEL, they are required to promptly institute administrative and/or engineering controls to assure compliance. Additionally, within 60 days of receiving a citation, coal mine operators are required to submit to MSHA a plan for the administration of a continuing, effective hearing conservation program, including provisions for—

(1) Reducing environmental noise levels;

(2) Making personal ear protective devices available to miners;

(3) Conducting pre-placement and periodic audiograms; and,

(4) Instituting engineering and administrative controls to ensure compliance with the standard (underground only).

With regard to MSHA's existing noise standard, the Federal Mine Safety and Health Review Commission (Commission) has addressed the issue of what MSHA must consider, when determining what is a feasible noise control for enforcement purposes, at a particular mine. According to the Commission, a control is considered feasible when: (1) the control reduces exposure, (2) the control is economically achievable, and (3) the control is technologically achievable. See *Secretary of Labor* v. *Callanan Industries, Inc.*, 5 FMSHRC 1900 (1983), and *Secretary of Labor* v. *A. H. Smith,* 6 FMSHRC 199 (1984).

In determining technological feasibility of a regulation, the Commission has ruled that a control is deemed achievable if through reasonable application of existing products, devices, or work methods with human skills and abilities, a workable engineering control can be applied to the noise source. The control does not have to be ''off-the-shelf''; but, it must have a realistic basis in present technical capabilities.

In determining economic feasibility, the Commission has ruled that MSHA must assess whether the costs of the control are disproportionate to the ''expected benefits,'' and whether the costs are so great that it is irrational to require its use to achieve those results. The Commission has expressly stated that cost-benefit analysis is unnecessary in order to determine whether a noise control is required. According to the Commission, an engineering control may be feasible even though it fails to reduce exposure to permissible levels contained in the standard, as long as there is a significant reduction in exposure. *Todilto Exploration and Development Corporation* v. *Secretary of Labor,* 5 FMSHRC 1894 (1983). No guidance has been provided by the Commission as to what level of reduction is considered significant. However, the Commission has accepted the Agency's determination that a 3 dBA reduction is significant.

MSHA has interpreted the ''expected benefits'' to be the amount of noise reduction achievable by the control. MSHA generally considers a reduction of 3 dBA or more to be a significant reduction of the sound level because it represents at least a 50% reduction in sound energy. Consequently, a control that achieves relatively little noise reduction at a high cost could be viewed as not meeting the Commission's test of economic feasibility.

Consistent with the case law, MSHA considers three factors in determining whether engineering controls are feasible at a particular mine: first, the nature and extent of the overexposure; second, the demonstrated effectiveness of available technology; and third, whether the committed resources are wholly out of proportion to the expected results. Before a violation of these requirements of the standard could be found, MSHA would have to determine that a worker has been overexposed; that administrative or engineering controls are feasible; and that the mine operator failed to install or maintain such controls. (See also the discussion of enforcement policy in the last of the Questions and Answers in part I.)

OSHA's PEL is a TWA_8 of 90 dBA, computed using a 90 dBA threshold. The standard requires the use of feasible engineering or administrative controls when a citation for exceeding the PEL is issued. Under OSHA policy (CPL 2.45A CH–12), however, if an effective HCP is in place, no STS has been detected, and adequate hearing protectors are utilized, no citation will be issued for noise exposures up to a TWA_8 of 100 dBA if the costs to implement the HCP are less than those of engineering or administrative controls. In determining the appropriateness of hearing protection for this purpose, OSHA reduces the EPA rating by 7; but it then further reduces effectiveness by halving the result of that calculation. (A more detailed discussion of hearing protector derating approaches can be found in the section on *Hearing Protector Effectiveness,* part of the discussion of proposed § 62.125.)

Comments and Studies on PEL

Several commenters to MSHA's ANPRM recommended a PEL of 85 dBA. One of these stated the following:

> The current PEL provides inadequate protection for miner's hearing. The 90 dB(A) PEL is excessive and permits noise exposure that will result in significant hearing loss among exposed miners. Specifically, 21 to 29% of workers exposed to 90 dBA for 40 years will suffer material impairment of hearing. Material impairment of hearing, defined by OSHA in this case, is 25 dBA or more loss for the frequencies 1, 2, and 3 kHz. Based on this risk of damage, OSHA adopted a hearing conservation program that is required when noise exposure reaches 85 dBA TWA.

Another of these commenters recommended a PEL of 85 dBA with an 80 dBA action level. This commenter stated that:

> Both OSHA and the National Institute for Occupational Safety and Health (NIOSH) have recommended a PEL of 85 dBA. This level seems to be an appropriate PEL for mining as well, since the numbers of miners with hearing loss continues to be a problem. Obviously a more conservative approach would be to utilize 80 dBA as the action level to trigger the implementation provisions of an HCP. Although more costly, the benefits for prevention of NIHL would certainly be substantial.

Many commenters on this issue, however, believe that MSHA's current PEL of 90 dBA should be retained and that it is adequate to protect miners. One commenter referenced Bartsch (see *Related Studies* in the III. Nature of the Hazard section of this preamble) as supporting evidence for retaining the PEL of 90 dBA. Three commenters cited lack of compensable noise-induced hearing loss (NIHL) cases among miners in their geographical area as a positive indication that the current PEL is adequate and they questioned the benefit of reducing the PEL to 85 dBA. These commenters also stated that about 20% of the miners in their area were exposed to average sound levels above 85 dBA, but under 90 dBA.

In addition to the comments received in response to its ANPRM, MSHA also reviewed numerous studies and standards relating to the establishment of a PEL.

The Physical Agents Threshold Limit Value Committee of American Conference of Governmental Industrial Hygienists (ACGIH) (1993) has adopted a Threshold Limit Value (TLV) of 85 dBA $L_{eq,8}$. The committee believed that there was a clear consensus that an 85 dBA TLV was valid and needed to protect the hearing acuity of workers at the higher audiometric frequencies of 3000 and 4000 Hz.

Stekelenburg (1982) suggests that 80 dBA be the acceptable level for noise exposure over a 40 year work history. Moreover, the researcher suggests that extra precautions are necessary for sensitive individuals and that these people need to be identified during the first five years of exposure to noise.

Embleton (1994) summarized the occupational noise regulations (pertaining to: PEL, exchange rate, and the upper limit for noise exposure) from 17 countries and selected branches of the U.S. armed services. His summary table (absent the recommendations in his report) is reproduced below as Table III–4.

TABLE III–4.—SOME FEATURES OF LEGISLATION TABULATED FOR VARIOUS COUNTRIES*

Country (jurisdiction)	L_{Aeq} 8-hour exposure rate	Exchange rate	Limit for engineering or administrative controls	Limit for monitoring hearing	Upper limit for sound level
Australia (varies by state) ..	85 dB	3 dB	85 dBA	85 dBA	140 dB lin, peak.
Brazil	85 dB	5 dB	90 dBA, no exposure >115 dBA if no protection.	85 dBA	130 dB peak.
Canada:					
(Federal)	87 dB	3 dB	87 dB	84 dBA	140 dB peak.
(ON, QU, NB)	90 dB	5 dB	90 dBA	85 dBA (a).	
(AB, NS, NF)	85 dB	5 dB	85 dBA		
(BC)	90 dB	3 dB	90 dBA		
China	70–90	3 dB	.....	.....	115 dBA.
Finland	85 dB	3 dB	85 dB		
France (b)	85 dB	3 dB	90 dBA or 140 dB peak	85 dBA	135 dB peak.
Germany (b), (c)	85 dB	3 dB	90 dBA	85 dBA	140 dB peak.
Hungary	85 dB	3 dB	90 dBA	.....	125 dBA or 140 dB peak.
Israel	85 dB 5 dB	.....	.....	115 dBA or 140 dB peak..	
Italy	85 dB	3 dB	90 dB	85 dB	140 dB peak.
Netherlands	80 dB	3 dB	85 dB	140 dB peak..	
New Zealand	85 dB	3 dB	85 dBA +3 dB exchange rate.	115 dBA slow or 140 dB peak..	
Norway	85 dB	3 dB	.....	80 dBA	110 dBA.
Spain	85 dB	3 dB	90 dBA	80 dBA	140 dB peak.
Sweden	85 dB	3 dB	90 dBA	80 dBA	115 dBA or 140 dBC.
United Kingdom	85 dB	3 dB	90 dBA	85 dBA	140 dB peak.
USA (d)	90 dB (TWA_8) ...	5 dB	90 dBA but no exposure >115 dBA.	85 dBA	115 dBA or 140 dB peak.
USA Army and Air Force) ..	84 dB	3 dB	.....	85 dBA	140 dB peak.

*Embleton (1994).
Information for countries not represented by Member Societies participating in the Working Party is taken from Ref. 15.
(a) A more complex situation is simplified to fit this tabulation.
(b) These countries require the noise declaration of machinery, the use of the quietest machinery where reasonably possible, and reduced reflection of noise in the building, regardless of sound or exposure levels.
(c) The noise exposure consists of L_{Aeq} and adjustments for tonal character and impulsiveness.
(d) TWA is Time Weighted Average. The regulations in the U.S. are unusually complex because different thresholds are used to compute levels to initiate hearing programs (85 dBA), noise exposure monitoring (80 dBA), and noise reduction measures (90 dBA), each using a 5-dB exchange rate.

Embleton included recommendations based upon current practice taken from the various jurisdictions:

L_{Aeq} 8-hour exposure rate	Exchange rate	Limit for engineering or administrative controls	Limit for monitoring hearing	Upper limit for sound level
85 dBA	3 dBA	Use quietest machines and room absorption in workplaces.	On hiring and at intervals thereafter	140 dB peak.

He stated that:

The primary goal of this report and its recommendations is to reduce the risk of long term hearing damage and expose people to a practical minimum. . . . Each feature recommended had been considered to be practicable by at least one national jurisdiction and there may be some experience of its usefulness. Much current legislation was enacted several years ago, before the more recent scientific evidence was available and before it was integrated into current understanding of this complex scientific topic.

The U.S. armed services and possibly some international communities do not go through a public rulemaking process in establishing their respective noise regulations. Nevertheless, MSHA has included these sources to show that a consensus exists on noise legislation. Table III–5 lists information similar to that included in Table III–4 for several additional entities. Furthermore, there was a discrepancy found in Table III–4 as per the information provided for the U.S. armed services. The corrected information is included in Table III–5 (compiled by MSHA).

TABLE III–5.—FEATURES OF NOISE EXPOSURE CRITERIA FOR ADDITIONAL ENTITIES

Country or jurisdiction	L_{Aeq} 8-hour exposure rate	Exchange rate	Limit for engineering or administrative controls	Limit for monitoring hearing	Upper limit for sound level
American Conference of Governmental Industrial Hygienists (ACGIH).	85 dBA	3–dB	.....	85 dBA	140 dBC peak.

TABLE III–5.—FEATURES OF NOISE EXPOSURE CRITERIA FOR ADDITIONAL ENTITIES—Continued

Country or jurisdiction	L_{Aeq} 8-hour exposure rate	Exchange rate	Limit for exgineering or administrative controls	Limit for monitoring hearing	Upper limit for sound level
European Economic Community (EEC)	85 dBA	3–dB	90 dBA	85 dBA	140 dB peak.
South Africa	85 dBA	3–dB	85 dBA	85 dBA	115 dBA or 150 dB.
U.S. Air Force	85 dBA	3–dB	85 dBA	85 dBA	115 dBA or 140 dB.
U.S. Army	85 dBA	3–dB	85 dBA	85 dBA	140 dB.
U.S. Navy	84 dBA	4–dB	84 dBA	84 dBA	140 dB.
State of Western Australia	90 dBA	3–dB	90 dBA		140 dB.

Because the information contained in Tables III–4 and III–5 does not include every jurisdiction, MSHA solicits additional information on features of noise legislation for comparison purposes.

Hierarchy of Controls

The proposal would require mine operators to use all feasible engineering or administrative controls or a combination of these controls to reduce a miner's daily noise exposure to the PEL. If these controls do not reduce the exposure to the PEL, then they shall be used to reduce the exposure as low as feasible. The proposal does not place preference on the use of engineering controls over administrative controls; but all feasible controls of both types must be implemented to reduce noise exposure to the PEL or as close thereto as is possible when all feasible controls are utilized.

MSHA's proposed requirements for either feasible engineering or administrative controls or a combination of these controls are closer to MSHA's existing noise standards for metal and nonmetal mines than to the standards for coal mines.

In metal and nonmetal mines, engineering or administrative controls are required to the extent feasible when exposures exceed a TWA_8 of 90 dBA. Current metal and nonmetal enforcement requirements equate engineering and administrative controls and do not accept hearing protectors in lieu of such controls. Mine operators in these industries, which have a significant percentage of small employers, generally opt to use engineering controls over administrative controls, citing practical difficulties with the implementation of the latter. Administrative controls reduce exposure by limiting the amount of time that a miner is exposed to noise, through such actions as rotation of miners to areas having lower sound levels, rescheduling of tasks, and modifying work activities.

The hierarchy of noise control for coal mines is significantly different. In determining whether the mine operator is in violation of the PEL, MSHA deducts from noise exposure measurements the corrected attenuation of hearing protectors being worn by the miners. Given normal conditions in these mines, when hearing protectors are being worn, no citation is issued.

OSHA's standard requires the use of feasible engineering or administrative controls. As discussed above, however, current OSHA policy allows employers to rely on a combination of other controls—enrollment in an HCP, no STS, and adequate hearing protectors (measured in accordance with specifications adjusted for the purpose of the policy)—up to a noise exposure of 100 dBA, provided that the cost is less than that of the engineering and/or administrative controls.

A number of commenters responding to MSHA's ANPRM, specifically supported the primacy of engineering controls. One commenter supported the primacy of engineering controls citing anecdotal evidence that miners resist wearing hearing protectors. Another commenter stated that engineering controls for mining are far more available than commonly thought.

Several commenters stated that administrative controls can be effective but are often impractical. One commenter stated that administrative controls are effective but are of limited use at small operations because there are not enough people to rotate through the various jobs. Another commenter stated that although the use of administrative controls may lower the exposure of an individual miner such controls have the disadvantage of increasing overall exposure to a larger population. A third commenter stated that administrative controls should be the least preferred control method.

A significant number of commenters specifically requested that MSHA allow the use of hearing protectors in lieu of engineering or administrative controls, as long as the hearing protector provided adequate attenuation. These commenters believed that hearing protectors were equally as effective as engineering and administrative controls.

Many commenters recommended that MSHA allow the mine operator a choice or combination of controls, including the use of an HCP. Several commenters stated the following:

> There is no logical reason to handcuff operators by limiting flexibility and freedom of choice in selecting the most appropriate method of noise protection for the particular application; providing, of course, the method is effective.
>
> For some reason HPD's (hearing protection devices) have been regulated to be a third class behind administrative, and engineering controls. It is our experience the HPD's provide more effective, less costly, and more reliable protection than engineering or administrative controls in many circumstances. The employee acceptance is also good to excellent. Therefore the discrimination against HPD's should be removed in any future regulations.

Dear (1987) contends that employers can manage the risk of hearing impairment by encouraging all employees to participate in the HCP and that an HCP can be as effective, in many cases, as the use of other, more costly controls. He believes that some workers are better served by wearing hearing protectors than reducing the noise via engineering controls to the PEL. He contends that removing the hearing protectors when the sound levels are reduced to 90 dBA [by engineering controls] would expose workers to at least 90 dBA; whereas, use of hearing protectors would reduce exposures much lower. Dear cites studies conducted by DuPont on their employees to show the effectiveness of hearing protectors. Employees in the DuPont HCP, which includes hearing protectors and begins at approximately 90 dBA, had not developed hearing impairment during the study period.

Pell and Dear (1988) believe that employees exposed above 90 dBA are better protected by using appropriate hearing protectors, rather than implementing engineering controls to

reduce the noise to 89 dBA or even 84 dBA.

Berger (1983) states the following regarding engineering controls versus hearing protectors:

> When one compares engineering noise controls to HPDs [hearing protectors], it must be remembered that the same types of problems which afflict HPD performance in the RW [real world], will tend to reduce the effectiveness of noise control measures as well. For example, one of the most commonly used treatments is an enclosure. If it is not well fitted, or left partially ajar, or circumvented by an inconvenienced employee, or its gaskets and seals age, deteriorate, or break in any way, then its performance will be degraded in a manner similar to that which has been observed for poorly fitted and misused HPDs. When noise control is achieved by improved adjustments and lubrication, there must be a trained and dedicated employee to monitor the maintenance schedule, just as employees must care for and maintain their HPDs. In fact most engineering noise control procedures, except for some source noise control accomplished through equipment redesign, require maintenance and periodic adjustment or replacement to continue functioning properly. And except for enclosures, noise reductions of 10 dB or more are often difficult to achieve and maintain. Thus HPDs remain one of the most important protective methods for a hearing conservationist to consider, and can provide an effective adjunct to engineering noise controls in the majority of industrial noise environments.

Nilsson et al. (1977) studied hearing loss in shipbuilding workers. The workers were divided into two groups. In the first group, the workers were exposed to 94 dBA with 95% of the workers using hearing protectors. In the second group, the workers were exposed to 88 dBA and 90% of them wore hearing protectors. Both groups were subjected to impulse noise up to 135 dB. Despite the fact that the vast majority of the workers in both groups wore hearing protectors, cases of noise-induced hearing loss (NIHL) were common. The mean pure tone audiograms showed the typical noise dip at 4000 Hz. For increased exposure durations, the amount of NIHL increased. Workers exposed to 94 dBA exhibited more hearing loss than those exposed to 88 dBA. Nilsson concluded that 58.1% of all of the workers had some degree of hearing impairment, and only 1.8% was caused by factors other than noise after excluding hearing loss due to heredity, skull injury, or ear disease. According to Nilsson et al., the hearing protectors should have attenuated the noise by at least 13 dBA. This study concluded that reliance on hearing protectors alone is not sufficient to protect the hearing acuity of the workers.

NIOSH's position regarding the hierarchy of controls is stated in their December 16, 1994 comments to MSHA (NIOSH 1994). According to NIOSH there are three elements of an effective hierarchy of controls. They are—

1. Prevent or contain hazardous workplace emissions at their source;
2. Remove the emissions from the pathway between the source and the worker; and
3. Control the exposure of the worker with barriers between the worker and the hazardous work environment.

NIOSH further states that the essential characteristics of specific control solutions are—

1. The levels of protection afforded workers must be reliable, consistent, and adequate;
2. The efficacy of the protection for each individual worker must be determinable during use throughout the lifespan of the system;
3. The solution must minimize dependence on human intervention for its efficacy so as to increase its reliability; and
4. The solution must consider all routes of entry into worker's bodies and should not exacerbate existing health or safety problems or create additional problems of its own.

NIOSH (1988), in its publication entitled ''Proposed National Strategy for the Prevention of Noise-Induced Hearing Loss'' (Publication No. 89–135), encouraged OSHA to rescind its policy of accepting HCP's in lieu of either feasible engineering and/or administrative controls and states:

> It is extremely foolhardy to regard hearing protection as a preferred way to limit noise exposures because most employees obtain only half the sound attenuation possible from hearing protectors. Even with training, some workers fail to obtain maximum benefit from these protectors because they have difficulty adjusting them properly, or they refuse to wear them because they fear such devices will impair their ability to perform their jobs properly or hear warning signals. If, however, noise is reduced by engineering and/or administrative controls, the limitations of hearing protectors are of less concern.

In the report, ''Preventing Illness and Injury in the Workplace,'' the Office of Technology Assessment (1985) found that health professionals rank engineering controls as the priority means of controlling exposure, followed by administrative controls, with personal protective equipment as a last resort.

The National Hearing Conservation Association (NHCA) in a letter from their President, Susan Cooper Megerson (1994), to Joseph Dear, Assistant Secretary of Labor for Occupational Safety and Health, urged OSHA to rescind its policy of accepting an HCP in lieu of engineering noise controls for exposures up to 100 dBA. NHCA contends that feasible engineering controls should be the preferred method of controlling the noise. Further, NHCA states that ''Most hearing protectors, as they are worn in the field, do not provide sufficient attenuation to bring workers' exposures from 100 dB(A) to safe noise levels.''

Suter (1994) in a letter to Sue Andrei of OSHA's Policy Directorate urged OSHA to rescind its policy of accepting an HCP in lieu of engineering and/or administrative controls for exposures up to 100 dBA. Suter contends that most HCPs are ineffective due to hearing protectors providing only a fraction of their laboratory attenuation. Further, Suter urges OSHA to re-emphasize engineering noise controls.

MSHA understands that the two letters to OSHA were sent in response to an OSHA request for comment on how to design a priority scheme for OSHA standards. No responses were issued, and the priority scheme is still pending. MSHA has also reviewed a recent letter to the EPA from the American Industrial Hygiene Association questioning the rating system used to label hearing protectors with attenuation values; this is discussed above in the section on *Hearing protector effectiveness* (in connection with proposed 62.125).

In summary, commenters and researchers on this issue were divided as to whether engineering/administrative controls should have primacy over the use of hearing protectors or an HCP. Most of the international community, U.S. armed services, and NIOSH, however, discourage the use of hearing protectors and an HCP as the primary means of control and accept their use only when engineering and administrative controls failed to achieve a significant reduction in the worker's exposure.

Administrative controls reduce exposure by limiting the amount of time that a miner is exposed to noise, through such actions as rotation of miners to areas having lower sound levels, rescheduling of tasks, and modifying work activities. Many mine operators have demonstrated that administrative controls can be as effective and less costly than the installation of engineering controls. However, the use of administrative controls may be limited by labor/management agreements, limitations on the number of qualified miners capable of handling a specific task, or difficulty in ensuring that miners adhere to the

administrative controls. Additionally, administrative controls have the potential draw back of exposing multiple workers to high sound levels for designated time periods. Because the effectiveness of administrative controls is based on adherence to these strict time periods, mine operators may find it difficult to verify compliance with the administrative procedures.

Although there are some disadvantages to using administrative controls, the Agency has determined that in certain circumstances they can be as effective as engineering controls. MSHA, therefore, believes that the mine operator should have the option to choose which method of control to use—provided that all feasible controls must be utilized if needed to reduce sound levels to or below the PEL. This would give mine operators maximum flexibility when considering the intricacies of their operation in complying with the regulation. Administrative controls, utilized properly, spread the risk over a larger population although at a lower risk to each individual.

A related type of control would be the transfer of miners to other assignments. The Mine Safety and Health Act provides for the Agency to prescribe such an approach in certain cases. MSHA considered proposals to do so in cases in which an STS is detected. Discussion of this topic is covered by the section of the preamble that reviews proposed § 62.180.

Based upon its review of the available evidence, MSHA concludes that a reduction of a miner's risk of material impairment due to occupational NIHL noise can best be achieved through the use of all feasible engineering or administrative controls or a combination thereof. The use of engineering controls inherently provides the most consistent and reliable protection because such controls do not depend upon individual human performance or intervention to function. MSHA's proposal would, however, allow mine operators to use either engineering or administrative controls. This would provide the mine operator with the flexibility to select the most appropriate control for the situation. These methods would be given clear primacy over personal protective controls. While MSHA is aware that NIOSH is seeking to develop an approach that would more accurately derate hearing protectors in actual workplace use, the prospects for this remain uncertain; moreover, the issues associated with the consistency and reliability of personal protective equipment use would remain.

Engineering Noise Controls for Mining Equipment

Engineering noise controls reduce exposure by modifying the noise source, noise path or the receiver's environment thereby decreasing the miner's exposure to harmful sound levels. Examples of these three types of engineering controls are exhaust mufflers, barriers, and environmental cabs, respectively. Exposures may also be controlled by substituting quieter mining equipment. For example, a diamond wire saw can be substituted for a conventional hand-held channel burner in the dimension stone industry.

MSHA has listed feasible engineering controls for the major classifications of equipment used in metal and nonmetal mines in its Program Policy Manual, Volume IV. The engineering controls referenced in this manual have been evaluated by MSHA Technical Support and proven feasible and effective in the mining industry. This document is currently used by MSHA inspectors and others to assist in determining if engineering controls are feasible. Following are some examples of the feasible controls covered in that manual.

1. *Acoustically treated cabs.* For mining equipment such as haul trucks, front-end-loaders, bulldozers, track drills, and underground jumbo drills, acoustically treated cabs are among the most effective noise controls. Such cabs are widely available, from the original equipment manufacturer and the manufacturers of retrofit cabs, for machines manufactured within the past 20 years. The noise reduction of factory installed acoustically treated cabs is generally more effective than that of retrofit cabs. According to some manufacturers, sound levels at the mine operator's position inside factory cabs are often below 90 dBA and in some cases below 85 dBA.

Occasionally, underground mining conditions are such that full-sized surface haulage equipment can be used. Where this is possible, such equipment can be equipped with a cab as described above. Additionally, some manufacturers offer cabs for lower profile underground mining equipment such as scoop-trams, shuttle cars, and haul trucks. The use of cabs on such underground mobile haulage equipment generally is feasible provided it does not create a safety hazard due to impaired visibility.

The former USBOM has published two how-to manuals entitled ''Bulldozer Noise Controls'' (1980), and ''Front-End Loader Noise Controls'' (1981) that describe in great detail how to install a retrofit cab and install acoustical materials.

2. *Barrier shields.* For some equipment, generally over 20 years old, an environmental cab may not be available from the original equipment manufacturer or from manufacturers of retrofit cabs. In such cases, a partial barrier with selective placement of acoustical material can generally be installed at nominal cost to block the noise reaching the equipment operator. These techniques are also demonstrated in ''Bulldozer Noise Controls'' (1980).

Barrier shields and partial enclosures can also be used on track drills where full cabs are not feasible. Such shields and enclosures can be either free standing or attached to the drill. Typically, however, they are not as effective as cabs and usually do not reduce the miner's noise exposure to within MSHA's current 90 dBA PEL. This barrier can be constructed at minimal cost from used conveyor belting.

3. *Exhaust mufflers.* In addition to an environmental cab or barrier shield, diesel powered equipment can be equipped with an effective exhaust muffler. The end of the muffler's exhaust pipe should be located as far away from the equipment operator as possible, and the exhaust directed away from the operator. For underground mining equipment, exhaust mufflers are generally not needed where water scrubbers are used. A water scrubber offers some noise reduction and the addition of an exhaust muffler may create excessive back pressure or interfere with the proper functioning of the scrubber. However, exhaust mufflers can be installed on underground equipment where catalytic converters are used.

Exhaust mufflers can also be installed on pneumatically powered equipment. For example, exhaust mufflers are offered by the manufacturers of almost every jackleg drill, chipping hammer, and jack hammer. In the few cases where such exhaust mufflers are not available from the factory, they can be easily constructed by the mine operator. MSHA has a videotape available showing the construction of such an exhaust muffler for a jackleg drill. This muffler can be constructed at minimal cost from a section of rubber motorcycle tire.

4. *Acoustical materials.* Various types of acoustical materials can be strategically used to block, absorb, and/or dampen sound. Generally such materials are installed on the inside walls of equipment cabs or operator compartments and in control rooms and booths. For example: barrier and

absorptive materials can be used to reduce noise emanating from the engine and transmission compartments; and acoustic material can be applied to the firewall between the employee and transmission compartment. Noise reduction varies depending upon the specific application. Care must be taken to use acoustical materials that will not create a fire hazard.

5. *Control rooms and booths.* Acoustically treated control rooms and booths are frequently used in mills, processing plants, or at portable operations, to protect miners from noise created by crushing, screening, or processing equipment. Such control rooms and booths typically are successful in reducing exposures of employees working in them to below 85 dBA.

6. *Substitution of equipment.* In a few cases, where sound levels are particularly severe, and neither retrofit nor factory controls are available, the equipment may need to be replaced with a quieter type. For example, hand-held channel burners had been used for many years to cut granite in dimension stone quarries. These were basically small jet engines on a pole, fueled by diesel fuel and compressed air. The pole was held by the channel burner operator and the flame was directed against the granite. The intense heat caused the granite to spall and by moving the flame back and forth a channel could be created. Sound levels typically exceeded 120 dBA at the operator's ear.

Several years ago, alternative and quieter methods of cutting the granite were developed. These included replacing the channel burner with either a diamond wire saw, hydraulic or pneumatic slot drill, or water jet. Dimension stone operators were notified by MSHA of the availability of these alternatives and given time to phase out the use of diesel-fueled, hand-held burners and replace them with one of the quieter alternatives. MSHA also has a videotape describing these various alternatives.

7. *New equipment design.* Using the channel burners as an example, a new design of channel burner was engineered which automated the process. The hand-held channel burners can be replaced with automated channel burners using liquid oxygen. The automated design does not require the operator to be near the channel burner, thereby using distance to attenuate the noise.

In addition to the noise controls described in MSHA's Program Policy Manual, Volume IV, a number of other documents are available describing effective noise controls for coal, metal and nonmetal mines—controls for underground equipment and controls for surface equipment.

The MSHA document entitled, ''Summary of Noise Controls for Mining Machinery,'' (Maraccini et al., 1986) provides case histories of effective noise controls installed on specific makes and models of mining equipment. The case histories describe the controls used, their cost, and the amount of noise reduction achieved. MSHA believes that the controls utilized in these specific cases can be extended to other pieces of mining equipment.

Furthermore, the former USBOM, which has been responsible for conducting research leading to improved equipment and methods for controlling safety and health hazards in mining, published a handbook entitled, ''Mining Machinery Noise Control Guidelines, 1983.'' (Bartholomae and Parker, 1983) This handbook describes engineering noise controls for coal, metal and nonmetal mining equipment. The former USBOM also published numerous documents describing noise controls for mining machinery. Many of these research reports are listed in the USBOM publication IC9004, ''The Bureau of Mines Noise-Control Research Program—A 10-Year Review.'' (Aljoe et al., 1985) Part V of this preamble contains a list of USBOM publications dealing with particular types of equipment.

In particular, these include noise control methods for coal cutting equipment, longwall equipment, conveyors, and diesel equipment. Underground coal mining equipment may require some unique noise controls. However, for coal cutting machines such as continuous miners and longwall shears, the use of remote control is the single most significant noise control. The installation of noise dampening materials and enclosure of motors and gear cases can be used to aid in controlling noise of coal transporting equipment such as conveyors and belt systems. Diesel equipment used underground can use controls similar to those used on surface equipment. Mufflers, sound controlled cabs, and barriers will provide much of the needed noise control for this type of equipment.

Finally, while MSHA is not making any assumptions about the development of new technologies, it would be interested to learn of any processes under development that could further assist mine operators in controlling noise. For example, the former USBOM (Burks and Bartholomae, 1992) has developed a variable speed chain conveyor which can be used to reduce the noise exposure of continuous miner operators and loading machine operators in particular. An empty conveyor is noisier than a full one because the coal covering the conveyor inhibits the radiation of noise. The variable speed chain conveyor only operates when necessary to convey coal. To date the manufacturers of mining machines have apparently not adopted this technology, despite the fact that it has the added benefits of reduced dust emissions, reduced power consumption, and reduced maintenance costs.

Although most of the USBOM noise control documents are not specifically discussed in this section, MSHA has reviewed them. The reviewed documents are listed in the references and are available to the mining community. For additional information on USBOM noise control projects contact: Mr. Edward D. Thimons, U.S. Department of Energy, Pittsburgh Research Center, P.O. 18070, Pittsburgh, PA 15236, (412) 892–6683, Fax (412) 892–4259.

Posting of Administrative Control Procedures

The proposal would require that the mine operator post a copy of any administrative controls in effect on the mine bulletin board, and provide affected miners with a copy. As required by Section 109 of the Mine Act, a mine operator must have a bulletin board. Documents containing pertinent mine information are required to be posted by various mandatory standards (e.g., training plan, emergency communication numbers, MSHA citations, etc.). This is an ideal place to require the administrative procedures to be posted, since most miners are familiar with its location and the importance of documents placed on it.

The existing MSHA coal noise regulations do not require written administrative controls, unless these controls are part of a hearing conservation plan. Further, if written, the administrative controls are not required to be posted. However, the affected miner would be informed of the administrative procedures as part of his/her required part 48 training. Neither MSHA's current metal and nonmetal nor OSHA's noise regulations require that administrative controls, if used, be in writing and posted.

MSHA did not receive any comments on this issue.

MSHA has concluded that it is important that administrative controls be posted, since miners must actively comply for the controls to be effective. Posting would facilitate informing miners of work practices necessary for

reducing their noise exposures, especially when temporarily assigned to a different job. Since the administrative controls must be in writing to be posted on the mine bulletin board, MSHA believes that providing the affected miners with copies would not be a significant burden as compared to other possible methods of notification and is likely to be more much more effective in ensuring miners are on notice of their obligation to comply.

Supplementary Controls

Under proposed § 62.120(b), any miner exposed above the action level will receive special training in noise protection, and be enrolled in a hearing conservation program in which annual audiometric tests are offered. Any miner exposed above that level is to receive hearing protection upon request, as is any miner who incurs an STS or who is waiting for a baseline audiogram. The operator must ensure hearing protection is worn, however, in only two cases: if there is an STS, and if it will take more than 6 months to get the baseline audiogram because of the need to wait for a mobile test van.

Under proposed § 62.120(c), if exposures exceed the PEL, and cannot be feasibly reduced to the PEL through the use of all feasible engineering and administrative controls, a few additional requirements would be applicable. All miners so exposed must be provided hearing protection, and required to use the hearing protection. In addition, the operator would be required to ensure that miners take the scheduled audiometric examinations.

The circumstances under which hearing protection must be worn are discussed more fully in connection with proposed § 62.125.

MSHA is proposing that mine operators require miners enrolled in an HCP to participate in audiometric testing once exposures exceed the PEL. This is not the case under OSHA; however, MSHA believes this approach is warranted in the mining industry.

The information generated by these tests can serve as triggers for both the mine operator and the Agency to investigate more thoroughly the implementation of noise controls. If an employee incurs a standard threshold shift, at the very least a hearing protector needs to be provided or changed. The audiological information can provide useful clues to the noise causing the problem, and point to an undetected failure of various controls: engineering controls, administrative controls, or the failure to properly fit, maintain or utilize hearing protectors. If an employee incurs a reportable hearing loss, it is an indication that despite regular MSHA inspections, some serious problem has not been detected or resolved and a more thorough analysis is probably required. If the required audiological examinations are not taken, standard threshold shifts and cases of reportable hearing loss will go unreported.

In addition, the Agency wants to ensure that miners are aware of the severity of any hearing loss; in a mining environment, this knowledge could have implications for the safety of the miner and the safety of others. Miners who do not recognize that they have a hearing problem—and hearing loss occurs gradually and is often hard for individuals to accept—may be less willing than those who have been advised they have a problem to pay attention to the problem. The proposed regulation provides for annual training, but a notification of a detectable change in hearing acuity would certainly help to focus attention.

The Agency is concerned that unless such participation is mandatory, the cost of the examinations, however limited, might create an incentive for mine operators to encourage miners to waive the examinations. Concern about the implications of health examinations on their job security may likewise discourage miners from taking examinations. The voluntary X-ray surveillance program currently offered to coal miners has a poor record of participation. This is not an unusual situation in the mining industry, where retention of good, well-paying jobs is a priority for most workers.

Finally, it should be noted that audiometric testing is not an invasive procedure. No damaging radiation is involved, nor is there any penetration with a needle or other device.

Comments on this provision are specifically solicited. In particular, experience from companies in which such examinations are mandated would be welcome. The Agency recognizes there may be concern on the part of some miners that if mine operators are provided with audiometric information, it could lead to the discharge of miners who are developing hearing loss problems so as to minimize potential workers' compensation claims.

Dual Hearing Protection

Proposed § 62.120(d) would require that, in addition to the controls required for noise exposure that exceed the PEL, a mine operator provide dual hearing protectors to a miner whose noise exposure exceeds a TWA_8 of 105 dBA during any workshift, a dose of 800% of the PEL. The mine operator must also ensure that they are worn. An earplug type protector would be worn under an earmuff type protector.

Currently, neither MSHA nor OSHA specifically mandate the use of dual hearing protection. In practice, however, existing rules require dual hearing protection under some circumstances.

Under current Coal and Metal and Nonmetal noise policy, dual hearing protection would be required whenever the attenuation of a single hearing protector does not reduce the miner's noise exposure to within the PEL.

Also, due to MSHA's current procedures for determining the attenuation of hearing protectors (discussed under *Hearing protector effectiveness* of this preamble), dual hearing protection would almost always be required when miners are exposed to sound levels above 112 dBA. As discussed below, the attenuation provided by dual hearing protectors is less than the sum of their individual attenuations. MSHA policy currently specifies that 6 dB be added to the attenuation of the hearing protector having the higher attenuation.

OSHA requires that ''adequate'' hearing protection be provided to and worn by workers. Employers would thus have to utilize dual hearing protection in some cases to get the needed attenuation. However, no specific dose level triggering dual hearing protection level has been established by OSHA.

No commenter addressed the exposure above which dual hearing protection would be required. One commenter suggested that MSHA consider dual hearing protection to provide 5 dB more attenuation than the hearing protector with the higher attenuation. Another commenter, disagreed with current MSHA Metal and Nonmetal policy and believed that more than 6 dBA credit should be given above the attenuation of the higher component (earplug or earmuff) when dual hearing protectors are worn. This commenter did not, however, specify how much credit should be given.

Research has demonstrated that dual hearing protection affords the wearer greater attenuation than either earplugs or earmuffs alone. Berger in EARLOG 13 (1984) has shown that the use of dual hearing protectors provides greater attenuation. The attenuation of the dual hearing protection is at least 5 dB greater than the attenuation of either hearing protector alone. This attenuation, however, is much less than the sum of the individual Noise Reduction Rating (NRR) values and is dependent on the frequency. Dual hearing protectors are especially important for noise which is dominated

by low to middle frequency sounds. The performance of dual hearing protectors is not influenced greatly by the selection of the earmuff; however, the selection of the earplug has a strong influence on the attenuation below 2000 Hz. For noises which are dominated by sounds above 2000 Hz, the attenuation of dual hearing protectors is limited by flanking bone conduction paths to the inner ear. Berger recommends dual hearing protectors whenever the TWA_8 exceeds 105 dBA.

Michael (1991) believes that, because of complex coupling factors, the attenuation from wearing both earplugs and earmuffs cannot be predicted accurately. If the attenuation of the earplug and earmuff is about the same at a given frequency, then the resultant attenuation should be 3 to 6 dB greater than the higher of the two individual attenuations. However, if one attenuation is much greater than the other, then the resultant attenuation will be slightly more than the higher attenuation.

Nixon and Berger (1991) report that earplugs, worn in combination with earmuffs or helmets, typically provided more attenuation than either hearing protector alone. The gain, in attenuation at individual frequencies, varies between 0 to 15 dB. At or above 2000 Hz, the attenuation of the combination is limited by bone conduction to approximately 40 to 50 dB. Below 2000 Hz, the selection of the earplug is critical for increasing the attenuation. There is little change in the attenuation of different types of earmuffs at frequencies below 2000 Hz.

Bertrand and Zeiden (1993) determined that miners exposed to sound levels of 118 dBA were afforded protection consistent with a sound level of 98 dBA by the use of earmuffs. The earmuff had an NRR of 24 dB. Consequently, the earmuff alone could not provide attenuation sufficient to protect the miner's hearing acuity.

Research has clearly demonstrated that dual hearing protection provides greater attenuation than either hearing protector alone. Further, the U.S. armed services require dual hearing protection for workers exposed to high sound levels. MSHA concurs that the additional attenuation afforded by the use of dual hearing protection is necessary to protect miners who are exposed to high sound levels. Furthermore, MSHA has concluded that a TWA_8 of 105 dBA (800%) is a prudent level above which dual hearing protection should be required. This level of noise exposure can quickly damage the hearing acuity of the exposed miner.

Dose Ceiling

Although the statement of the PEL in § 62.120(c) is absolute that no miner shall be exposed to noise above a TWA_8 of 90 dBA, the remainder of that paragraph and paragraph (d) deal with situations where in fact miners are going to be exposed to noise in excess of the PEL for some period of time—due to the economic feasibility of administrative and engineering controls for a particular mine operator, or due to the technological feasibility of engineering controls as to a particular operation. The seriousness of this situation for miners is indicated by the fact that MSHA is proposing that dual hearing protectors be required at a TWA_8 of 105 dBA: a noise dose of 800%.

The Agency is interested in comments on whether there is some noise dose which should be established as an absolute dose ceiling by the regulation, regardless of the implications for a particular mine operator or operation. The circumstances in which this might pose a problem for the mining industry appear to be very limited. While coal inspection data over the years have indicated some exposures over 800%, MSHA believes these are anomolies for which well-known controls are available. If there are problems, they are likely to be in the metal and nonmetal sector.

On the one hand, the dual-survey data indicate that using the 80 dBA threshold level, only about one-quarter of one percent (0.28%) of metal and non-metal exposures exceed a noise dose of 800%. The data indicate, however, that there remain a few specific job categories in the metal and nonmetal sector which experience a significant problem with noise exposures of this dimension, as indicated in Table III–6. The sample size is provided to illustrate that in some cases, the percentages are based on limited data.

TABLE III–6: METAL/NONMETAL JOB CATEGORIES IN WHICH MORE THAN 1% OF RECORDED EXPOSURES ARE OVER A TWA_8 of 105 dBA (800% of PEL)

Code	Job category	No. > 105	No. of sample	Percent > 105
134	Jet-piercing channel operator	5	9	56
234	Jet-piercing drill operator	1	3	33
058	Drift miner	15	55	27
057	Stope miner	9	39	23
534	Jackleg or stopper drill operator	7	31	23
434	Churn drill operator	1	7	14
334	Wagon drill operator	3	30	10
034	Diamond drill operator	3	46	7
046	Rock or roof bolter	2	38	5
734	Rotary (pneumatic) drill operator	20	478	4
634	Rotary (electric or hydraulic) drill operator	11	544	2
934	Jumbo percussion drill operator	2	111	2
399	Dimension stone cutter and polisher; rock sawer	3	301	1

Notes: Miscellaneous job categories where less than 1% of recorded exposures exceeded TWA_8 of 105 dBA are not displayed. Numbers are for four year period, 1991–1994.

The job descriptions do not necessarily indicate the equipment in use; for example, the stope miners and drift miners may well have been using the same equipment as the jackleg drill operators. Based on the Agency's experience, there are only a few pieces of equipment used in mining for which no control other than multiple hearing protectors is currently available.

The data illustrate that many exposures at this level are preventable. Even with the jackleg drills more than 75% of the exposures were controlled to less than a TWA_8 of 105 dBA. The data base from which the above information was drawn found nine bulldozer operators and three truck drivers

exposed to noise above 800% of the PEL; and while these constituted only a small fraction of the samples of those job categories, 0.7% and 0.05% respectively, the Agency is disturbed to find any such samples at all given that the metal and nonmetal industry has for some years been operating under a requirement to use engineering and administrative controls to bring sound levels down to the PEL or as close thereto as is feasible.

Accordingly, MSHA requests comment on whether there should be an absolute dose ceiling, regardless of the economic feasibility of control by an individual mine operator, and what that should be. MSHA also requests comment on whether such a dose ceiling should be technology forcing—i.e. apply regardless of the technological feasibility of currently available controls.

Ceiling Level

Proposed § 62.120(e) would retain MSHA's current 115 dBA ceiling level for continuous and intermittent noise. The 115 dBA ceiling level is intended to protect individuals from high sound levels which last longer than those typically characterized by impulse/impact noise.

The 115 dBA ceiling level originated out of the Walsh-Healey Public Contracts Act which formed the basis of current Department of Labor noise regulations. OSHA, in its 1974 proposed noise standard (39 FR 37775), specified that the 115 dBA limit was a maximum steady state sound level which was not to be exceeded regardless of the time-weighted average dose computation.

In its ANPRM, MSHA did not specifically request comments on the 115 dBA ceiling limit. One commenter, however, presented a view on the 115 dBA level. This commenter stated that ''Few professionals would allow a worker to remain unprotected while exposed to 115 dBA for 15 minutes.''

MSHA's review of available literature found a diversity of opinions on the choice of a ceiling level for exposures to continuous and intermittent noise.

At the 93rd Meeting of the Acoustical Society of America, Johnson and Schori (1977) reported that 115 dBA for 15 minutes may be grossly under protective, while an upper limit of 115 dBA, regardless of the time of the exposure, is unduly restrictive. For example, they found significant temporary threshold shift from exposure to 115 dBA for only 2.7 minutes. On the other hand, they found virtually no such shift from exposure to 130 dBA for 10 seconds and minimal shift (median of 2 dB) when exposed to 120 dBA for 40 seconds—although MSHA would point out it knows of no mining tasks taking such a limited time. In any event, this shows that the ceiling limit is dependent upon both time and intensity.

Cluff (1984) stated that ''The selection of 115 dBA for 15 minutes is arbitrary and represents several contradictions.'' He agreed with Johnson, however, that exposures to 115 dBA for 15 minutes is dangerous. Cluff stated that ''this danger is magnified by extending the 5 dB rule to 130 dBA'' and suggested that a 3–dB or 4–dB exchange rate may have merit as a solution.

Others discussed different ceiling limits to prevent temporary threshold shift which may lead to a permanent NIHL. The U.S. Army's Technical Memorandum 13–67, ''Criteria for Assessing Hearing Damage Risk from Impulse-Noise Exposure'' (Coles, 1967) stated that:

> It has been customary in steady-state noise DRC [damage risk criteria] * * * to include an upper limit of about 135 dB for unprotected noise exposure *for any duration, however short.* In most cases it is understood by implication only, rather than by direct statement, that this restriction is not intended to apply to impulse noise * * *

The technical memorandum, however, stated further that:

> The relationship between TTS [temporary threshold shift] resulting from a single noise exposure and permanent threshold shift (PTS) to be expected from habitual exposure is not known with certainty even for steady-state noise.

In *Acoustic Parameters of Hazardous Noise Exposures*, however, Henderson (1990) discussed a critical level above which damage by acoustic trauma begins. He stated that:

> At levels above 120 dB SPL [sound pressure level] the cochlea begins to be damaged by direct mechanical destruction, i.e., the organ of Corti can be lifted off the basilar membrane, tight-cell junctions can be ripped apart, and the tympanic membrane can be ruptured. The level at which mechanical damage occurs has been called the ''critical level,'' but it is important to recognize that there is not a critical level but rather a transition point that is related to the spectrum and temporal pattern of the exposure.

CHABA (1993) believed that single exposure to sound levels above 140 dBA can permanently damage hearing. Furthermore, the threshold for pain is dependent upon the frequency of the noise. This threshold lies between 135 and 140 dB.

Ward (1990) stated that:

> * * * a ''critical exposure'' for production of immediate severe loss, presumably associated with structural failure in the cochlea rather than with metabolic fatigue, is dependent not on the energy in the exposure (p^2t) but on a different quantity given by integrating the fourth power of the pressure over time. * * * The best estimate for the critical exposure in man is around 10^{11} Pa^4-sec for a median value, although individual differences in susceptibility and vulnerability mean that the range will be very great.

NIOSH (1995) recommends that the 115 dBA ceiling limit be retained. Citing recent medical research, NIOSH believes that the critical level is between 115 and 120 dBA. Above the critical level, immediate structural damage to the ear occurs. This structural damage causes a loss of hearing acuity.

ACGIH (1994) recommended that exposures to occupational noise should not be permitted above 139 dBA. Further, for sound levels equal to or exceeding 103 dBA, ACGIH believes that the exposure be ''limited by the noise source—not by administrative control.''

As illustrated by the above discussed studies, there is no consensus among the scientific community as to a sound level above which permanent damage occurs (regardless of the duration of exposure). However, many researchers believe the critical level is slightly above 115 dBA and is time dependent with an allowable duration of less than 15 minutes.

International communities and selected branches of the U.S. armed services specify a ceiling level; however, there is no agreement among these groups either.

There are relatively few noise sources in the mining industry that produce sound levels exceeding 115 dBA (e.g., unmuffled pneumatic rock drills and hand-held channel burners). However, these sources often operate during most of the work shift with resulting full-shift noise exposure considerably over the PEL. Currently, MSHA surveys these noise sources by taking spot readings with Type 2 sound level meters rather than conducting full-shift sampling with a personal noise dosimeter. The requirements for Type 2 sound level meters are in ANSI S1.4–1983, ''Specification for Sound Level Meters.'' MSHA intends to continue sampling these sources using a sound level meter.

Even though this proposal has retained the 115 dBA ceiling level for noise exposure, sound levels above 115 dBA are to be included in the determination of the noise dose. The Agency has determined that it is important to include sound levels above 115 dBA in the noise dose so that the miner's noise exposure is accurately assessed. By having an accurate assessment, the mine operator will be

able to provide hearing protectors with maximum attenuation and take steps to ensure that the hearing protectors are effectively fitted and properly worn.

MSHA believes that exposure to sound levels exceeding 115 dBA, regardless of duration, may potentially result in acute hearing loss among susceptible individuals. Although there is a lack of scientific consensus on the exact time of safe exposure, the majority believe that 15 minutes is hazardous. Accordingly, MSHA believes retention of the current ceiling is warranted. The Agency, however, welcomes additional comment on this issue.

Exposure Determination by Operators

Proposed § 62.120(f)(1) would require mine operators to establish a system of monitoring which effectively evaluates each miner's noise exposure. This will ensure that mine operators have the means to determine whether a miner's exposure exceeds any of the limitations established by this section, as well as to assess the effectiveness of noise controls. The proposed rule is performance oriented in that the regularity and methodology used to make this evaluation are not specified. Specific requirements for periodic monitoring by qualified persons now applicable to the coal sector would be revoked.

Under the approach proposed, mine operators may design a monitoring program suitable for each specific mine site. Mine operators would be expected to utilize survey methods and instrumentation which are scientifically valid and based on sound industrial hygiene practice.

Although calibration requirements are not specifically mandated in the proposal, good industrial hygiene practice dictates that any instrumentation used for determining a worker's occupational exposure to a contaminant, in this case noise, be calibrated. The calibration program should be composed of three phases—type testing of instruments, laboratory calibration of the instruments, and field calibration. Seiler and Giardino (1996) discussed the importance of each of these classes of calibrations.

Briefly, type testing is an exhaustive testing of a model of instrument to ascertain that it complies with a standard, such as the ANSI standard for personal noise dosimeters. Laboratory calibration is an extensive calibration that ascertains that an individual instrument meets factory specifications. Finally, field calibration is a brief procedure conducted before and after a survey to ascertain that an instrument is operating properly.

The mine operator has the responsibility of accurately determining a miner's noise exposure. In order to do this properly the type of instrumentation needs to be considered. In the cramped quarters of an underground mine and on mobile mining equipment, it may not be possible to accurately evaluate a miner's noise exposure without endangering the technician if a sound level meter is used. Other occupations cannot be sampled with a sound level meter because the most exposed ear is not accessible to the technician. For the above occupations, a personal noise dosimeter would need to be used. An analysis of noise exposures collected from 1986 through 1992 by the MSHA coal inspectorate revealed that 21.8% of the occupations could only be sampled using personal noise dosimeters. These occupations comprised nearly 60% of the surveys conducted by the inspectors.

A program would be expected to evaluate noise exposure in adequate detail to enable the mine operator to reasonably determine which miners work in areas requiring the institution of the controls that may be required. Sufficient evidence of a noise monitoring program must be available during mine inspections to permit the evaluation by MSHA of the program's effectiveness. The Agency will also take its own surveys of noise exposure during inspections to ascertain miner exposure and to evaluate the effectiveness of the mine operator's monitoring program.

MSHA believes that this proposal affirms a mine operator's obligation to take the action needed to determine whether or not a miner is in compliance with the exposure limitation requirements of the proposed regulation. At the same time, it allows mine operators maximum flexibility for determining a miner's noise exposure.

MSHA believes that mine operators have a number of incentives to monitor sound levels on a regular basis to ensure they can:

(1) Avoid the costs associated with needlessly including or retaining a miner in an HCP or providing special noise training;

(2) Assess the effectiveness or need for either engineering or administrative controls or a combination of these controls to meet the TWA_8 of 90 dBA;

(3) Document the miner's exposure for workers' compensation purposes;

(4) Provide information to health professionals evaluating miners' health and audiograms; and

(5) Avoid citations and penalties during the regular Agency inspections in the mining industry for failure to comply with the standard's requirements.

The results of operator monitoring will not be sent to MSHA, nor will monitoring results be used to determine compliance with the applicable noise standard. Mine operators are, however, under an obligation to take certain actions based upon any noise measurements they conduct. Proposed § 62.120 requires mine operators to take specific corrective action when a miner's noise exposure exceeds the various limitations set forth in the section. It also requires that miners be notified whenever a mine operator determines that their noise exposure exceeds the action level.

The requirements of proposed § 62.120(a), as to how noise is to be measured for the purposes of this proposal, would need to be followed by mine operators in their monitoring. These requirements include: disregarding the attenuation of any hearing protector worn by the miner, integrating all sound levels from 80 dBA to at least 130 dBA during a miner's full workshift, using a 90 dBA criterion level and a 5-dB exchange rate, and using an A-weighting and slow-response instrument setting. Mine operators would, of course, be free to take any additional measurements that they deem appropriate: for example, taking peak-response readings to measure any impact/impulse noise.

MSHA current coal noise standards (30 CFR §§ 70.500/71.800) require mine operators to monitor each miner's noise exposure twice a year and certify the results to MSHA. These standards also specify when and how to sample, who is qualified to sample, and reporting requirements.

MSHA's noise standards (30 CFR §§ 56/57.5050) for metal and nonmetal mines do not contain any operator sampling requirements, although they do require that mine operators maintain exposures in compliance with the PEL. In order to do this effectively, many metal and nonmetal mine operators conduct their own monitoring.

OSHA's noise standard requires employers to implement a monitoring program when information indicates that any employee's noise exposure may equal or exceed the action level (TWA_8 of 85 dBA). OSHA allows employers to use representative personal or area sampling; however, in areas with significant variations in sound level or high worker mobility, the employer would have to show that area sampling produces results equivalent to personal sampling. OSHA also requires the

employer to repeat the monitoring in specific situations.

MSHA's ANPRM solicited comments on the frequency of monitoring, the sampling strategy, and the use of the information obtained. The ANPRM also asked whether specification-oriented or performance-oriented requirements would be more appropriate. At that time, the Agency solicited comments based on the premise that the proposed rule would include a detailed monitoring requirement and the commenters responded accordingly. However, since MSHA has decided not to propose detailed monitoring requirements, the Agency has not addressed specific issues regarding area versus personal monitoring, instrumentation specifications, calibration requirements, or other related monitoring issues.

Many commenters preferred performance-oriented standards, similar to OSHA's, that would allow mine operator discretion in when and how to sample. One of these commenters stated:

> The goal of the monitoring effort should not be simply to collect noise exposure data, but rather to accomplish the goal of eliminating job-related noise induced hearing loss. With this goal in mind, the operator would need to have collected noise exposure information on the jobs that he had reason to believe were above the 85 dBA action level. This information would be necessary to identify those workers that should be included in the HCP as well as areas and equipment where noise controls are needed.
>
> If the operator does not choose to monitor for noise, he should have an alternate plan that accomplished the same goal: i.e., includes all non-office workers in the HCP regardless of noise exposure, perform a sound level survey to identify mandatory hearing protection areas and equipment, etc. It is recommended that MSHA adopt the logic outlined in the OSHA noise standard, 29 CFR 1910.95(d) (1), (2) and (3).

Conversely, two commenters recommended a specification-oriented rule. One of these recommended personal monitoring on an annual basis and the other simply recommended personal or area monitoring.

Finally, two commenters had a different view on monitoring. They recommended that MSHA, rather than the mine operator, conduct all monitoring for the purpose of this proposed standard. In response to these commenters, the Agency would point out that it is the responsibility of mine operators to ensure the safety and health of their miners. MSHA sampling programs are to audit the mine operators to ensure the protection of miners. Moreover, MSHA does not have the resources to sample every miner annually. Metal and Nonmetal has specific health sampling guidelines which require periodic sampling of selected mining occupations. MSHA currently conducts over 20,000 full-shift noise exposure surveys in the mining industry annually. Although MSHA intends to continue measuring the noise exposure of miners in order to determine compliance, it can only sample a small percentage of the exposed mining population annually. Mine operators are responsible for knowing at all times when their employees exceed applicable limits so that appropriate action can be taken.

The Agency, however, is willing to share its sampling results and analyses of these results with the mining industry. Mine operators who do not conduct their own monitoring could use the MSHA data along with information from equipment manufacturers to estimate a miner's noise exposure. This could be beneficial to all mine operators, particularly small mine operators with limited resources. If, however, as a result of this proposal, MSHA changes the threshold, prior sampling conducted by the Agency may not provide an accurate indication of whether a miner's noise exposure exceeds the new standard.

Although a mine operator could use prior MSHA sampling results, and information from equipment manufacturers, such use would not relieve the mine operator of responsibility to appropriately determine a miner's noise exposure. Therefore, it would behoove mine operators to determine a miner's noise exposure by methods comparable to those which would be used by MSHA, as outlined in § 62.120(a).

Although numerous commenters and organizations supported the need for monitoring, most favored a performance-oriented approach and did not specify a procedure to be followed. MSHA agrees. The Agency believes that the focus of the noise standard should be on preventing NIHL and reducing miners' noise exposures and that it would be counterproductive to specify detailed monitoring requirements or procedures. Also, the Agency does not want to stifle improvements in monitoring technology or methodology.

Moreover, the Agency believes that the current specification-oriented coal operator monitoring produces results that in fact are not representative of miners' noise exposure. For example, in FY 1994, coal mine operators conducted approximately 180,000 noise surveys (two per miner) and found 36 miners to be overexposed (their exposures exceeded 132%). However, MSHA does not know the extent to which mine operators may be including credit for the wearing of hearing protection in the determination of the miner's exposure. Conversely, MSHA conducted 6,339 surveys in coal mines and found 857 exposures exceeding the 132%. However, only 62 of these surveys resulted in a violation due to credit being given for use of hearing protection. This indicates that despite having specification-oriented monitoring requirements, current operator sampling in coal mines may not be providing results consistent with those found by MSHA.

For monitoring compliance with this proposal, the Agency intends to use validated scientific methodology. Current MSHA sampling procedures and policies are listed in MSHA's Program Policy Manual and its Coal, and Metal and Nonmetal, Health Inspection Procedures Handbooks. Copies of these documents are available for review and copying in MSHA offices. MSHA's sampling procedures, however, would be modified to be consistent with § 62.120(a) of this proposal once the rule is finalized.

Currently, MSHA bases its noise exposure compliance determinations on personal full-shift sampling with a personal noise dosimeter. The calibration of the personal noise dosimeters is checked before and after each survey. Additionally, annual laboratory calibration is conducted to assure measurement accuracy. The personal noise dosimeter's microphone is positioned on the top of the miner's shoulder, midway between the neck and the end of the shoulder, with the microphone diaphragm pointing in a vertical upward direction. The microphone is placed on the shoulder that is normally between the principal noise source and the miner's ear. Sampling is conducted while the miner performs his/her normal duties.

In the development of this proposal, MSHA also reviewed the noise monitoring programs of the U.S. Armed Services and other jurisdictions.

Although MSHA has described its current noise sampling procedures, the Agency may decide to modify or change these procedures based upon new or improved sampling methods, instrumentation, or technology.

Employee Notification

Proposed § 62.120(f)(2) would require that within 15 calendar days of determining that a miner's exposure exceeds the action level, the permissible exposure level, the dual hearing protection level, or the ceiling level established by this section, the mine

operator notify the miner in writing of the overexposure and the corrective action being taken. If the miner's exposure has not changed from one of these levels to another, and the miner has been notified of his exposure at that level within the past year, no notification needs to be provided; if the level has changed, or there has been no notification in the past year, notification is to be provided. The proposal specifically states that these notifications are triggered by exposure evaluations conducted either by the operator or by an MSHA inspector.

At the present time, MSHA does not require notification, though it is implied in those cases in which a coal miner is enrolled in an HCP for having exceeded the PEL. OSHA's standard requires that employees be notified in writing of monitoring results that exceed the action level within 21 days of the monitoring.

The proposed requirement is consistent with Section 103(c) of the Mine Act. Section 103(c) of the Mine Act states in pertinent part that:

> Each operator shall promptly notify any miner who has been or is being exposed to * * * harmful physical agents * * * at levels which exceed those prescribed by an applicable mandatory health or safety standard promulgated under section 101 * * * and shall inform the miner who is being thus exposed of the corrective action being taken.

Many commenters supported miner notification of all sampling results and stated that such is current company policy. Several of these commenters recommended that the specific method of notification be left to the discretion of the mine operator. One commenter specifically stated that through notification, ''the employee could help facilitate a solution to the problem and be more committed to following safety procedures.'' This commenter also stated that ''requiring written notification is not effective when dealing with persons who cannot read or do not have the background to understand the meaning of the notification's contents.''

A mining association commented ''* * * that miners should be made aware when their exposure exceeds allowable limits * * *'' and that ''* * * employees should have knowledge of their exposure and any subsequent hearing loss. * * *'' This association suggested, however, that notification ''* * * be in the form of entry into the HCP. * * *'' Several other commenters recommended that MSHA's requirements be the same as OSHA's.

After reviewing the comments and the regulations from the U.S. Armed Forces and international organizations, MSHA concludes that notification should be provided for exposure at any level defined in the proposed regulation. At the action level, there is a significant risk of material impairment (as discussed in part II of this preamble). Notification will be needed at this level because under the proposal, if the noise exceeds that level, the mine operator would be required to take protective action (hearing protectors and enrollment in an HCP). Notification at this level would explain to the miners the reason why it is necessary for them to wear their hearing protectors. Moreover, since the harm occurs at this level, notification is required under § 103(c) of the 1977 Mine Act. Notification at the permissible exposure level and dual hearing protection level—exposures respectively 2 and 16 times the dose at the action level—is necessary to ensure the miner understands the rationale for added protection and the actions being taken by the mine operator to lower noise exposures. The same is true for any exposures exceeding the ceiling level.

MSHA believes there is no need to notify a miner of every exposure determination, as long as the miner is cognizant of the general level of his or her exposure—so that the miner pays attention to noise exposure and noise abatement efforts (including the use of properly fitted and maintained hearing protectors). If an exposure measurement for a miner demonstrates a change in that miner's situation—e.g., from below the PEL to over the PEL, or from over the PEL to above the dual-hearing protector level—the miners should be made aware of this fact.

Moreover, even if the miner's situation has not changed, the miner should be reminded of his or her overexposure when it is measured if notification has not been made recently. MSHA welcomes comment on the proper balance to strike between the need for notification and nonproductive paperwork.

MSHA has concluded that the notification should be in writing. This would ensure that the miner does not misconstrue the measured level nor the actions being taken.

Warning Signs

The proposed rule has no provision for requiring the posting of warning signs. While MSHA acknowledges the value of posting warning signs, the process is inherently complicated in the ever changing mining environment, and MSHA believes the training requirements it is proposing should ensure miners are apprised of noise hazards to which they may be exposed.

Section 101(a)(7) of the Mine Act requires that health or safety standards promulgated by MSHA:

> * * * prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, * * *

Existing MSHA noise standards do not exercise this authority with respect to noise, and do not require the posting of warning signs.

When OSHA promulgated its Hearing Conservation Amendment, it did not include a requirement for warning signs. OSHA stated in the preamble to the final rule, that the use of warning signs to warn employees about noise hazards in high noise areas should be left to the discretion of the employer. In so doing, OSHA stated that noise is more readily discernible than other harmful physical agents and therefore a specific warning sign requirement may not be necessary to protect employees, and that in certain circumstances such signs might confuse rather than serve a useful educational purpose. OSHA also recognized that the employer is more familiar with the workplace environment and will be in a better position to determine if the posting of signs in a given situation will aid in the success of the company's HCP. Further, OSHA stated that other methods, such as training, may be more appropriate for apprising employees of the hazards of noise.

In its ANPRM, MSHA asked whether it should require warning signs in areas exceeding a specified sound level, and what this sound level should be. Numerous commenters specifically addressed the issue of warning signs and were about equally divided over whether such a requirement is necessary. Those commenters supporting the use of warning signs varied considerably on criteria for their use. For example, one commenter indicated that warning signs should only be posted in areas where an immediate threat of injury exists, such as areas with impact noise above 140 dB or constant noise above 115 dBA. Other commenters said that warning signs should only be required on non-mobile equipment, or in areas where the use of hearing protectors is mandatory.

Among those commenters that did not support the use of warning signs, several stated that MSHA's standard should be performance-oriented and allow the mine operator to decide how to warn its employees, such as through training, safety meetings, notification of exposure results, etc. One commenter

stated that in the mining environment it would be difficult to illuminate signs to the point they could be read and understood, and that they would be difficult to maintain in most mining situations. This commenter also believed that the nature of certain mining operations does not lend itself to the use of signs because the work area is constantly changing. Another commenter agreed, stating that warning signs would be difficult to keep current in mobile operations.

Warning signs could provide an indication to miners that they are entering an area where the wearing of hearing protectors is required. Some mine operators have voluntarily placed warning signs in high noise areas such as preparation facilities and on surface mobile equipment.

MSHA believes, due to the dynamic nature of mining (advancing underground faces, changing quarry perimeters, a mobile workforce, etc.), that a requirement for the installation of fixed warning signs may be difficult to implement. Warning signs may also be inappropriate where miners do not work a fixed period of time in the area covered by the sign. For example, a miner in an area with a 90 dBA sound level for less than four hours, with no significant noise exposure for the rest of the day, would not be required to wear hearing protectors under MSHA's proposal, whereas a miner who spends more than four hours in that area would.

After careful analysis of the literature and review of regulatory requirements from international communities and the U.S. Armed Services, MSHA believes that training may be a more appropriate vehicle to inform workers of the hazards of noise to their hearing. Further, the Agency believes that the posting of warning signs for noise should be optional and left to the discretion of the mine operator. The proposed rule would require initial and annual training for all miners exposed above the action level as discussed under § 62.130 *Training* of this preamble.

Though MSHA is not proposing to require warning signs for noise, it expects that many mine operators will voluntarily post such signs to indicate to miners locations where hearing protectors must be worn. If, however, mine operators choose to use administrative controls to reduce a miner's noise exposure, the proposal would require that the affected miner be informed of the administrative procedures and that such controls be posted on the mine bulletin board. Such procedures may provide notification of sound levels in specific work locations.

Section 62.125 Hearing Protectors.

Whenever hearing protectors are required to be provided by the proposed regulations, they must be provided in accordance with the requirements of this section.

The miner is to have a choice from at least one earplug type and muff type protector; and, in the event dual hearing protection is required, a choice of one of each. The mine operator is to ensure that in those cases when hearing protection is required to be worn, it is worn by miners exposed to sound levels required to be integrated into the miner's dose measurement: i.e., sound levels above 80 dBA. The hearing protector is to be fitted and maintained in accordance with the manufacturer's instructions. Hearing protectors and necessary replacements are to be provided by the mine operator at no cost to the miner. Finally, should the hearing protector cause or aggravate a medical pathology of the ear, the miner is to be allowed to select a different hearing protector from among those offered by the mine operator.

Selection of Hearing Protector

The proposal requires that if hearing protectors are required to be provided to miners for any reasons, the mine operator shall provide a choice of one earplug type and one muff type, and ensure proper fit. Earmuffs include both active and passive; earplugs include disposable earplugs, pre-molded earplugs, custom-molded earplugs, and canal caps. The proposal also requires that the training in hearing protection specified in proposed § 62.130(a) be received at least once before the miner has to make a choice: to ensure the miner understands the choices available.

While these requirements are limited, they will help to significantly encourage hearing protector use and effectiveness. The proposal does not seek to constrain mine operator selection of protectors. As noted herein, hearing protectors come in a wide variety, for different purposes, and with different attenuation values. MSHA believes that mine operators have an incentive to provide a wide variety of types to encourage safe and effective use.

MSHA's existing noise standards require mine operators to provide adequate hearing protectors, but do not specify that a variety of hearing protectors be offered. OSHA's noise standard requires that employees be given the opportunity to select from a variety of suitable hearing protectors provided by the employer; however, the variety is not defined. OSHA states in the 1981 preamble to its Hearing Conservation Amendment (46 FR 4152) that ''The company must make a concerted effort to find the right protector for each worker-one that offers the appropriate amount of attenuation, is accepted in terms of comfort, and is used by the employee.''

In its ANPRM, MSHA asked whether mine operators should be required to make available a selection of hearing protectors. Almost all of the commenters on this issue were in favor of this provision. Some specifically recommended that the mine operator provide a choice of at least three different models, including at least one earmuff and one earplug. One commenter suggested that the selection should include at least six models. Most commenters indicated that the need to provide a variety of hearing protectors is more related to fitting and comfort than on the labeled attenuation per se.

One commenter recommended against providing a variety of hearing protectors, stating that ''It is the responsibility of the mine operator to evaluate the various noise exposures, and to select the appropriate HPDs [hearing protectors].'' The commenter maintained that the mine operator should only have to provide an alternative hearing protector when the individual has a specific condition which precludes the use of the selected hearing protector.

Several commenters addressed the need to allow the miner to choose a hearing protector that is comfortable. One commenter stated that:

> The most effective hearing protector is one that is worn and worn properly. If the hearing protector is not comfortable or the employee cannot wear a certain type of plug or muff, then the hearing protector will not be worn and the HCP will not be effective.

Another commenter maintained that ''* * * the principal usage problem with HPD's is that because of discomfort, interference with necessary communication, and interference with normal work routines, many HPD's are not worn.'' While another commenter stated:

> The performance of hearing protectors in the field (including the manners in which they are used, not used, or misused by workers in situations in which HPDs are needed, but are uncomfortable, unsafe, or otherwise inconvenient) is frequently inferior to their performance when tested in idealized laboratory conditions and there are substantial variations among individual susceptibilities to noise-induced hearing loss [NIHL].

The National Hearing Conservation Association's Task Force on Hearing Protector Effectiveness (Royster, 1995)

recommends that the employer consider many criteria when selecting the variety of hearing protectors from which workers are to choose. The most important criterion for choosing a hearing protector is ''the ability of a wearer to achieve a comfortable noise-blocking seal which can be maintained during all noise exposures.'' Other criteria include hearing protector's noise reduction, wearer's daily noise exposure, variations in sound level during a work shift, user preference, communication needs, hearing acuity of the wearer, compatibility with other safety equipment, wearer's physical limitations, and climate and working conditions. Physical limitations (missing fingers, arthritis, limited hand strength) may restrict users from properly inserting compressible foam earplugs in their ears.

Berger (1986) stated that comfort must be considered when selecting hearing protectors. If the laboratory attenuation of a hearing protector is very high, but it is uncomfortable to wear, the actual in-use attenuation may be reduced or even nonexistent. Conversely, a comfortable hearing protector with less attenuation may be worn consistently, thereby providing greater effective protection.

In EARLOG 8, Berger (1981) asserted that an employee should have two weeks to try out an adequate hearing protector and select another one if the original selection does not perform satisfactorily.

In the report, *Communication in Noisy Environments* (Coleman et al., 1984), the authors stated that:

> Although acceptability is in part governed by the comfort of the devices, there are other factors such as concern with hygiene, belief in (real or presumed) communication difficulties, and social constraints which can influence the extent to which workers will use the protection provided. * * * Sweetland (1981) found concern about communication difficulties to be a major factor in mine workers acceptance of protectors.

The authors further stated that:

> In general, ear inserts [earplugs] appear less attractive than circumaural protectors [earmuffs] for mining conditions. A helmet mounted circumaural protector is to be preferred on grounds of comfort, ease of fitting and removal, reliability of attenuation, and acceptability in terms of hygiene; whereas ear inserts of the compressible foam type may produce marginally less interference with communication and they will impair localization less, they are likely to be more comfortable in hot and humid conditions.

Pfeiffer (1992) suggested that greater care be exercised when selecting hearing protectors for workers experiencing hearing loss. Pfeiffer stated that it is important not to overprotect the worker which can cause difficulty in communicating. If this happens, the worker will be reluctant to wear the hearing protector.

MSHA recognizes that local mine conditions such as dust, temperature, and humidity can cause one type of hearing protector to be more suitable than another. For example, under normal mining conditions, some miners may experience problems with earmuffs because of a buildup of perspiration under the seals.

Based on such factors and on comments received in response to the ANPRM, MSHA concluded that the minimum selection appropriate to offer miners with normal hearing consists of at least one type of earmuff and one type of earplug. MSHA expects that each hearing protector in the selection would provide adequate attenuation. Further, a consensus of the U.S. armed services and international communities agrees that workers should choose from a selection of several hearing protectors.

If miners are allowed to choose from a selection of hearing protectors, particularly if given appropriate training as is required under this proposal, they will be more apt to wear and care for them in such a manner as to obtain the maximum amount of protection. Providing miners with a choice from a selection of hearing protectors will foster greater acceptance and use. Further, MSHA recognizes that a trial period may be necessary for the miner to determine if using the selected hearing protector for a prolonged period causes significant discomfort. If significant discomfort occurs, MSHA encourages the mine operator to allow the miner an opportunity to select an alternate hearing protector. Selection of an alternative hearing protector is mandatory under the proposal if required by a medical condition.

There are several factors which the affected miner needs to consider before choosing a hearing protector from the selection offered, and which miners will learn about through the training specified under proposed § 62.130(a). These factors include—

(1) Hearing protectors must fit properly to provide the estimated amount of protection;

(2) People have all shapes and sizes of ear canals, and fitting commonly used earplugs to an unusually shaped ear canal may be uncomfortable or harmful to the individual. For those earplugs which need to be fitted to the size of the ear canal, all available sizes of that earplug should be available for fitting and use. Some employees may need a different size for each ear when their ear canals are of a different size or configuration; and

(3) Hearing impaired miners may need special hearing protectors which provide adequate attenuation, yet permit auditory reception.

With regard to the latter, MSHA is not at this time proposing that any special type of hearing protector be provided, nor any type of protector be excluded, for those miners who are already hearing impaired. However, MSHA will endeavor to ensure operators understand that special care should be taken in providing a hearing protector for the safety of a miner with a significant hearing loss. Most earplugs and earmuffs attenuate sound unequally across all frequencies and are most effective at attenuating high frequency sounds. Hearing loss due to noise and aging reaches its peak at the higher audiometric frequencies. Because of these factors, a miner wearing a hearing protector, without specific accommodation for any significant hearing loss, would hear distorted auditory signals which would significantly hamper communication. A miner, with a significant hearing loss and wearing hearing protectors, could be placed in a hazardous situation because he/she could not hear or comprehend an audible warning.

Although some commenters have recommended the use of communication type hearing protectors for hearing impaired miners, MSHA will caution mine operators against their use in very high noise areas because the sound level produced under the cup may be hazardous. Some manufacturers of communication type hearing protectors, however, have placed limiters in the electronics to protect against the speaker in the cup producing hazardous sound levels.

Even though some researchers have indicated that using a hearing protector may cause communication problems for an impaired miner, commenters have presented many practical ways of resolving this problem. Consequently, MSHA chose not to propose specific requirements regarding hearing protectors for impaired miners to allow the mine operators maximum flexibility.

MSHA solicits comments on whether mine operators should be required to provide an additional type of hearing protector, such as flat response, level dependent or active noise control earmuff, for miners with a hearing impairment, or whether any type of protector should be explicitly excluded for such miners.

Hearing Protector Effectiveness

MSHA received many comments on the attenuation, or effectiveness, of hearing protectors. The issue arises in a number of contexts, including what role a hearing protector's attenuating characteristics should play in the selection of the most appropriate hearing protector in those cases requiring hearing protection.

While MSHA recognizes the importance of proper selection, MSHA has decided not to incorporate specific procedures into its proposal on rating the effectiveness of hearing protectors. Based on the information presented herein, MSHA has concluded there is not presently a generally acceptable method of predicting hearing protector attenuation in the field. Moreover, MSHA has determined that there are other factors which are equally or more important than a hearing protector's attenuation for ensuring that a miner is protected from NIHL. These factors include: (1) comfort, (2) training, (3) fit, (4) maintenance, and (5) consistent use.

Nevertheless, MSHA realizes the merits of having a valid methodology for determining the attenuation of hearing protectors—for a variety of reasons, including facilitation of the selection of the most appropriate hearing protector when selection and use is required. The Agency, therefore, solicits comments on a scientifically based, yet practical, method for determining the effectiveness of hearing protectors as used under mining conditions. In addition, comments on field estimates of hearing protector attenuation, especially the NIOSH (1995) derating scheme, are encouraged.

Current MSHA regulations do not explicitly address this issue. MSHA policy, however, specifies a procedure for calculating a hearing protector's effective attenuation based upon the Noise Reduction Rating (NRR) provided by the manufacturer. Manufacturers currently determine an NRR for each hearing protector from laboratory testing in accordance with EPA regulations (40 CFR § 211.206 and § 211.207). The NRR is intended to provide an estimate of the noise reduction achievable under optimal conditions and was designed to be used with C-weighted sound levels. Because MSHA measures noise exposure with A-weighting instead of C-weighting, it adjusts the NRR by subtracting 7 dB. As reported by Maraccini (1987), this 7-dB adjustment accounts for the average difference between the C-weighted and A-weighted sound levels in mining.

OSHA's standard does specify the hearing protector attenuation required. Under OSHA's standard, attenuation must be sufficient to reduce an employee's noise exposure to a TWA_8 of 90 dBA; except that if the worker is experiencing an STS, then the hearing protector must reduce the noise exposure to a TWA_8 of 85 dBA. Employers are required to use one of four methods to determine the noise exposure beneath the hearing protector. These methods are NRR and NIOSH methods 1, 2, or 3 as described in the ''List of Personal Hearing Protectors and Attenuation Data,'' HEW Publication No. 76–120, NIOSH 1975, pp. 21–37. The NRR is the most convenient method to use and is a simplification of NIOSH method 2. In addition, when the NRR is to be used with A-weighted sound levels, OSHA requires that 7 dB be subtracted from the NRR.

As noted in connection with the discussion of proposed § 62.120(c), where an employer wishes to take advantage of OSHA's policy of not citing overexposures when, among other factors, adequate hearing protection is being used, a more stringent method of determining the effectiveness of hearing protectors is used by OSHA. In evaluating hearing protector effectiveness in this context, OSHA also subtracts 7 dB from the hearing protector's stated NRR to adjust for the difference in weighting systems, but further derates the NRR by 50%. All types of hearing protectors are treated the same way. The derating is done to account for the significant reductions, which various researchers have found, in hearing protector attenuation under industrial conditions when compared to laboratory conditions.

One commenter to MSHA's ANPRM indicated that laboratory protocols have been developed and are being tested which may be more representative of the actual field performance of hearing protectors, but noted that validated and agreed upon standardized procedures are still some years away. This commenter stated:

> The real-world attenuation data which form the basis for our criteria are taken from Berger's summary (1983) of 10 field studies, utilizing 1551 employees, wearing seven different types of earplugs and greater than nine different types of earmuffs, in over 50 different industries, and his more recent paper (Berger, 1988) which discusses additional current studies. Although the data can be separated by plugs and muffs, the variability within the plug category is such that some of the better attenuating earplugs overlap with the earmuffs. Therefore, for a general regulatory guideline, the data averaged across all HPDs and employee subjects is taken from the two papers. This results in an NRR_{84} of approximately 10 dB (i.e., the NRR computed with a one-standard deviation correction which estimates the protection at the 84th percentile).
>
> Since the NRR is meant to be subtracted from the C-weighted sound level, and the regulation is formulated in terms of A-weighted levels, an indicator of representative C–A values for the mining industry is then required. The 100 NIOSH noises (NIOSH, 1975) which have often been taken to be representative of general industry have median C–A of about 2 dB, and 90% have C–As of <6.5 dB. However, mining noises may exhibit greater low-frequency energy. For example the data in Kogut (1990) which represent 17 different types of equipment in the metal/nonmetal mining industry (coal excluded), show a mean C–A of 6.7 dB, but the Kogut values are not a statistically representative sample of the mining industry. For our purposes we will average the two estimates and presume a median C–A for mining of 5 dB.
>
> With an NRR for 84% of the users of 10 dB, and C–A value for typical mining noises of 5 dB, the credit for HPD attenuation for most of the users in the typical mining noises is 10 − 5=5 dB. Adding this value of 5 dB to the PEL of 90 dBA sets the second cutoff level of 95 dBA.

This commenter also stated that NRR's do not provide a good indication of either relative or absolute field performance; thus, ''there is no good way to accurately derate existing lab data to predict field performance.''

In The NIOSH Compendium of Hearing Protection Devices (1994) several sets of laboratory measured attenuations, besides the NRR, are listed. These data were obtained using different standardized methods. NIOSH presents examples of using each method to estimate the sound level beneath the hearing protector. In addition, NIOSH presents physical features (i.e., number of flanges, composition, compatibility with other personal safety equipment, etc.) of the hearing protectors.

NIOSH (1995) recommends a derating scheme based upon the type of hearing protector. NIOSH acknowledges that hearing protector wearers do not attain the laboratory attenuation in industrial situations. Accordingly, they recommend that to ascertain the effectiveness of a hearing protector in workplace use, the NRR for an earmuff, formable earplugs, and all other earplugs would be derated by 25%, 50%, and 70%, respectively.

The National Hearing Conservation Association's Task Force on Hearing Protector Effectiveness (Royster, 1995) recommends that the EPA's NRR for hearing protector attenuation be replaced with a new NRR(SF), which the researchers felt more realistically reflects the field performance of hearing protectors. The NRR(SF)'s are determined by laboratory testing for hearing protector attenuation after the

subject fits the hearing protector to his/her head. This differs from the EPA's NRR value which is determined after the researcher fits the hearing protector to the subject. Regardless of the method used, the amount of attenuation provided by a hearing protector will vary among the individual subjects resulting in a range of attenuation values. The Task Force stresses that it is not possible to predict the field attenuation of a given hearing protector for an individual; it concluded, however, that the NRR(SF) would be a more realistic estimate. In addition, small differences (less than 3 dB) in the NRR or NRR(SF) are not believed to be of practical consequence. The Task Force recommends continued audiometric testing whenever hearing protectors are used.

MSHA notes that the American Industrial Hygiene Association (AIHA, 1995) recently sent the EPA a letter requesting that the EPA revise its rule on noise labeling requirements for hearing protectors. The reasons cited for requesting a revision of EPA's NRR rating system included—(1) the current method of rating hearing protectors overestimates the actual workplace protection from 140 to almost 2000 percent; (2) the inability to predict absolute levels of protection from labeled values; (3) the labeled values are a poor predictor of relative performance of one hearing protector versus another; (4) there are no provisions for retesting the hearing protectors on a recurring basis; and (5) there is no requirement for quality assessment or accreditation of the test laboratory.

Michael (1991) believed that the simplification needed to obtain a single number rating (NRR) caused it to be inaccurate. Instead of the NRR, the researcher recommended using the spectra of the noise in conjunction with the attenuation characteristics to select the most appropriate hearing protector. This is even more important when the wearer has sensorineural hearing loss.

Many field studies on the attenuation of hearing protectors have been conducted in the mining industry by Giardino and Durkt (1996), Kogut and Goff (1994), Giardino and Durkt (1994), Bertrand and Zeiden (1993), Durkt (1993), Goff et. al. (1986), Durkt and Marraccini (1986), Goff and Blank (1984), and Savich (1979). With the exception of Bertrand and Zeiden (1993), these researchers reported that hearing protectors provided much less attenuation than that measured in the laboratory. Some researchers tested new earmuffs while others tested old earmuffs. In many instances attenuation was minimal and highly variable. These studies indicate that hearing protector attenuation cannot be reliably predicted under actual use conditions and is substantially less than that indicated by the NRR from the manufacturer.

Bertrand and Zeiden (1993) determined the effectiveness of hearing protectors by measuring the hearing level of miners exposed to sound levels exceeding 115 dBA. These researchers found that although the hearing protectors provided less attenuation, the difference was not significant. For example, miners exposed to 118 dBA had hearing levels consistent with exposure to 98 dBA. Therefore, the hearing protector whose NRR was 24 provided 20 dBA of attenuation.

Durkt (1993) studied the effectiveness of 11 models of new earmuffs using miniature microphones inside and outside the cups. At surface mines, 107 tests were conducted on operators of equipment, including bulldozers, front-end-loaders, and overburden drills. Durkt concluded that the effectiveness of the earmuff was related to the noise spectrum. Moreover, the measured noise reduction was much less than the NRR when the noise spectrum contained significant amounts of low frequency noise. Most diesel-powered equipment generate noise which is primarily in the low frequency range.

Kogut and Goff (1994) studied the effectiveness of earmuffs being used in both surface and underground mines. A total of 540 tests were conducted on miners wearing their normal earmuffs. The procedure was similar, but not identical, to the procedure used by Durkt (1993). Like Durkt, the researchers concluded the noise reduction afforded by earmuffs was related to the spectrum of the noise. According to the researchers, ''The earmuffs' effectiveness in reducing noise exhibited great variability and frequently fell far short of the NRR.'' Furthermore, a simple method of reliably predicting the effectiveness of earmuffs eluded the researchers. A complex method was developed for predicting the effectiveness of earmuffs; however, it lacks practicality.

Giardino and Durkt (1996) and Giardino and Durkt (1994) expanded on the previous two discussed studies. A total of 1,265 tests were performed on 545 different machines (20 different machine types). According to the researchers, earmuffs provided minimal noise reduction for the operators of equipment powered by internal combustion engines. The researchers concluded that the NRR was a poor predictor of earmuff performance under actual mining conditions. Furthermore, they reported that the NRR is not a good indicator for comparing different models of earmuffs.

Numerous research studies performed in other industries by Pfeiffer (1992), Hempstock and Hill (1990), Green et al. (1989), Behar (1985), Lempert and Edwards (1983), Crawford and Nozza (1981), and Regan (1975) indicate that hearing protector effectiveness is substantially less than the NRR value indicated by the manufacturer.

Furthermore, Regan (1975) found that earmuff type protectors yield the most attenuation and custom molded earplugs the least. Behar (1985) found that the measured NRR, in industrial situations, averaged 14.9 dB lower and reached 25 dB lower than the manufacturer's nominal value. Green et al. (1989) reported workers, who were using earplugs, were receiving one-third to one-half of the laboratory based NRR value and workers enrolled in an effective HCP obtain greater attenuation from their hearing protectors. Crawford and Nozza (1981) reported that the average attenuations of the earplugs were typically 50% of the manufacturer's values, except for user-molded earplugs whose field attenuation was near the laboratory values.

Lempert and Edwards (1983) reported, ''In the majority of cases, workers received less than one-half of the potential attenuation of the earplugs'' and concluded, ''Regardless of the type of earplug used by a particular plant, a large portion of the workers received little or no attenuation.''

Hempstock and Hill (1990) reported that the workplace performance of earmuffs more closely approximated the laboratory performance than earplugs. For both earmuffs and earplugs, the measured workplace attenuations were lower and the standard deviations higher than those measured in the laboratory. The researchers attributed these results to the ease of fitting an earmuff compared to fitting an earplug. Their study revealed that the degradation was dependent upon the model of hearing protector and even differed between sites. Another result was that safety glasses substantially degraded the performance of earmuffs. Workers wearing safety glasses received approximately one-half of the laboratory attenuation. However, the researchers did not find that headband tension was a factor in the attenuation of earmuffs.

Royster et al. (1996) found that the wearing of safety glasses reduced the attenuation of earmuffs by about 5 dB at all frequencies.

Pfeiffer (1992) reported on studies of hearing protector effectiveness in

German industry. According to Pfeiffer earplugs provided between 10 and 15 dB less attenuation and earmuffs about 6 dB less in industry than in the laboratory. As part of the study, used muffs, which were not obviously defective (e.g., missing liners, headbands stretched out of shape, cushions missing or broken), were tested against new ones. The older earmuffs provided significantly less attenuation than new ones. The degradation of attenuation was dependent upon the model and frequency tested and exceeded 7 dB for some frequencies.

Abel and Rokas (1986) reported that the attenuation of earplugs decreases as a function of wearing time and that head and jaw movement hastened the decrease. At Noise-Con 81, Berger (1981) also concluded that the performance of hearing protectors decreased as a function of wearing time. Kasden and D'Aniello (1976, 1978) found that the custom molded earplugs retained their attenuation after three hours of use during normal activity; however, typical earplug performance degraded over the three hours of use. Krutt and Mazor (1980) reported that the attenuation of mineral down earplugs decreased over a three-hour wearing period. These researchers did not observe any degradation of the attenuation of expandable foam earplugs. Cluff (1989) investigated the effect of jaw movement on the attenuation provided by earplugs and, determined the change in attenuation was dependent on type of earplug. The self-expanding viscose foam earplugs retained more of their attenuation than multi-flanged or glass-fiber earplugs. Casali and Grenell (1989) tested the effect of activity on the attenuation provided by an earmuff and found that only at 125 Hz was there a significant degradation in attenuation. Furthermore, the attenuation of an earmuff was highly dependent upon the fit.

Royster and Royster (1990) report that the noise reduction rating (NRR) cannot be used to determine, or rank order, the real world attenuation of hearing protectors. Two individuals, using the same model of hearing protector, can obtain vastly different levels of attenuation. Royster and Royster stated that ''Products that are more goof-proof (earmuffs and foam earplugs) provided higher real-world attenuation than other HPDs.''

Casali and Park (1992) reported that the noise attenuation at 500 or 1000 Hz showed a high correlation with the total noise attenuation of hearing protectors. Therefore, the researchers believe that models can be developed to predict the total attenuation of hearing protectors based upon the measured attenuation at a single frequency. This would eliminate the need to derate the NRR so that it accurately reflects the field attenuation. The prediction method, they believe, will provide information on the adequacy of the worn hearing protector and can be used in objectively fitting the hearing protector.

Berger (1992) reported on the progress of the ANSI Working Group S12/WG11, ''Field Effectiveness and Physical Characteristics of Hearing Protectors'', on developing or identifying laboratory and/or field procedure(s) which yield useful estimates of field performance of hearing protectors. The Working Group was established to address the clearly demonstrable divergence between laboratory and field attenuations of hearing protectors.

Berger also summarized the results of 16 studies involving over 2,600 subjects on the field attenuation of hearing protectors. Earplug attenuation averaged about 25% of the published U.S. laboratory attenuations (range 6 to 52%) and earmuff attenuations averaged about 60% of the laboratory attenuations (range 33 to 74%).

Royster et al (1996) reported on the progress of the American National Standards Institute Working Group (S12/WG11) charged with developing a laboratory methodology of rating hearing protectors which reflects the attenuation obtained by workers. Hearing protector attenuation measured using this methodology reflects the attenuation achieved by workers in a well managed hearing conservation program. The Working Group has developed a methodology and is in the process of drafting an ANSI standard around it. However, it will be some time before the standard is adopted. Even if the standard is adopted, there will be some legal ramifications, as the EPA would have to append their regulations to adopt this standard as the method for rating hearing protectors. As part of the testing of the methodology, the researchers found that the instructions which manufacturers include with their hearing protectors may be inadequate. Some of the test subjects could not properly don the earplug, from simply reading the manufacturer's instructions.

As demonstrated above, many researchers have developed standardized methods of measuring the attenuation of hearing protectors in a laboratory setting. In addition, many researchers have compared the results of laboratory attenuations to estimated or measured field attenuations. However, based on a review of the major studies, MSHA notes that researchers have yet to develop standardized tests for measuring the field attenuation of hearing protectors.

MSHA is cognizant of the potential for increased use of diesel equipment in mines in coming years. Diesel engine noise, a common mining noise control problem, is predominantly low frequency noise. In this regard, the Agency notes that hearing protectors are generally more effective in reducing high frequency noise than low frequency noise. Thus, noise from diesel engines contains the frequencies where hearing protectors are least able to attenuate the noise. The consequence is that hearing protectors poorly protect workers from excessive noise exposure when the source of the noise is a diesel engine.

Some special hearing protectors, notably flat response hearing protectors, attenuate the sound across all frequencies the same. In developing a flat response hearing protector, the manufacturer degraded the attenuation at the high frequency instead of enhancing the low frequency attenuation.

MSHA has concluded that at this time there is not a consensus among the scientific community as to a reliable method of predicting the actual attenuation received from hearing protectors in the mining environment. Additionally, experience indicates that miners do not receive the full attenuation measured in the laboratory (NRR). Research data indicate that many workers receive only a small fraction of the NRR. Therefore, the Agency has determined that one cannot rely solely on the EPA's NRR value.

Because of the lack of an acceptable method of predicting hearing protector attenuation in the field, MSHA chose not to include a method for determining the adequacy of hearing protectors in the proposed noise regulations.

It should be noted that in order to ensure hearing protection devices have undergone testing to ensure quality, MSHA is proposing that the definition of ''hearing protector'' permit only devices having a ''scientifically accepted indicator of noise reduction value.'' The Agency solicits comments as to alternatives to the NRR that could be used in this regard.

Wearing of Hearing Protectors

Proposed § 62.120 would require that hearing protectors must be worn in certain cases: if noise exceeds the action level and a baseline audiogram has not taken place within 6 months after the exposure is determined; if an STS has been detected; and whenever a miner is

exposed to noise levels above the PEL. In such cases, proposed § 62.125 would provide that the hearing protectors must be worn when the miner is ''exposed to sound levels which are required to be integrated into a miner's noise exposure measurement.'' This means that if a miner is required to wear hearing protectors, those protectors must be worn when that miner is exposed to sound levels above 80 dBA; sounds above that level have been demonstrated to be harmful, while such a demonstration has not been made for sound levels less than 80 dBA.

MSHA recognizes that mine operators may want to develop particular policies on exactly when hearing protectors can be removed, and sees no need to delimit how this might be done. This practical approach, when taken together with the proposed requirements for employee training about hearing protectors and ensuring selection and proper fit of hearing protectors should facilitate the appropriate use of hearing protectors.

Both MSHA's and OSHA's existing standards require that hearing protectors be worn when the employee's noise dose exceeds permissible levels. Neither standard, however, specifies a sound level below which workers could remove their hearing protectors. Although MSHA received general comments on levels above which hearing protectors should be worn, MSHA did not receive any specific comments addressing wearing practices or under what conditions it would be safe to remove a hearing protector.

As has been emphasized, hearing protectors are only effective if they are worn. Chart NR1 illustrates that the amount of attenuation provided is highly dependent upon the duration a hearing protector is worn.

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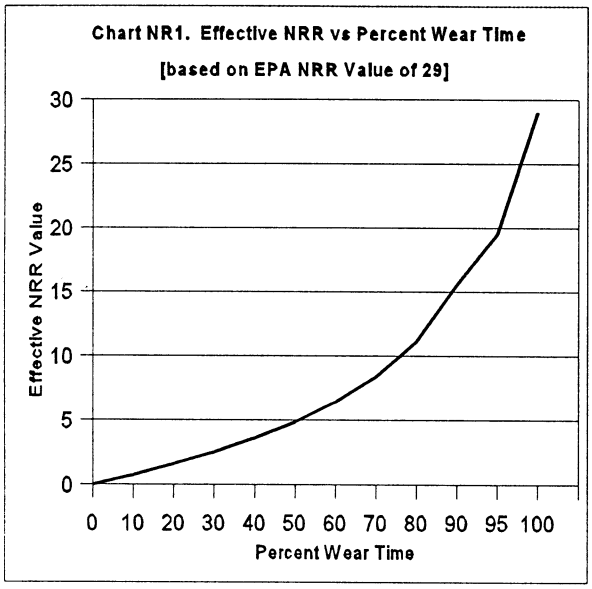

Chart NR1 demonstrates that if a hearing protector with an NRR of 29 dB is worn only half the time, the wearer will effectively obtain only about 5 dB of attenuation. Thus, it is critical for mine operators to ensure that the hearing protectors provided are worn. An NRR of 29 dB is among the highest NRR values reported by hearing protector manufacturers.

Although MSHA did not ask a specific question in its ANPRM on monitoring effective usage of hearing protectors, several commenters recommended that MSHA require mine operators to supervise the proper wearing of hearing protectors.

Despite mandatory use of hearing protectors, most workers in the Abel (1986) study admitted to wearing their hearing protectors less than 50% of the time. Further, many modified their hearing protectors to provide greater comfort. Many of the modifications had a deleterious effect on the attenuation.

In EARLOG 8, Berger (1981) contends that persons, who are more prone to otitis externa (infections), would need to be monitored more closely for failure to wear their hearing protectors. Persons with a medical pathology of the ear are more likely to resist wearing a hearing protector because of pain or extreme discomfort associated with its use.

Based on the comments received and MSHA's experience, one critical factor impacting on miner use is their concern that wearing hearing protectors can, under some circumstances, create serious safety risks. Apart from the information previously noted in connection with the discussion of the proper selection of a hearing protector by miners already suffering hearing loss, there is the issue whether hearing protectors diminish the ability of even miners with good hearing to hear ''roof talk.'' Prout et al. (1973) stated that:

> Personal ear protectors do not generally prevent a miner from hearing and analyzing roof talk when the noise level [sound level] is sufficiently high as to require the use of ear protectors. However, the ability to interpret roof warning signals is degraded by the use of ear protectors in quiet. Consequently, ear protectors should be removed when the noisy machines are shut down.

MSHA is reviewing its own records for further information on the effect of hearing protectors on safety, and welcomes further information from commenters. Of course, MSHA recognizes that failure to wear hearing protectors may accomplish nothing in some cases. For example, if some surface haulage fatal accidents result because high sound levels from mining machinery mask the backup alarms, taking off hearing protectors is not going to make the working environment any safer. Indeed it is more likely that the miner would suffer a temporary threshold shift which would make it

even more likely the backup alarm was missed.

MSHA's review of the literature and codes revealed that the U.S. armed services and many international communities have specified sound levels above which hearing protectors must be worn.

MSHA believes proposing specific trigger levels for hearing protectors in specific circumstances would be burdensome and require mine operators to conduct a comprehensive survey on each piece of equipment. A more practical approach would be for mine operators to ensure through their policies that hearing protectors are worn whenever noise producing equipment is operating in the miner's work area, and permit miners to remove their hearing protectors in areas with low sound levels (below 80 dBA). This would minimize the miner's feeling of isolation and communication difficulties caused by the wearing of hearing protectors in such areas. As previously presented, most researchers have indicated that sound levels below 80 dBA are not hazardous.

The Agency, however, requests additional comment on this issue, and, as noted above, on the specific issue of whether hearing protection can be a safety hazard.

Fitting of Hearing Protectors

The proposal would require that mine operators ensure that hearing protectors be fitted in accordance with manufacturer's instructions.

MSHA's existing noise standards do not address requirements for fitting hearing protectors. OSHA's existing standards require that employers ensure proper initial fitting and supervise the correct use of all hearing protectors.

Many commenters on this issue recommended fitting.

Most of these specified use of the manufacturer's instructions for fitting. A few of these specifically recommended that miners be fitted by individuals trained in the fitting of hearing protectors. Other commenters did not recommend fitting per se, but recommended that mine operators provide a variety of types and sizes of hearing protectors to ensure proper fit.

Several commenters indicated that some types of hearing protectors do not require fitting. One commenter recommended use of Audiometric Data Base Analysis (ADBA) to determine hearing protector effectiveness. Other than ADBA, this commenter believed that there was insufficient data at this time to recommend a criterion for proper fitting.

In EARLOG 17, Berger (1985) recommends that ''Prior to issuing HPDs the fitter should visually examine the external ear to identify any medical or anatomical conditions which might interfere with or be aggravated by the use of the protector in question.''

In *Communication in Noisy Environments,* Coleman et al. (1984) stated:

> If a protector cannot be removed or fitted easily and quickly, it may be either left on when not needed, possibly impairing communication * * * or not fitted when needed, reducing the protection from noise exposure. Ease of fitting is therefore a desirable attribute for coal mining conditions.
>
> Sweetland (1981) found that circumaural protectors were removed and replaced more often than earplugs in mining conditions, which could be taken as an indication that the former devices were easier to fit and use. * * * Factors, such as the time required to hold a compressible foam plug in position for it to achieve its design performance, and the procedure required to fit inserts correctly, which involves reaching around the back of the head to grasp the earlobe, can reduce their acceptability for mining conditions.

At Noise-Con 81, Berger (1981) reported that the attenuation was greater when noise was used to help in the fitting of hearing protectors although the variability was not significantly greater.

Carter and Upfold (1993) investigated methods of determining the attenuation provided by foam earplugs. Both an earmuff with an earphone and a cushion with an earphone gave results comparable to the standard laboratory method and could be used to estimate the group attenuation of foam earplugs. However, the results of the measured attenuation for individuals were not as good as that for the group. The researchers, therefore, concluded that neither method with earmuffs or cushions could be used to determine the attenuation provided by a foam earplug to an individual, although the methods could be used to check the effectiveness of fitting and training of a group.

Merry et al. (1992) reported that subjects obtained greater attenuation from earplugs if an experimenter directs the fitting using the subject's response to noise when compared to subjects simply reading the manufacturer's instructions and inserting their own earplugs.

Chung et al. (1983) reported that the major factor affecting the earmuff performance was the fit which is dependent upon headband tension. Adequate tension is necessary for good attenuation. However, high headband tension generally caused discomfort. The same occurred when the earmuff seal was cracked. However, no effect of the age of the earmuffs was observed. Chung et al. concluded that training and proper fitting can increase the effectiveness of earmuffs, thus protecting workers from incurring noise-induced hearing loss (NIHL).

Phoon and Lee (1993) studied workers who developed NIHL in Singapore. For 103 of 156 earplug users (66%) who developed NIHL, there was a mismatch between the earplug and the size of both ear canals. In 13.5% of these workers, the mismatch occurred in one ear.

Royster et al. (1996) reported the manufacturer's instructions were not always adequate in describing the procedures for donning a hearing protector. Several subjects improperly inserted earplugs during a laboratory experiment of hearing protector attenuation. The inappropriately inserted earplugs would be considered improperly fitted hearing protectors.

ANSI S3.19–1974, ''Method for the Measurement of Real-Ear Protection of Hearing Protectors and Physical Attenuation of Earmuffs'', recommends that 60 to 70 dB white noise be used when the subject fits a hearing protector. White noise has essentially a random spectrum with equal energy per unit frequency bandwidth over a specified bandwidth.

As described above, researchers have identified several techniques for both subjectively and objectively evaluating the fit of hearing protectors. While many of the techniques show promise, there is no consensus as to which method is best. Most techniques are applicable to a specific type of hearing protector and are not practical for use by many mine operators. These techniques are discussed further under the *Hearing Protector Effectiveness* section of this preamble.

MSHA also considered the use of ADBA (Audiometric Data Base Analysis) to determine the effectiveness of hearing protectors in lieu of subjective fitting requirements. Since ADBA does not provide immediate feedback as to the fit of a hearing protector, MSHA has concluded that ADBA is inappropriate for determining the fit of a hearing protector. ADBA analysis requires multiple subjects, not an individual, before a conclusion of adequacy is determined. Besides ADBA determines the adequacy of the HCP (protecting the hearing acuity of a group of workers), not the adequacy of protecting an individual. Moreover, MSHA believes that ADBA is not practical for most mining operations as discussed under the *Evaluation of HCP effectiveness* section of this preamble. Furthermore, ADBA requires several audiograms which are conducted on an

annual basis. In the interim, the hearing acuity of a miner could be irreversibly damaged.

As supported by the researchers and many commenters, MSHA agrees that proper fitting is necessary to ensure optimal effectiveness of hearing protectors and that it should not be left solely up to the individual miner to determine if the hearing protector fits properly. Further, MSHA is concerned that some manufacturer's instructions are not adequate to ensure the proper fitting of a hearing protector. Although comfortable hearing protectors should be provided, MSHA is also concerned that some miners may choose hearing protectors that are too loose or otherwise improperly fit, and consequently not achieve adequate noise reduction.

In light of the wide variety of hearing protectors available, the broad range of subjective fitting procedures, and the lack of consensus on an objective fitting method, MSHA concluded that the manufacturer's instructions are the best criteria for fitting. MSHA encourages commenters to provide information on any standardized methods of testing the fit of hearing protectors.

Maintenance of Hearing Protectors

MSHA's proposal would also require mine operators to ensure that hearing protectors are maintained in accordance with manufacturer's instructions. Neither MSHA's nor OSHA's existing noise standards address requirements for maintaining hearing protectors.

MSHA recognizes that it is difficult to keep hearing protectors clean in the mining environment. Using contaminated hearing protectors, however, may contribute to a medical pathology of the ear. Once the skin has been abraded or inflamed, it is easier for microorganisms normally found in the ear to invade the skin. When hearing protectors are implicated as the cause of inflammation of the external ear canal (otitis externa), often the hearing protector is contaminated with an irritating or abrasive substance. This situation can be corrected with proper cleaning of the hearing protector before use.

MSHA's proposal is designed to ensure that miners not develop medical problems while they are attempting to protect themselves from the hazard of noise. If an earplug cannot be adequately cleaned, then the mine operator would have to replace it.

In addition to providing guidance on the fitting of hearing protectors, manufacturers also provide instructions on the proper care and cleaning of their hearing protectors. Many recommend soap, warm water, and careful rinsing. Solvents and disinfectants generally are discouraged as cleaning agents because they can cause skin irritation and some can damage the hearing protector. In most cases, the proper insertion technique for earplugs would just be a matter of applying common sense, i.e., cleaning the hands before rolling and/or inserting earplugs.

Several commenters addressed hygiene problems when the hearing protectors become dirty. One of these commenters stated that miners would need to clean their permanent hearing protector daily and that irritation due to sweating and skin contact with the hearing protector can be a problem associated with its use.

In EARLOG 5, Berger (1980) states that permanent [non-disposable] hearing protectors should be replaced between two and 12 times per year. The constant wearing of hearing protectors causes them to lose their effectiveness. For example, headbands on earmuffs can lose their compression ability; the soft seals surrounding the ear cup on earmuffs can become inflexible; and plastic earplugs can develop cracks, can shrink, or can lose their elasticity.

As referenced in EARLOG 17 (Berger, 1985), Forshaw and Cruchley studied the effects of washing the hearing protectors worn by long-range patrol aircraft crews. The crews were divided into three groups: one group wore pre-molded earplugs; the second group wore foam earplugs washed after each use; and the third group wore foam earplugs which were washed weekly. Examinations by medical officers revealed no fungal or clinically significant bacterial infections among the three groups.

MSHA also reviewed standards from the U.S. Armed Forces and the international community on the topic of hearing protector maintenance. The consensus of the standards was that damaged or deteriorated hearing protectors must be replaced.

Miners have also been known to alter the hearing protection provided to make them more comfortable. Such alterations have included cutting off the end of earplugs or stretching out the head-band on earmuffs. These alterations can significantly decrease the hearing protector's attenuation.

Hearing protectors can also be damaged from exposure to heat, cold, ozone, chemicals, or dirt. Such conditions are common in the mining industry, and mine operators must periodically check the hearing protectors provided and replace them when damage is found.

Hearing Protectors Provided at No Cost to Miner

The proposal would also require the mine operator to provide necessary replacements at no cost. This is intended to ensure that the mine operator repairs or replaces a miner's hearing protector when it becomes damaged or deteriorated to the point that the required protection is compromised.

MSHA believes that it is essential for mine operators to replace worn-out or damaged hearing protectors in order to maintain their effectiveness. This is in agreement with the international community and the U.S. armed services. Damaged or deteriorated hearing protectors do not provide their designed optimum amount of protection. Further, MSHA believes that the manufacturer's instructions are the best source of information as to the proper procedures for maintaining a particular protector.

MSHA's existing noise standards do not specifically address the replacement of hearing protectors. OSHA's noise standards simply require that hearing protectors be replaced as necessary.

MSHA received no direct comments to its ANPRM on the issue of mine operators supplying commercially available hearing protectors at no cost to the miner. However, several commenters supported adopting requirements similar to OSHA's which includes provisions for providing hearing protectors at no cost to the worker.

Replacement of hearing protectors would be based on the manufacturer's instructions, upon finding any deterioration that could adversely affect the hearing protectors attenuation, or upon a need for the miner to choose a different hearing protector due to a medical pathology caused or aggravated by the initial hearing protector provided (see following section which discusses medical pathology). For example, manufacturers of disposable earplugs may state in their instructions that they should be replaced after each use.

Replacement of Hearing Protector Due to Medical Pathology

MSHA's proposal would also require the mine operator to provide an individual miner with a different, more acceptable, type of hearing protector when presented with evidence of a medical pathology (e.g., otitis externa or contact dermatitis). The definition of ''medical pathology'' is intended to be broad enough to cover injuries. If, for example, a miner would suffer a burn in the ear canal which would preclude the wearing of earplugs, an employee who

elected earplugs should have the opportunity to now select a muff.

MSHA does not intend to require that the evidence of a medical pathology be a diagnosis by a physician specialist—nor to require mine operator action without any evidence whatsoever. The goal here is a practical one: exchange the hearing protector if there appears to be a medical problem. A preliminary diagnosis of medical pathology by a family physician or nurse should be accepted by an employer for the purposes of this requirement.

In EARLOG 17, Berger (1985) discusses some predisposing factors for otitis externa. These include allergy to chemicals or hair dyes and sprays; dermatitis; chronic draining middle ear infections; excessive cerumen (ear wax); and systemic conditions which lower the body resistance, such as anemia, vitamin deficiencies, diabetes, and endocrine disorders. Disposable hearing protectors may be warranted for those individuals prone to infections. The researcher reported that the prevalence of otitis externa is approximately 2% in both users and nonusers of hearing protectors. He stated that:

> Although hearing protection devices should not be worn in the presence of some preexisting ear canal pathologies, and care must be exercised regarding selection and use under certain environmental conditions, regular wearing of HPDs does not normally increase the likelihood of contracting otitis externa.

Furthermore, Royster and Royster in EARLOG 17 (Berger, 1985) reported on a situation in which underground miners in a warm and humid environment were experiencing otitis externa. Switching from a pre-molded vinyl earplug to a foam earplug decreased the incidence of this condition.

Although documented cases of hearing protectors causing infections in the ear canal or on the skin surrounding the ear are not prevalent, MSHA is aware of at least one reported case of an ear infection in the mining industry specifically attributed to the use of hearing protectors.

MSHA's existing noise standards do not specifically address the replacement of hearing protectors. OSHA's noise standards simply require that hearing protectors be replaced as necessary.

Based upon the research and several international standards, MSHA believes that hearing protectors need to be replaced whenever a medical pathology is present. Such replacements would also be at no cost to the miner.

Section 62.130 Training

Summary

Proposed § 62.130 would provide the specifications for instruction and certification of training required by the proposed rule. Proposed § 62.120 requires such training for all miners exposed above the action level, and annually thereafter if still exposed above that level. Proposed § 62.180 requires retraining for every miner who incurs an STS.

Miners would receive instruction in the value of hearing protectors, selection and fitting of protectors, and proper use of such protectors. Miners would also receive instruction as to the operation of an operator's hearing program and in the mine operator's noise control efforts. There are no special qualifications for instructors, nor any specifications on the hours of instruction. Training is required to be provided without cost to the miner. The mine operator would be required to certify the completion of any training required by this part, and maintain the most recent certification for a miner at the mine site for as long as the miner is required to use hearing protectors or be enrolled in an HCP, and at least 6 months thereafter.

MSHA considered whether the requirements of part 48, ''Training and Retraining of Miners,'' were adequate to ensure the training required under this part. The requirements of part 48 specify the initial and annual retraining of all miners in a list of subjects, many specified in the law itself (section 115 of the Mine Safety and Health Act). The importance of this training is emphasized by statutory requirements for the submittal of training plans, on the specification of the hours to be devoted to the training, and on the qualifications of instructors. Training is required on noise, but it is in general terms, covering the purpose of taking exposure measurements and on any health control plan in effect at the mine. Mine operators may provide additional training, but the topics that need to be covered often make this impracticable within the prescribed time limits.

After considering the available information about the importance and prevalence of training requirements, and based upon its experience in implementing the requirements of part 48, MSHA has determined that the requirements of part 48 do not provide adequate noise training for those miners for whom exposure is clearly a problem. Part 48 training is neither comprehensive enough to provide such miners with the level of education needed for the proper use of hearing protection devices, nor, in the case of noisy mines, detailed enough on methods to reduce sound levels.

Nevertheless, MSHA believes compliance with this proposal can in many cases be fulfilled at the same time as scheduled part 48 training. The Agency does not believe special language in proposed part 62 is required to permit this action under part 48, but welcomes comment in this regard. Mine operators who can do so are free to fulfill their training requirements under § 62.120 by covering the topics in initial and annual part 48 training, and so certify on the separate form required by this part. If incorporated into part 48, mine operators would, however, be required to submit a revised training plan to the local district office for approval. Some mine operators may not have room in their part 48 plans, however, to be able to incorporate these topics. Moreover, some training required under the proposal will clearly not fit within a regular schedule: e.g., the training required by § 62.180 whenever a standard threshold shift in hearing acuity is detected.

MSHA has endeavored to make the training requirements as simple as possible. If conducted separate from part 48, there are no specifications on trainer qualifications, no minimal training time, nor any training plans. If however the training is incorporated into part 48, then all applicable part 48 requirements will have to be met.

Background

Training requirements are a mainstay of mine safety and health. Although MSHA has no training requirements in its existing noise regulations, the general training requirements set forth in part 48 require basic training as to the purpose of taking noise measurements, and in any health (noise) control plans that are in effect at the mine.

Numerous commenters responding to MSHA's ANPRM, expressed considerable support for miner training on noise and its effects and believed that it is an essential element of any effective HCP. Many of these commenters specifically supported annual refresher training. Commenters differed, however, in their opinions as to how training could best be accomplished. Several commenters recommended that MSHA incorporate any training requirements related to this standard into MSHA's existing training requirements under 30 CFR part 48—Training and Retraining of Miners. A few commenters believed that the training requirements in MSHA's part 48 were adequate and that no additional instruction was needed.

One commenter suggests that the initial training class be limited to less than 10 individuals (Berger, 1988; Royster and Royster, 1985). Although training may best be accomplished in small groups, MSHA's proposal would not limit the size of any training classes.

There is considerable precedent for requiring training as part of noise control programs.

OSHA's noise standard has training requirements which are similar to those in MSHA's proposed noise standard with a few exceptions. These exceptions are discussed later in this section.

In OSHA's 1981 preamble (46 FR 4157), Morrill stresses the importance of worker education in overcoming workers objections to wearing hearing protectors. This document quotes a Dr. Maas as saying that, ''Supervisors must sell employees on the need and value of hearing protection devices. When employees understand what the protective measure is for, it will be accepted because the employee realizes it is for his own good.'' A number of comments to OSHA's Hearing Conservation Amendment (46 FR 4157) indicated that workers are reluctant to appear weak or ridiculous as a result of wearing hearing protectors. Suter (1986) states, ''Workers who understand the mechanism of hearing and how it is lost will be more motivated to protect themselves.'' Other researchers concur with this opinion (Wright, (1980) and Royster et al., (1982)).

CAOHC (Miller, 1985) states the following regarding the need for training as part of an effective program (HCP):

> A critical component of the OHC [Occupational Hearing Conservation] program is the employee education program (EEP). In many respects, the EEP is the most important aspect of the OHC program since it is designed to increase the auditory consciousness of the employee regarding the hazardous effects of noise exposure and by so doing to get him to use effective forms of PHPD's [personal hearing protective devices] conscientiously and consistently. Such use of PHPD's will actually protect the worker's hearing, while the other aspects of the program, important as they are, will not do so. No amount of noise monitoring or audiometric testing, for example, will protect hearing.

MSHA also reviewed the training requirements set forth in international standards and those of the U.S. Armed Services. The consensus was that training was necessary; however, the training interval was not always specified.

Training About Hearing Protector Selection and Use

Section 62.130(a) specifically provides that the training is to include instruction in—

(1) the effects of noise on hearing;

(2) the purpose and value of wearing hearing protectors;

(3) the advantages and disadvantages of the hearing protectors to be offered;

(4) the care, fitting, and use of the hearing protector worn by the miner;

(5) the general requirements of the regulation;

(6) the operator's and miner's respective tasks in maintaining mine noise controls; and

(7) the purpose and value of audiometric testing and a summary of the procedures.

OSHA requires annual training on the same elements except it does not require training on the requirements of its noise standard. It is MSHA's view, however, that some training on the requirements of the standard is necessary in order for employees to understand the role hearing protection plays in a broader protection scheme.

Purpose, Advantages, and Disadvantages of Hearing Protectors Offered

Instruction on this topic would help the miner make an informed choice as to which hearing protector to use. This basic instruction would be initially required when the mine operator first determines the miner's noise exposure exceeds the action level. Moreover, pursuant to proposed § 62.125, this instruction must be provided at least once before the miner must make a selection of a hearing protector. Furthermore, it would need to be repeated annually thereafter, because hearing protectors should be replaced periodically.

MSHA anticipates the training would address specific advantages and disadvantages of earmuffs, earplugs, and canal caps as they relate to the needs of the miner and the specific conditions at the mine. For example, an electrician who opts to use an earmuff must understand the need to use one with dielectric properties to minimize the chance of incurring an electrical shock when working around energized equipment. An over-the-head earmuff is unsuited for those miners required to wear hardhats: the earmuff would interfere with the wearing of the hardhat as the hardhat could not be placed over the headband. In addition, the mine operator should discuss the specific advantages and disadvantages of any special hearing protectors offered such as active noise reduction, level-dependent, flat-response, and notch-amplification hearing protectors, or a communication headset. For example, a miner with a sensorineural hearing loss in the higher frequencies may require a different type of hearing protector than a miner with a conductive hearing loss across all frequencies. Accommodating the hearing loss may require a level-dependent, active noise reduction, or notch-amplification hearing protector to improve the miner's ability to communicate and hear warning signals in a noisy environment. All miners need to understand the relative advantages and disadvantages of earmuffs and earplugs as they are not at all obvious: hence, the necessity for training.

Some advantages of earmuffs (circumaural hearing protectors) include: they are easily donned and removed by the miner when working in intermittent noise; they offer protection against dust in the ear canal; they are not easily misplaced or lost; they fit people with unusually shaped ear canals; and they can be worn over earplugs. Berger in EARLOG 3 (1980), and Coleman et al. (1984) reported that one major disadvantage of earmuffs is that they hinder a miner's ability to localize the direction of sounds. If the miner's safety depends on the ability to localize sounds, then this disadvantage would preclude the use of earmuffs. Other potential disadvantages of earmuffs include: discomfort; headache; a feeling of claustrophobia; excessive warmth and perspiration under the muff seal; and skin irritation. Earmuffs may present problems if the miner wears safety glasses or earrings. Eyeglass temples reduce the attenuation afforded by earmuffs.

In EARLOG 19, Berger (1988) states that the use of eyeglasses with an earmuff can break the seal of the earmuff and cause a loss of attenuation of up to 6 dB depending on the frequency of the noise.

Royster et al. (1996) tested the effect of wearing two different safety glasses on the attenuation of an earmuff. The researchers found that the attenuation was reduced by about 5 dB across all frequencies.

Barham et al. (1989) investigated the effects of safety glasses and hair on the effectiveness of earmuffs. The wearing of safety glasses decreased the noise reduction up to 4 dB depending upon the frequency. The glasses had slender and flexible wire-reinforced side frames so that the side frames would fit close to the head. Not only did the safety glasses decrease the average noise reduction, they also reduced the variability (standard deviation) of the

noise reduction realized among the individuals. The type of hair and its length influenced the noise reduction provided by earmuffs. Individuals with short hair realized up to 5 dB more protection, depending upon the frequency, than individuals with long or curly hair and beards.

Michael (1991) asserts that glasses with plastic temples may cause a loss of attenuation from 1 to 8 dB, due to breaking the seal of the earmuff. In some cases, this loss can be substantially reduced if small, close fitting wire temples are employed.

Nixon and Berger (1991) report that temples of eyeglasses reduce the efficacy of earmuffs normally by 3 to 7 dB provided the cushions of the earmuffs are in good shape. This effect varies among earmuffs and it also depends upon the style and fit of the eyeglasses. To minimize the effect of wearing eyeglasses, the temples should be as thin as possible and fit close to the side of the head.

Savich (1979) measured the noise attenuation of earmuffs. Because of long hair and safety glasses, the earmuffs provided less attenuation than expected based upon laboratory tests. Furthermore, head size has a significant influence on the attenuation because of different clamping forces. Increased clamping force increases the attenuation.

Some advantages of earplugs include: they are cooler, if the miner has to work in a hot, humid environment; they are more easily worn with safety glasses, hardhats, and other personal safety equipment (e.g., air-purifying or welding helmets); and they fit miners who have extremely large external ears. One disadvantage of an earplug is that inserting it into the ear canal could present a personal hygiene problem if the miner removes and reinserts it several times during the day. A miner who is susceptible to ear infections or secretes significant amounts of ear wax may be better suited for using earmuffs.

As noted earlier in this section, training is critical to miner cooperation. MSHA has concluded, after reviewing the scientific literature, U.S. Armed Forces regulations, and standards from the international community, that requiring the mine operator to instruct each miner required to wear hearing protectors on the purpose, advantages, and disadvantages of the choices available will facilitate hearing protector use and effectiveness.

Care, Fitting, and Use of the Hearing Protector Selected

In response to MSHA's ANPRM, many commenters supported the need to train employees on the proper fitting, care, and use of hearing protectors.

Merry et al. (1992) studied the effect of fitting instructions on the resulting attenuations of earplugs. Novice subjects were given earplugs. The difference in their hearing thresholds between the unoccluded and occluded conditions was the attenuation of the earplug. The subjects obtained greater attenuation whenever the experimenter assisted the subject in fitting the earplug than when the subject merely read the manufacturer's instructions before donning the earplug. Furthermore, the researchers noted that the attenuations obtained by the subject when just the manufacturer's instructions were read is comparable to the attenuations measured under industrial conditions.

Casali and Lam (1986) reported that the proper design and presentation of user insertion/donning instructions are critical to the amount of attenuation afforded by hearing protectors. They found that in some cases, the magnitude of protection afforded by the use of earplugs exhibited greater than a twofold increase when training ranged from no instruction to detailed and model instruction. Their study also showed that the attenuations afforded by earmuffs and earcaps were not as influenced by the level of instruction as were earplugs. Casali and Lam concluded that any instruction technique provided an improvement in attenuation over no instruction at all. However, they found no statistically significant differences among the type of instruction used. They also stated that regardless of the insertion/application instruction type selected, it is imperative that workers be retrained periodically in hearing protector insertion practices, hearing protector sizing, and hearing protector care to maintain optimal hearing conservation.

Royster et al. (1996) had novice users of hearing protectors don the protectors after reading the manufacturer's instructions. Since some users failed to properly don the hearing protectors, the researchers concluded that the instructions provided by the manufacturer were not always adequate. Consequently, additional instruction should be provided to assure the proper donning of hearing protectors.

Barham et al. (1989) reported that the noise reduction achieved by an earmuff improved by approximately 4 dB for a group and up to 6 dB for an individual following instruction on its use. Not only did the attenuation increase but also the standard deviation (a measure of variability) decreased. Therefore, instruction significantly improved the noise reduction achieved by the wearer of an earmuff.

Park and Casali (1991) studied the effects of two levels (minimal and detailed) of instruction on the measured attenuation obtained by regular hearing protector users. The users were tested using different hearing protectors from the ones they normally wore. The amount of noise attenuation increased and the standard deviations decreased when the investigators presented the instructions and demonstrated the proper manner to don and doff hearing protectors as compared to the employees simply reading the instructions. The efficiency of earplugs was found to be highly sensitive to the degree of instruction while earmuffs and canal caps were not.

MSHA believes that training is critical to the effective use of hearing protectors, and that miners must be shown how to use, fit, and care for their hearing protectors if they are to be effective. Further, the instructions should be repeated at yearly intervals to maintain effectiveness. Simply instructing the miner to read manufacturer's directions on the hearing protector container would not be adequate. MSHA is concerned that some manufacturer's instructions are inadequate for the proper fitting of hearing protectors. The effectiveness of hearing protectors can be highly dependent on how they fit the individual wearer. Not all people will achieve the same degree of fit or effectiveness from the same hearing protector.

Training About Hearing Conservation Program and Operator Noise Controls

OSHA's noise standard has similar training requirements with the exception that they do not require training on the respective responsibilities of the employer and employee in maintaining controls.

MSHA has determined that training miners enrolled in an HCP on the respective responsibilities of mine operator and miner is necessary to obtain maximum effectiveness from an HCP. Miner cooperation and support is required, for example, to ensure:

(1) The hearing protector provided fits properly each time it is donned;

(2) The hearing protector is worn whenever the miner is exposed to hazardous sound levels;

(3) Exposure to high sound levels is avoided for at least 14 hours before taking the baseline audiogram;

(4) Participation in the audiometric testing;

(5) Cooperation with any administrative control(s) instituted by the mine operator; and

(6) Use and maintenance of the engineering noise controls provided by the mine operator.

MSHA believes that a miner's understanding and motivation would be enhanced by conducting initial and annual training in these areas. The rationale for retraining miners who suffer an STS is discussed in connection with § 62.180, *Follow-up corrective measures when STS detected.*

MSHA believes that a miner must also be trained to understand the audiometric tests. This will enable miners to understand their own results and determine the effect of wearing hearing protectors.

Effectiveness. MSHA has endeavored to make the training requirements as simple as possible. If conducted separate from part 48, there are no specifications on trainer qualifications, no minimal training time, nor any training plans. If however the training is incorporated into part 48, then all applicable part 48 requirements will have to be met.

While this approach reduces the burden on those mine operators who cannot incorporate part or all of the noise training into part 48 training, it also means that certain safeguards in effect for part 48 training will not be directly applicable to that noise training not provided during part 48 training. There would be no review of a noise training plan, for example, to ensure that the instruction is adequate or that the training is to be given in the language spoken by most of the miners. Comments on this point are solicited.

The Agency believes it can ensure the noise requirements have been fulfilled by checking with exposed miners to ensure that the required training elements have been covered and that the certifications are valid.

Certification. Section 62.130(b) of the proposal would require that, upon completion of any training required under this part, the mine operator certify the date and type of training (initial or annual) given each miner. The certification would be signed by the person conducting the training.

It is standard practice in the mining industry to require certification of training, as a way of facilitating compliance. Training received under part 48 must be certified. The certification form used for part 48 does not have a separate line on which to indicate that the training required under the proposed noise standard has been completed; moreover, this would not be suitable in any event for noise training given independently of part 48 training as may often be the case.

MSHA believes that it is important to record the type and date of any training conducted under its proposed noise regulations. A written record, together with miner interviews, provide the Agency necessary checks to ensure the training is provided as required with only a minimal burden.

An optional approach on which MSHA would welcome comment is to simply require that a mine operator must, upon request, give an MSHA inspector copies of all materials related to the employer's noise training program. This is the approach taken by OSHA.

Retention. Section 62.130(b) of MSHA's proposal would require the mine operator to retain the most recent certification at the mine site for as long as the miner is exposed to noise above the level which initiated the training and for at least six months thereafter.

MSHA has a retention requirement for part 48 training. Part 48 training records are to be retained for two years for currently employed miners or for 60 days after the termination of employment. OSHA has no retention requirement for training records.

The Agency believes it is important to retain training records in order to verify that the required training has been provided, as with the certification requirements. The retention requirement is short and not burdensome: only the most recent record must be retained, and then only until the miner's exposure drops beneath the level which initiated the training (or 6 months after cessation if employment should that come before the exposure level has dropped).

Section 62.140 Audiometric Testing Program

This section of the proposal would establish basic procedures for the audiometric testing program in which those miners enrolled in a hearing conservation program (HCP) will participate. It includes provisions for: qualifications of personnel performing the audiograms, baseline audiograms, annual audiograms, and supplemental baseline audiograms.

MSHA is seeking explicit comment on a number of points. What follows is a brief summary of some key features of this section of the proposal.

With respect to qualifications of personnel, MSHA would require that an ''audiologist'' be certified by the American Speech-Language-Hearing Association or licensed by a state board of examiners. ''Qualified technicians'' would be required to have been certified by the Council for Accreditation in Occupational Hearing Conservation (CAOHC) or another recognized organization offering equivalent certification. CAOHC or equivalent certification would assure that the technicians are qualified. MSHA is not proposing to require qualifications for physicians.

It is critical to obtain a baseline audiogram before exposure to hazardous noise. If this is not possible, then the baseline is to be obtained as soon as is reasonably possible. Due to remote locations and intermittent operations of many mines, MSHA determined that allowing six months (or 12 months if a mobile test van is used) for obtaining the baseline audiogram was reasonable. The 12 month period would allow mine operators to schedule many baseline and annual audiograms simultaneously, and thus, substantially reduce the cost when mobile test vans are used. Pursuant to proposed § 62.120(b), miners would be provided hearing protection until such time as the baseline audiogram is conducted; and in the event the miner has to wait for more than 6 months to get a baseline audiogram because a mobile test van is used, the operator would be required to ensure the use of hearing protection.

MSHA has also determined that a 14-hour quiet period should precede the baseline audiogram to ensure a valid result: hearing protectors will not be considered a substitute for a quiet period under the proposal, and miners are to be notified of the importance of compliance with the quiet period.

MSHA has concluded that audiograms need to be provided annually for miners enrolled in an HCP. MSHA is not proposing to require this quiet period for annual audiograms, though it may be in the mine operator's interest to do so.

Background

Under existing standards for coal mines, MSHA requires pre-employment and periodic audiograms at those mines under a hearing conservation plan, but includes no specific procedures or time frames for obtaining these audiograms. Moreover, at present, less than 1% of the coal miners are covered by a hearing conservation plan. MSHA currently does not have any requirements addressing audiometric testing for metal and nonmetal mines.

OSHA's noise standard also contains requirements for qualifications of personnel and for baseline, annual, and supplemental baseline audiograms. The limited number of differences between the OSHA standard and the MSHA proposal are noted in the discussion that follows.

Qualifications of Personnel

Section 62.140(a) of MSHA's proposal would require that audiometric tests be conducted by a physician, an audiologist, or a qualified technician who is under the direction or supervision of a physician or an audiologist.

MSHA would require that an ''audiologist'' be certified by the American Speech-Language-Hearing Association or licensed by a state board of examiners. ''Qualified technicians'' would be required to have been certified by the Council for Accreditation and Occupational Hearing Conservation (CAOHC) or another recognized organization offering equivalent certification.

OSHA's noise standard requires that—

> Audiometric tests shall be performed by a licensed or certified audiologist, otolaryngologist, or other physician, or by a technician who is certified by the Council of Accreditation for Occupational Hearing Conservation, or who has satisfactorily demonstrated competence in administering audiometric examinations, obtaining valid audiograms, and properly using, maintaining and checking calibration and proper functioning of the audiometers being used. A technician who operated microprocessor audiometers does not need to be certified. A technician who performs audiometric tests must be responsible to an audiologist, otolaryngologist or physician.

MSHA received comments that specifically addressed the qualifications of persons conducting audiometric tests. Some commenters were concerned that physicians may not have the specific knowledge necessary to conduct audiometric testing. One of these commenters stated that:

> * * * many physicians are not well versed in problems of audition, especially occupational noise induced hearing loss [NIHL]. If physicians are to be included in the list of acceptable supervisors, they should be limited to ''qualified occupational physicians,'' or perhaps ''qualified occupational physicians with audiological experience.''

Other commenters recognized that technicians need specific training, but disagreed as to whether formal certification was necessary. Many commenters specifically stated that MSHA should require CAOHC certification as the minimum acceptable criteria for training of audiometric technicians.

Many commenters specifically recommended or implied that MSHA treat technicians who operate microprocessor audiometers the same as technicians who operate other types of audiometers. One stated that:

> The use of a microprocessor audiometer does not guarantee a valid, reliable audiogram, nor does it obviate the need for the technician to be familiar with the important interpersonal and procedural details of administering an audiogram and providing feedback to the employees.

Other commenters, however, stated that persons who operate microprocessors do not need to be certified, but it was unclear whether they thought that training and demonstration of competency would be necessary for such technicians. Finally one commenter wanted ''maximum flexibility in audiometric testing.''

One commenter on this issue stated that:

> * * * We do not believe that there are other qualified medical personnel [other than an audiologist or physician] who understand the principles of interpreting an audiogram appropriately.

The U.S. Army (1991), Air Force (1991), and Navy (1994) regulations require that a physician, audiologist or technician conduct the audiometric tests. The audiometric technician must be CAOHC certified or certified through military medical training and be under the supervision of a physician or audiologist.

MSHA believes that it is unnecessary to specify that physicians be ''licensed'' or ''qualified.'' All states require physicians to be licensed. MSHA is concerned, however, that licensing does not imply qualification to conduct audiometric testing, evaluate audiograms, and supervise technicians in these areas. The Agency expects physicians to exercise professional judgement when evaluating their own qualifications to conduct audiometric testing. In addition, the medical profession enforces a high degree of accountability and ethical standards. Nevertheless, further comment is requested on this issue.

MSHA believes that certification or licensing of audiologists is essential to an effective HCP. Properly trained and certified audiologists would be qualified to conduct audiometric testing, evaluate audiograms, and supervise technicians. Unlike physicians, MSHA believes that certification or licensing presupposes that the audiologist would be qualified to conduct audiometric testing.

With respect to qualified technicians, MSHA considered the comments on this topic filed in response to the ANPRM and concluded that qualified technicians need to be certified by CAOHC or by an organization offering equivalent training. CAOHC or equivalent certification would assure that the technicians are qualified. While MSHA recognizes that the OSHA standard allows physicians discretion to judge the qualifications of technicians, MSHA believes requiring certification is not restrictive and best ensures quality control. MSHA would also require CAOHC or equivalent certification for technicians who operate microprocessor audiometers. The Agency concludes that requiring CAOHC or equivalent certification would not be overly burdensome on the mining industry.

NIOSH commented on OSHA's proposed rule, and again on MSHA's ANPRM, that there may not be enough CAOHC courses offered in a given year, or in a wide enough geographical area, to require that all technicians be CAOHC certified. OSHA's preamble (46 FR 4128) in 1981 indicated that, at that time, there were about 6,700 CAOHC certified technicians and 700 course directors. Since 1981, however, the number of CAOHC course directors has decreased to about 400, but the number of certified technicians has increased to about 14,000. Although this number of certified technicians may be sufficient to conduct the required audiograms in the mining industry, MSHA believes that promulgation of this rule will result in even more individuals seeking certification. In addition to CAOHC certification for audiometric technicians, MSHA would also accept training by any other recognized organization offering equivalent certification. MSHA requests information on any other nationally recognized program for the certification of persons to conduct audiometric tests.

MSHA also considered the ''qualifications of personnel'' requirements from U.S. Armed Forces codes and international standards. The consensus was that the technician needed to be trained in conducting audiometric testing.

Although the proposal would not require that the audiologist or physician be present when the technician conducts the audiometric test, MSHA would require that they directly supervise the technician to ensure strict adherence to testing procedures and measurement parameters.

Baseline Audiogram

Section 62.140(b) of MSHA's proposal would require that, within six months of a miner's enrollment in an HCP, the miner shall be offered a valid baseline audiogram of the miner's hearing acuity against which subsequent annual audiograms can be compared. This would include miners with temporary layoffs, such as those miners employed at seasonal operations. However, the proposal would allow up to 12 months

to obtain a baseline audiogram when a mobile test van is used.

Under existing standards for coal mines, MSHA does not specifically address a time frame for offering a baseline audiogram for those miners under a hearing conservation plan. MSHA has no requirements for baseline audiograms in its current metal and nonmetal noise regulation. This proposal is consistent with OSHA's noise regulation.

The proposal would allow mine operators to use existing audiograms as the baseline, provided that they meet the testing requirements of this part. OSHA also accepts existing audiograms as a baseline because, in most cases, accepting old baseline audiograms is more protective for the employee. OSHA reasoned that:

> * * * old baselines will allow the true extent of the hearing loss over the years to be evaluated. Obtaining a new baseline audiogram after many years of noise exposure might be less protective since the new audiogram might show higher thresholds and the true extent of future losses would appear smaller than when compared with the original baseline.

All commenters, addressing the issue of audiograms recognized the need to establish a baseline. The commenters varied, however, on the time needed to establish this baseline, i.e., from 30 days up to one year from the first exposure to noise. One stated that ''* * * the first annual or periodic audiogram should be allowed to be considered as the baseline or pre-employment audiogram.'' Most of the commenters, who specified a time frame for completing the baseline audiogram, agreed with OSHA's position of allowing up to six months. Only one comment was received, on the 1-year time allowed, for audiometric testing with mobile test vans. This commenter was concerned that miners might be exposed to noise, in the interim period, until the test van was available and recommended ''that the employees utilize hearing protection from the time they are enrolled in an HCP.''

NIOSH (1995) recommended that the baseline audiogram be conducted within 30 days of enrollment in an HCP, even if a mobile test van is used. NIOSH believes it is unacceptable to wait up to six months for a baseline audiogram, because exposure to high sound levels for a relatively short period of time can adversely affect the hearing acuity of susceptible individuals.

MSHA has also taken into consideration requirements of the U.S. Armed Forces and the international community with respect to baseline audiograms. Many in the international community and the U.S. armed services agree that the baseline audiogram is of primary importance.

MSHA has determined that the baseline audiogram is essential, because it is the reference against which subsequent audiograms are to be compared. The comparison will be used to determine the extent of hearing loss. If the baseline audiometric test is not conducted properly, it will not reflect the miner's true hearing thresholds and any changes between baseline and subsequent tests may be masked. Further, existing audiograms may be used as the baseline, if they meet the testing requirements of this part. The use of pre-existing audiograms would be more protective for the affected miner and less burdensome on the mine operator.

Because of the baseline audiogram's importance, it is critical to obtain one before exposure to hazardous noise. If this is not possible, then the baseline is to be obtained as soon as is reasonably possible. Due to remote locations and intermittent operations of many mines, MSHA determined that allowing six months (or 12 months if a mobile test van is used) for obtaining the baseline audiogram was reasonable. The 12 month period would allow mine operators to schedule many baseline and annual audiograms simultaneously, and thus, substantially reduce the cost when mobile test vans are used.

It should be noted that the provisions of § 62.120 of MSHA's proposal would require mine operators to ensure that all miners enrolled in a hearing conservation program be provided hearing protectors until they receive a baseline audiogram; and require the operator to ensure the protection is used if the need to wait for a mobile test van delays the initial audiogram past 6 months.

MSHA solicits additional comments on the appropriate time frame for obtaining audiograms, especially in remote mining areas.

14-hour Quiet Period

Section 62.140(b)(2) of the proposal would require that the mine operator ensure that the affected miner is not exposed to workplace noise for at least a 14-hour period immediately prior to receiving the baseline audiogram.

MSHA has no existing requirement in this area. The proposal is similar to OSHA's noise standard except that, as discussed below, OSHA permits the use of hearing protectors in lieu of removal from workplace noise.

The 14-hour quiet period is intended to provide a miner's hearing with sufficient rest to allow recovery from any temporary threshold shift (TTS) caused by pre-test noise exposure. If the baseline audiogram is skewed by TTS, subsequent comparisons to annual audiograms would not provide accurate indications of the extent of damage incurred during the time span between the baseline and subsequent tests.

There were numerous comments concerning the time frame for a quiet period. Of these, most suggested that the 14 hours mandated in OSHA's noise standard was sufficient to minimize any TTS. Others recommended different time frames for the quiet period. One stated that ''* * * there are sufficient human data in the literature to establish that a 14-hour quiet period is too short.'' Several commented that:

> A suitable quiet period of 24 hours prior to the performance of audiometric testing would be preferred. However, a 16-hour quiet period would often meet the needs of most operations, being the amount of time normally between the end of one days work and starting time for the next.

One thought that eight hours was enough. Another commented that a quiet period should be allowed but not required for the initial test. Further, this commenter stated that 24 hours should be required for confirmation testing.

Fodor and Oleinick (1986) in their paper on workers' compensation reported that one researcher found full recovery from ''physiological fatigue'' in 16 hours, with recovery from ''pathological fatigue'' taking longer. This researcher reported that the initial recovery seems to be a logarithmic function of time and the longer recovery period is a linear function. Most researchers, however, report complete recovery from TTS taking no longer than 16 hours provided the TTS did not exceed 40 dB. On the other hand, some states require that a worker be away from noise exposure for six months before evaluating hearing loss for workers' compensation purposes.

MSHA concludes, after reviewing the scientific literature and the standards of various jurisdictions, that the length of time required to obtain full recovery from TTS depends upon the magnitude of the sound pressure level, the length of exposure, the frequencies affected, the person's age, and the person's susceptibility to hearing damage. Because the mine operator has no control over the non-occupational noise exposure of a miner, MSHA decided against limiting non-occupational noise to a specified sound level during the quiet period; however, as noted below, MSHA is requiring that the mine operator notify employees of the need to avoid high levels of noise during the 14-hour period preceding the test, which it

hopes will limit non-occupational noise exposure. With the exception of the EEC (15 minute quiet period), the consensus of the international community and the U.S. armed services is that there should be a quiet period of at least 14 hours. MSHA decided that a 14-hour quiet period would be the most appropriate alternative and is consistent with OSHA's requirements, comments to the ANPRM, and its review of available literature. A quiet period longer than 14 hours could place an undue burden on mine operators as the miner may have to stay away from work to comply with the quiet period if the miner works a slightly extended shift; many work shifts exceed 8 hours especially when a lunch period is taken into account.

Use of Hearing Protectors for 14-hour Quiet Periods

Section 62.140(b)(2) of the proposed standard would also prohibit the use of hearing protectors as a substitute for the 14-hour quiet period. As noted previously, OSHA currently does allow hearing protectors to be used during the required 14-hour quiet period.

When it first promulgated its Hearing Conservation Amendment in 1981, OSHA did not permit the substitution of hearing protectors for the 14-hour quiet period. This decision generated much discussion among commenters believing that it was unnecessarily restrictive. Even professional audiologists strongly disagreed on this issue. One commenter suggested that if the hearing protector reduced the level of sound energy reaching the ear to 80 dBA or less, this would effectively reduce the amount of baseline contamination to less than the usual amount of audiometric measurement error. Commenters also cited problems such as additional overtime wages, disruptions of work schedules, and non-occupational noise exposure.

In 1983, OSHA revised its Hearing Conservation Amendment to allow the use of hearing protectors as an alternative for the 14-hour quiet period prior to the baseline audiogram. OSHA concurred with the large number of commenters who testified that the use of hearing protectors may provide sufficient attenuation to prevent noise-induced TTS from contaminating baseline audiograms.

MSHA received many comments addressing this issue. Several of these stated that hearing protectors should not be substituted for the quiet period. Their general consensus can be summarized by one commenter who stated that:

> * * * the use of HPDs cannot be relied upon to reduce the noise in all cases to a level suitable to be considered quiet for the purpose of establishing baseline audiograms, especially if individual variations in susceptibility to noise induced hearing loss are considered.

Other commenters believed that the use of hearing protectors should be allowed because they prevent TTS. One such commenter wanted a qualification stating that:

> * * * in many instances it may simply not be practical or possible to test everyone for their baselines as they come to the workshift, and thus reliance on HPDs for the 14-hr. noise-free period is required. Thus MSHA should allow use of HPDs in lieu of the 14 hrs., but with the following stipulation:
>
> * * * no more than five days prior to the test, 1) the employees whose hearing is to be evaluated receive refresher training in the use of their protectors, and 2) the condition of the hearing protector(s) the employee is to wear is checked and found satisfactory. Any employee whose TWA exceeds 100 dBA shall be required to wear an earplug together with an earmuff * * *

Some researchers, Shaw (1985) and Suter (1983), contend that sound levels must be below 72 dBA to be considered ''effective quiet.'' Schwetz et al. (1980) found that a sound level below 85 dBA is needed for recovery of TTS. Individuals with TTS recovered their normal hearing quicker when exposed to 75 dBA sound level rather than 85 dBA. The NIOSH Criteria Document (1972) recommends a sound pressure level of 65 dB as ''effective quiet'' based on work by Schmidek et al (1972). Hodge and Price (1978) concluded that the level would have to fall below 60 dBA to be effective quiet and not contribute to the development of a TTS.

MSHA's proposal differs from OSHA's standard, in that it would not allow hearing protectors to be substituted for the 14-hour quiet period prior to the baseline audiogram. Although MSHA recognizes that its decision may pose some scheduling problems for mine operators, it should be emphasized that the quiet period is required only for the baseline audiogram. Mine operators, however, may choose to employ it for the annual audiograms.

MSHA has determined that the problems associated with the use of individual hearing protectors are too great to guarantee an accurate baseline measurement. Data indicate that in order to provide effective quiet, the sound levels encountered during the quiet period would need to be below 80 dBA. MSHA is particularly concerned with the ability of hearing protectors to attenuate noise to such low levels in order to prevent contamination of the baseline. Even at 80 dBA, some researchers concluded that this level may be inadequate for the most susceptible individuals. Moreover, the typical sound levels in mining are higher than those experienced in general industry; therefore, hearing protectors would need to attenuate the noise to a greater degree. Although MSHA contends that hearing protectors can provide some protection to miners whose exposures do not exceed the PEL, MSHA has concluded that engineering and administrative controls provide much more effective protection. MSHA's concerns with the ability of hearing protectors to provide adequate attenuation are addressed in connection with the requirements of proposed § 62.120(b), under the heading of *Hearing protector effectiveness*.

Notification to Avoid High Sound Levels

Section 62.140(b)(3) of the proposal would require mine operators to notify miners to avoid high levels of non-occupational noise during the 14-hour period before taking the baseline audiogram. This requirement is the same as OSHA's noise standard.

In the 1983 preamble to its Hearing Conservation Amendment (48 FR 9757), OSHA emphasizes that, even if workers received this information in training classes, such notification would aid memory and, thus, provide additional support to the goal of obtaining a valid baseline audiogram. OSHA concludes its discussion of this issue as follows:

> Although employers are not responsible for employee noise exposures sustained away from the workplace, the likelihood of non-occupational noise exposure contaminating the baseline audiogram can be substantially reduced by counseling workers of the need to avoid such exposures in the period before their baseline test. Therefore, this requirement is necessary and appropriate for the implementation of a successful hearing conservation program.

Only a few commenters offered an opinion on this specific issue in response to MSHA's ANPRM. These commenters agreed that workers need to be advised to avoid non-occupational noise exposure prior to taking the baseline audiogram.

MSHA believes that it is appropriate for operators to notify miners of the importance of avoiding high noise areas in order to obtain valid baseline audiograms. The proposed requirement is consistent with OSHA's noise standard and the limited commenter responses.

Annual Audiogram

Section 62.140(c) of MSHA's proposal requires that, after establishing a baseline, the miner to be offered a new

audiogram once every 12 months as long as the miner remains in the HCP.

Existing MSHA standards require coal mine operators to submit a hearing conservation plan, which includes conducting periodic audiograms, for each miner exposed to noise in excess of the PEL. Because the use of hearing protectors is considered to provide compliance with the PEL in this industry, few receive audiograms. Moreover, there are no standards requiring audiograms for metal and nonmetal workers.

OSHA requires, after the baseline audiogram has been obtained, an annual audiogram for each employee exposed at or above its action level to identify changes in hearing acuity, so that the use of hearing protectors can be prescribed or other follow-up measures initiated before hearing loss progresses. The preamble to OSHA's hearing conservation amendment (46 FR 4143) states:

> OSHA has chosen to retain the annual audiometric test requirement because of the potential seriousness of the hearing damage that can occur within a 2-year period. For employees exposed to high levels of noise, a 2-year period between audiograms might allow too much hearing loss to occur before identifying the loss and taking remedial steps.

In response to its ANPRM, MSHA received numerous comments that specifically addressed periodic audiograms. Many of these supported annual testing and a few recommended a different time period. These latter commenters suggested the following alternative time periods: once or twice a year, depending on the intensity of the exposure; every other year; and based upon need.

MSHA concludes that the determination of an STS in the one-year period between required audiograms is meaningful for detecting the type of problems for which HCP enrollment is the purpose. Detection of an STS triggers several important actions under the proposal. Retraining of the miner would be required. If the miner is enrolled in the HCP as a result of noise exposure above the action level, but the miner's noise exposure is below the PEL, detection of an STS would require the provision of a hearing protector—which a miner at that exposure level would otherwise not be required to utilize. If the miner was already using a hearing protector, it would have to be replaced. Detection of an STS would also require reevaluation of the engineering and administrative controls being used. Waiting two years or more between periodic audiograms could allow excessive hearing damage to miners. MSHA also recognizes that some miners may be more susceptible to hearing damage from noise exposure, and a few may be exposed to high sound levels, such that annual audiometric testing may not be frequent enough to prevent an STS.

In light of the comments to MSHA's ANPRM, the Agency's review of the literature and pertinent governmental regulations, and OSHA's existing requirements, MSHA has tentatively concluded that annual audiometric testing is both necessary and appropriate. Annual audiometric testing is an integral part of a comprehensive HCP.

Supplemental Baseline

Section 62.140(d) of MSHA's proposal would require the mine operator to establish a ''supplemental audiogram'' when: (1) the STS revealed by the annual audiogram is persistent, or (2) the hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram.

These proposed requirements are similar to those in OSHA's noise standard except for the terminology.

In response to its ANPRM, MSHA received numerous comments on circumstances in which it was not appropriate to use the original baseline audiogram. Many commenters were in favor of revising the baseline if an STS was persistent. One stressed the need for clear guidelines for baseline revision to avoid the use of a variety of creative methods which could result in different STS totals. Other commenters were in favor of revising the baseline if the annual audiogram showed an improvement in hearing. Another recommended revising the baseline only if the improvement was consistent for at least two or three consecutive tests. A final commenter wanted the baseline revised only if there was a testing error.

MSHA believes, after reviewing these comments and standards of the U.S. Armed Forces, that revising the baseline after an STS has been identified would prevent this same STS from being identified repeatedly. The annual audiogram on which the STS is identified would then become the ''supplemental baseline audiogram.'' This supplemental baseline would be used for comparison with future annual audiograms to identify a second STS. The ''baseline audiogram'' would continue to be used to quantify the total hearing loss in determining whether the loss constitutes a ''reportable hearing loss''. To avoid confusion in the mining industry, MSHA is proposing the term ''supplemental baseline'' rather than the term ''revised baseline'' used under OSHA. Since all audiograms are to be retained as part of the audiometric test record (see § 62.150(c)), supplementation of the baseline audiogram would not permit the destruction of the original baseline audiogram.

MSHA would also require supplementation of the baseline if the annual audiogram shows significant improvement in hearing level because this would more closely resemble the miner's actual hearing acuity prior to being exposed to occupational noise. In this case, supplementation of the baseline would be more protective because it would allow more accurate evaluation of the true extent of future hearing loss. Therefore, when a baseline is revised due to an improvement of hearing acuity, this supplemental baseline would be considered as the original baseline for determining when an STS occurs and for quantifying the total hearing loss for reportablility under part 50. The latter is reflected in the definition of reportable hearing loss.

Section 62.150 Audiometric Test Procedures

MSHA proposes not to include specific procedural requirements for conducting audiometric tests, calibrating audiometers, and qualifying audiometric test rooms. Instead, MSHA proposes a performance-oriented requirement that audiometric testing be conducted in accordance with scientifically validated procedures. MSHA would specify the test frequencies, but would allow the physician or the audiologist to use professional judgment in choosing the appropriate testing procedure(s) and require certification of the scientific validity of the procedures.

While this approach may require somewhat more in the way of paperwork requirements, MSHA believes this is far preferable to the alternative of a detailed specification standard, which could stifle technology and impede improvements in methodology.

The proposal would also specify what records must be maintained, and for how long, at the mine site. The proposed items included in the audiometric test record—name, job classification, audiograms and certifications as to the procedures used to take them, any exposure determinations, and the results of any follow-up examinations—would provide information essential for evaluating a miner's audiogram, among other purposes.

The records are to be retained for at least six months beyond the duration of the miner's employment. The six month retention period at the mine site would assure that the audiometric test records of miners who have short periods of unemployment are not destroyed and are available for use by the mine operator to conduct further evaluations upon the miner's return. In practice, MSHA believes that many mine operators will keep miner's audiograms long after the miner's employment ceases, for use if the miner should file a subsequent workers' compensation claim for hearing loss.

Currently MSHA's metal and nonmetal noise standards do not contain audiometric testing provisions. While Coal's noise standard requires audiometric testing, it does not specify how it is to be conducted. MSHA's proposal differs from OSHA's noise standard which contains detailed procedures in 29 CFR § 1910.95(h) and the associated Appendices C, D, and E.

Several commenters generally supported MSHA's adoption of audiometric testing requirements that are the same as OSHA's. A number of commenters made specific recommendations regarding various aspects of conducting audiograms including audiometric test instruments, calibration procedures, and audiometric test rooms. Since MSHA has decided not to specify audiometric test requirements in the proposed rule, a discussion of the comments on specific procedures is not included (except in the section which follows, *Test procedures).*

ANSI has several standards which impact the audiometric test procedure. ANSI S3.21–1978 ''Methods for Manual Pure-Tone Threshold Audiometry'' provides detailed procedures for conducting audiometric tests. ANSI S3.1–1991 ''Criteria for Maximum Ambient Noise Levels for Audiometric Test Rooms'' provides a criteria for the maximum background sound pressure levels neccessary in order to obtain a valid audiogram. ANSI S3.6–1996 ''Specifications for Audiommeters'' provides design criteria for various classes of audiometers.

After reviewing comments, the scientific literature and several governmental standards, MSHA chose not to include detailed, highly technical procedures and criteria for conducting audiometric testing in the proposal. Instead MSHA chose a performance-oriented approach by proposing to require that audiometric testing procedures be governed by scientifically validated methods. Because the person responsible for conducting the tests is a physician, audiologist, or qualified technician, he/she should be familiar with scientifically validated procedures. MSHA would allow the physician or the audiologist to use professional judgement in choosing the appropriate testing procedure(s).

Moreover, audiometer manufacturers provide recommendations on audiometer use and calibration (both laboratory and field). Because the manufacturers are aware of the intricacies of their instruments, they would be the most qualified to issue recommendations on the use and calibration of their audiometers. By following manufacturer's recommendations accurate audiometric testing is assured without MSHA mandating detailed calibration specifications.

By not specifying a single test procedure, MSHA would permit the use of any scientifically validated procedure. If a new, possibly more accurate procedure would be validated, the medical professional could readily adopt its use. If, however, current procedures were adopted in the rule, an amendment would be needed to permit the use of any new procedure.

Even though MSHA found no single comprehensive criteria for audiometric testing, save OSHA's, there are criteria which deal with various aspects of testing. For example, ANSI has standards on background sound pressure levels for audiometric testing, methods for pure tone audiometry, and for specifications for audiometers. MSHA expects that most audiograms would be conducted using OSHA's requirements, since many physicians and audiologists are familiar with those regulations. Further, many texts and CAOHC training courses discuss OSHA's audiometric testing procedures and criteria. Although MSHA has not proposed detailed specifications in its standard, the Agency contemplates publication of nonmandatory guidelines describing what it believes to be the latest scientific procedures for conducting audiometric tests.

MSHA, realizing that performance-oriented standards for audiometric testing may be controversial, solicits comments on this approach, and continues to solicit comments on the audiometric test procedures, permissible background sound pressure levels, and calibration requirements for audiometers.

Test Frequencies

The proposal would require that audiometric tests be pure tone, air conduction, hearing threshold examinations, with test frequencies at 500, 1000, 2000, 3000, 4000, and 6000 Hz. The proposal also specifies that these examinations be taken separately for each ear at the given test frequencies. In response to MSHA's ANPRM, no commenters specifically addressed audiometric test frequencies. Several, however, generally supported MSHA's adoption of audiometric testing requirements that are the same as OSHA's. MSHA's proposal would be consistent with OSHA's requirements with respect to testing frequencies, as well as consistent with the NIOSH criteria document (1972).

Although none of the commenters directly addressed audiometric test procedures, several stated that MSHA should adopt or follow the OSHA Hearing Conservation Amendment.

As noted in part II of this preamble, noise-induced hearing loss is a permanent sensorineural condition that cannot be improved medically. It is characterized by a declining sensitivity to high frequency sounds. This loss usually appears first and is most severe at the 4000 Hz frequency. The ''4000 Hz notch'' in the audiogram is typical of NIHL. Continued exposure causes the loss to include other audiometric test frequencies, with 500 Hz being the least affected. While 500, 1000, and 6000 Hz are not included in the definition of STS, MSHA, like OSHA, believes that these test frequencies contribute to a more complete audiometric profile and are helpful in assessing the validity of the audiogram as a whole. Furthermore, the inclusion of 500 and 1000 Hz makes it easier for an audiologist or physician to differentiate conductive hearing loss from NIHL, and the inclusion of 6000 Hz would better differentiate between presbycusis and NIHL.

Certification

Section 62.150(b) of MSHA's proposal would require that mine operators obtain a certification, from whomever conducts audiometric tests under this part, that such tests were conducted according to a scientifically validated procedure.

OSHA's current noise standard does not require such certification. OSHA has specific audiological test procedures, allowable background sound pressure levels in audiometric test rooms, and audiometer calibration requirements. MSHA's metal and nonmetal noise standards do not contain audiometric testing provisions. While Coal's noise standard requires audiometric testing, it does not specify how it is to be conducted.

MSHA did not address this issue of certification in its ANPRM and, therefore, no comments were received.

MSHA's proposal would relieve the mine operator from specifying the audiological test procedure and criteria. The mine operator would rely on the professional judgement of the physician or audiologist to select the appropriate tests and criteria. Certification would not be accepted from a qualified technician; pursuant to the proposed provisions in § 62.140, qualified technicians are to perform their work under the supervision of a physician or audiologist. MSHA believes that it is necessary for the physician or audiologist to certify that the audiological tests were conducted in accordance with a scientifically validated procedure. In most cases, the mine operator does not have sufficient medical knowledge to determine if the tests were properly conducted and must rely on the judgement of a physician or audiologist. The certification will stand as evidence that the audiological tests were conducted in accordance with the requirements for a scientifically validated procedure.

Audiometric Test Recordkeeping and Retention

Section 62.150(c) of MSHA's proposal would require that mine operators maintain a record of each required audiometric test. This record would contain—

(1) the name and job classification of the miner tested

(2) a copy of the miner's audiogram(s) (original baseline, annual, and supplemental baseline);

(3) certification(s) that the tests were conducted using scientifically validated procedures;

(4) any exposure determination for the miner; and

(5) the results of any follow-up examination(s).

This information would not have to be written on the actual audiogram as long as it was kept with the audiogram. The audiometric test records would be required to be maintained at the mine site for the duration of the affected miner's employment plus at least six months.

Although not defined in this proposal, by the term ''duration of employment'' MSHA means the period of time between the date of a miner's initial hiring and the date on which the miner is released, quits, retires, or dies. There must be a lapse of at least six months beyond formal termination of employment before a mine operator could destroy the audiometric test records. Moreover, it is MSHA's intent that a layoff, strike, lockout, furlough, period of leave (both paid and unpaid), or other temporary break in service would not be considered as a formal termination of employment, even if it exceeds six months.

MSHA's existing standards have no requirements in this area. OSHA's noise standard requires that employers maintain a record of the audiometric test results and maintain these records for the duration of employment.

Since the publication of the noise standard, OSHA promulgated 29 CFR 1910.20 Access to employee medical records. This standard applies to all medical records required to be kept pursuant to OSHA standards—noise records are treated in the same way as carcinogen records. Under 1910.20, OSHA requires that medical records for each employee be maintained for at least the duration of employment plus (30) years, with the exception of employees who have worked for less than (1) year for the employer. The medical records for these employees need not be retained beyond the term of employment if they are provided to the employee upon termination. Further this standard requires that exposure records be maintained for at least 30 years.

Additionally, OSHA's noise standard requires that the audiometric test record include—

(1) name and job classification of the employees;

(2) date of the audiogram;

(3) examiner's name;

(4) date of the last acoustic or exhaustive calibration of the audiometer; and

(5) employee's most recent noise exposure assessment.

Additionally, employers are required to maintain an accurate record of background sound pressure levels in audiometric test rooms. OSHA's noise standard has no requirement to maintain these records at the employer's work site.

MSHA received a number of comments specifically addressing time frames for maintaining audiometric test records. One commenter recommended that they be maintained for 30 years. Two commenters recommended that such records be retained for the duration of the miner's employment plus 30 years. Most of the commenters on this issue recommended that MSHA require that audiometric test results be kept for the duration of employment.

MSHA also reviewed the audiometric test recordkeeping and retention requirements from the U.S. Armed Forces and various other countries. Generally, the audiometric test record is to be maintained for at least the duration of employment.

MSHA considered allowing mine operators to keep the audiometric test record at a location other than the mine site. The Agency concluded, however, that this alternative was impractical because it could delay MSHA's access to such records. Furthermore, it would be burdensome for mine operators to copy and mail the records or send a fax of these records to the Agency.

MSHA believes that this record should be retained for at least six months beyond the duration of the miner's employment. The risk of harm stops with the cessation of employment; keeping the records an additional 6 months would assure that a miner's audiometric test records are not destroyed and are available for use by the mine operator to conduct further evaluations should a miner return within that time period. In practice, MSHA believes that many mine operators will keep miner's audiograms long after the miner's employment ceases, for use if the miner should file a subsequent workers' compensation claim for hearing loss. In some states, the worker has many years following employment to file such a claim.

The proposed items included in the audiometric test record would provide essential information to MSHA and to the health professional for evaluating a miner's audiogram. The information is also necessary for identifying the audiograms, evaluating whether the audiometric tests have been conducted properly, and for determining whether the results are valid. Further, the information is critical for the evaluator in determining whether an identified hearing loss was not work related or aggravated by occupational noise exposure.

Section 62.160 Evaluation of Audiograms

MSHA's proposal would require that the mine operator inform the person evaluating the audiogram of the requirements of this part and provide them with copies of the miner's audiometric test records. The mine operator would be responsible for having a physician, audiologist, or qualified technician determine if an audiogram is valid and if a standard threshold shift (STS) or reportable hearing loss has occurred—in which case certain actions are required pursuant to § 62.180 and § 62.190. Time frames and privacy protection are part of the proposal, as is a requirement for a prompt retest if an audiogram is invalid.

STS is defined in this proposal, as in OSHA's standard, as a change in a worker's hearing acuity for the worse,

relative to that worker's baseline audiogram, of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear. If the STS is determined to be permanent, a supplemental baseline is established pursuant to § 62.140 and this becomes the baseline for determining any future STS. This definition is sufficiently restrictive to locate meaningful shifts in hearing, yet not so stringent as to create unnecessary follow-up procedures; the averaging of hearing levels at adjacent frequencies will reduce the effect of testing errors at single frequencies.

The proposal would permit but not require mine operators to adjust audiometric test results by applying a correction for presbycusis before determining whether an STS or reportable hearing loss has occurred, and it includes tables for this purpose. Presbycusis is the progressive loss of hearing acuity associated with the aging process. The proposed adjustment for presbycusis is optional; however, if a mine operator uses this approach, it must be applied uniformly to both the baseline and annual audiograms in accordance with the procedures and values listed in the proposed standard. Although this is the position taken in the proposal, MSHA notes that the latest NIOSH advice on this topic has advised against the use of presbycusis correction factors. Moreover, the Agency is concerned about locking-in specific presbycusis adjustment tables. MSHA, therefore, requests additional comments on whether to use presbycusis corrections for audiograms and, if so, how to provide for such adjustment in a regulatory context.

MSHA's existing noise standards do not address the evaluation of audiograms. MSHA's proposed requirements would be similar to those in OSHA's noise standard; the few differences are noted below.

Information Provided to Reviewer

Section 62.160(a)(1) of MSHA's proposal would require that the mine operator inform the person evaluating the audiogram of the requirements of this part and provide the evaluator with copies of the miner's audiometric test records. OSHA requires employers to provide the persons evaluating audiograms with a copy of the requirements of its standard, copies of the employee's baseline and most recent audiometric test records, background sound pressure levels in the audiometric test room, and a record of audiometer calibration.

In its ANPRM, MSHA did not address what information the mine operator should provide to the person evaluating audiograms. The commenters, therefore, did not address this issue specifically. In discussing related topics, some commenters recommended that MSHA adopt OSHA's requirements on this issue.

Recently, research has implicated exposure to chemicals as aggravating hearing loss, Fetcher (1995), Morata (1989, 1993, 1995). MSHA requests comments as to how to address various aspects of this possible relationship. For example, could exposure to chemicals cause an invalid audiogram? What information should reviewers have about chemical exposure? Any research results on this topic would be welcome.

MSHA believes that providing certain information is necessary for physicians and audiologists to evaluate the accuracy and validity of miners' audiograms. For example, the evaluator would need to know the procedure for determining an STS, the criteria for retest or medical follow-up, presbycusis correction procedures, and recordkeeping requirements.

Review of audiogram. Under § 62.160(a)(2) of this proposal, the mine operator would be responsible for having a physician, audiologist, or qualified technician determine if an audiogram is valid and if an STS or reportable hearing loss has occurred. MSHA's proposal is consistent with the present OSHA noise standard.

Of the many commenters on this specific issue, most believed that professional review was necessary. One of these said that ''MSHA should require an audiologist or physician to evaluate audiograms that show standard threshold shifts [STS] or other unusual changes''.

A few commenters felt that professional review was unnecessary. These commenters indicated that the person conducting the audiogram could inform the employee of the results, and explain the significance of these results, so that the employee could make any decisions regarding further testing or evaluation.

The U.S. Armed Services and the international community vary on the medical expertise required to review audiograms.

MSHA believes that audiograms need to be reviewed for validity; as noted below, if audiograms are not valid, the proposal would require a retest. Examples of questionable audiograms are audiograms that show: large unilateral differences in hearing thresholds between the two ears; unusual frequency patterns that are not typical of NIHL; thresholds that are not repeatable; or an unusually large hearing loss over a yearly period. MSHA maintains that the review of audiograms is an integral part of an audiometric testing program.

Qualifications for Audiogram Reviewers

Under § 62.160(a)(2) of this proposal, a mine operator would be required to have a physician, audiologist or a qualified technician who would be under the supervision of a physician or audiologist evaluate audiograms to determine their validity and whether an STS or reportable hearing loss has occurred. The qualifications of these individuals to conduct this evaluation are discussed under § 62.140 *Qualifications of personnel* along with the comments received on this issue.

Standard Threshold Shift (STS)

This proposal would require the evaluator to determine whether a miner has incurred an STS in his/her hearing. STS is defined in this proposal as a change in a worker's hearing threshold relative to that worker's baseline audiogram of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear. This requires that hearing loss be calculated by subtracting the current hearing levels from those on the baseline audiogram at 2000, 3000, and 4000 Hz; when the hearing losses at each frequency are averaged (added up and divided by three); if the average loss in either ear has reached 10 dB, it constitutes an STS. If the STS is determined to be permanent, a supplemental baseline is established pursuant to § 62.140 and this becomes the baseline for determining any future STS. The definitions of ''baseline audiogram'', ''supplemental baseline audiogram'', and ''standard threshold shift'' are discussed in detail in connection with proposed § 62.110.

OSHA defines an STS in essentially the same way, requiring that employees' annual audiograms be compared to their baseline audiogram to determine if the annual audiogram is valid and if an STS has developed.

Of the numerous comments addressing the issue of STS in response to MSHA's ANPRM, many endorsed OSHA's definition of STS. One commenter stated that:

> The Standard Threshold Shift (STS) concept is the basic foundation of a hearing conservation program and is the best indicator of early noise-induced hearing loss [NIHL]. It enables those conducting the audiometric examinations to have the needed ''red flag'' to indicate when additional testing or evaluation is needed. It also enables the effectiveness of the employer's hearing conservation program to be evaluated and monitored. The criteria must be sensitive enough to identify meaningful changes in hearing but must not be so sensitive as to

pick up spurious shifts or ''false-positives.'' * * * Identifying a standard threshold shift therefore means that the shift value must be outside the range of audiometric error (± 5 dB) and serious enough to warrant prompt attention.* * * The averaging of shifts over adjacent frequencies minimizes normal test error, and random errors will tend to cancel each other out. * * *

In considering the frequencies to be used, it is noted that 4000 Hz is generally considered to be affected by noise the earliest and most severely. The 2000 and 3000 Hz frequencies are very important in understanding speech and should also be included in the definition of STS.

For the above-mentioned reasons, as well as simplifying the process in facilities which have operations under both MSHA and OSHA jurisdiction, we recommend MSHA adopt an average shift of 10 dB or more at 2000, 3000, and 4000 Hz, relative to the baseline audiogram. * * *

Of those commenters who did not endorse OSHA's STS criteria, one stated that OSHA's STS definition was ''* * * not stringent enough and the worker hearing loss has progressed too far with this shift to be a reliable preventive measure.'' Another stated—

* * * the suggested criteria [OSHA's STS definition] provides no benefit but additional testing, specialist costs, reporting, administrative costs, and potential MSHA punitive fines. * * *

The STS concept is misguided. A significant percentage * * * of people will have changes take place in their hearing which would qualify as an STS without any exposure to occupational noise.

Royster (1992) proposes a definition of STS that is different from OSHA's. In her definition, 15 dB of hearing loss (relative to the baseline) must occur at any audiometric test frequency from 500 to 6000 Hz on two sequential audiograms, before the STS is established. The 15 dB of hearing loss which occurs on two sequential audiograms identifies the largest number of true positives (permanent threshold shifts) and the least number of false positives (temporary threshold shifts mistakenly identified as permanent threshold shifts).

NIOSH (1995) recommends that the criteria for an STS be a 15 dB decrease in hearing acuity at any one of the audiometric test frequencies from 500 to 6000 Hz on two sequential audiograms. The shift in hearing acuity must be in the same ear. The second audiogram would be administered as soon as reasonable. NIOSH believes this criteria is sufficiently stringent to detect beginning hearing loss, yet won't include workers whose hearing acuity is simply showing normal variability. If the 15 dB change is found, an immediate retest should be conducted and followed by a confirmation test within 30 days. The confirmation test should be preceded by 14 hours of quiet.

This draft criteria for STS differs from the criteria recommended by NIOSH in their 1972 criteria document. NIOSH's previous criteria defined STS as a change of 10 dB or more at 500, 1000, 2000 or 3000 Hz; or 15 dB or more at 4000 or 6000 Hz.

There are some instances where large shifts in hearing level occur at higher test frequencies (4000 and 6000 Hz) with little or no change in hearing level at the middle frequencies. While large shifts are uncommon, they may occur in noise-sensitive individuals, especially in the early stages of NIHL. Correctly identifying significant threshold shifts is particularly important for workers who have already begun to lose their hearing. The proposed definition of STS would identify individuals suffering shifts as large as 30 dB at 4000 Hz with no shifts at the lower frequencies (30 plus 0 plus 0 divided by 3 equals 10, an STS). This permits the early identification of individuals at risk, so that corrective measures could be taken.

MSHA's proposed definition of STS is sufficiently restrictive to locate meaningful shifts in hearing, yet not so stringent as to create unnecessary follow-up procedures. The averaging of hearing levels at adjacent frequencies will reduce the effect of testing errors at single frequencies. The occurrence of an STS is serious enough to warrant prompt attention because it may be a precursor to material impairment of hearing. It is important to note that MSHA does not equate STS with material impairment caused by NIHL.

MSHA believes, after considering the relevant factors and reviewing current U.S. military and international standards, that the proposed definition of STS is the most appropriate and consistent with the purposes of its hearing conservation standard. The proposed definition of STS—

(1) is adequately supported in OSHA's record for its Hearing Conservation Amendment;

(2) is the criteria recommended or accepted by most commenters to MSHA's ANPRM;

(3) results in a high degree of accuracy in identifying workers for follow-up;

(4) concentrates on those frequencies that are the earliest or the most severely affected by noise; and

(5) is a recognized and relatively simple approach.

Because NIOSH revised its recommendation for the criteria of an STS, MSHA requests comments on NIOSH's new criteria. Furthermore, any data on the advisability of using either the MSHA proposed criteria of STS or NIOSH's criteria of STS would be welcomed.

Reportable Hearing Loss

The proposal would require the evaluator to determine if there has been a ''reportable hearing loss''. See the discussion of ''Reporting noise-induced hearing loss (NIHL)'' under § 62.190 *Notification of results.*

Instruction to Medical Professional

Section 62.160(a)(3) of the proposal would require the mine operator to instruct the physician or audiologist not to reveal to the mine operator any specific findings or diagnoses unrelated to the miner's exposure to noise or the wearing of hearing protectors without the written consent of the miner. Currently, neither MSHA nor OSHA have such a provision in their noise standards; OSHA does have such provisions in air quality standards like benzene and lead.

The topic of instructions to medical professionals was not raised in the ANPRM. Therefore, no comments on this issue were received.

MSHA believes that this requirement is necessary to safeguard the privacy of individuals. The mine operator does not need to be informed of medical conditions unrelated to occupational noise exposure. MSHA's rationale is that if the mine operator had confidential medical information, the mine operator could use it to justify an adverse action against the miner.

30-Day Requirement

According to § 62.160(a)(4) of MSHA's proposal, the mine operator would have 30 days to obtain the audiometric results and the interpretation of the results from the person evaluating the audiogram. OSHA does not specify a time period for evaluating audiograms.

MSHA's ANPRM did not address the issue of time frame for evaluating audiograms. A few commenters, however, expressed concern with the length of time that some service providers take to report results to the employer. One stated that:

Service providers have taken undue advantage of a perceived 'grace period' in the OSHA Hearing Conservation Amendment to inform employees of a shift in hearing. * * * the lag time may total six to eight weeks. This is a disservice to the employee, and is certainly preventable.

Notification of STS, including the optional retest of STS-affected employees, should be completed within a 30-day period following testing. OSHA's time limit of 21 days following notification to the employer creates a loophole which makes the employee wait all too long for feedback regarding STS.

The other commenter stated that:

In reality, from the time the hearing test is sent to an audiologist or physician to review, it is reviewed, recommendations made, it is returned to the plant personnel and the plant has 21 days to notify the employee, the total process often stretches into a 45–60 day time frame.

MSHA believes that a 30-day limit to evaluate audiograms is reasonable and necessary to prevent undue delays in the evaluation of the audiogram and notification to the miner of the results. Under proposed § 62.190, a miner would have to be notified within 10 working days of audiogram results obtained by the mine operator, as discussed in connection with that section; accordingly, the net result of these provisions is a maximum delay of approximately 44 days from the date of audiometric testing to the notification of the miner. If a retest was conducted, which, as discussed below must be done within 30 days of receiving a determination that the original test was invalid, this delay in notification could be as long as 104 days. If the miner's employment ceases during this delay period, the mine operator would be required to provide the miner with a copy of the audiometric test records as required by § 62.200(c), including the results of all testing, as soon as the record is complete. MSHA welcomes comments on this issue.

Audiometric Retest

Section 62.160(b)(1) of the proposal would require a mine operator to conduct a retest, if the audiogram was judged to be invalid, within 30 calendar days of receiving this information—provided, however, that the 30-day time frame is stayed until any medical pathology resulting in the invalid audiogram has improved to the point that a valid audiogram may be obtained. In addition, § 62.160(b)(2) of the proposal would allow a mine operator to obtain one retest within 30 days after an STS or reportable hearing loss is found, and to substitute the retest audiogram for the annual audiogram. The latter retest is not mandatory.

OSHA also permits a retest within 30 days to confirm an STS, but does not specifically require a retest if the audiogram is judged to be invalid.

Many commenters supported OSHA's retest provision as written, while others supported it with qualifications. One commenter believed that a 60-day period was appropriate. Another believed that a 30-day limitation to both retest and notify was appropriate because:

Service providers have taken undue advantage of a perceived grace period in the OSHA Hearing Conservation Amendment to inform employees of a shift in hearing. By the time audiometric tests are administered, entered into a computer, returned to an employer, and then finally returned to the employee, the lag time may total six to eight weeks. This is a disservice to the employee, and is certainly preventable.

Other commenters stated different views. One commenter stated that:

* * * most programs involve the use of testing vans that cannot easily make a return trip in 30 days because of scheduling limits. It would also be extremely expensive to make a return trip to confirm a single STS. If an employee is found to have a significant hearing loss, he should be required to wear hearing protectors in all noise environments of 85 dBA or greater. If the next scheduled audiogram also shows the hearing loss, then the loss should be considered confirmed.

Another commenter stated that:

* * * an employee with a change in hearing could be immediately counseled, refitted [i.e., hearing protectors], educated, notified and return to his job. This would be more cost-effective than bringing him back prior to the shift to get a hearing test showing there is no STS.

MSHA believes, after considering comments and reviewing U.S. armed forces and international standards, that the retest provisions are necessary to assure that valid audiograms are provided in a timely fashion. The retest should be conducted within a reasonable time, and 30 days is believed to be adequate, with the caveat that this time frame does not begin to run until any medical pathology causing a validity problem has improved to the point that a valid audiogram can be obtained. MSHA recognizes that in such cases it will not be possible to wait for a mobile van; but MSHA believes that in the limited number of cases where a retest is required, it is appropriate and necessary to send the miner to the nearest available facility for such a test.

The provision to obtain an optional retest if an STS is detected is desirable. This would permit the mine operator to substantiate that an STS had occurred, thus confirming permanent hearing loss. By detecting only permanent hearing loss, the mine operator would have better information on which to base administrative, technical, and financial decisions relative to retraining the miner, permitting the miner to select a different or additional hearing protector, and reviewing the effectiveness of the noise controls.

Use of Age Correction (Presbycusis Factors)

Section 62.160(c) of the proposal would permit mine operators to adjust audiometric test results by applying a correction for presbycusis before determining whether an STS or reportable hearing loss has occurred. Presbycusis is the progressive loss of hearing acuity associated with the aging process. This adjustment for presbycusis is optional; however, if it is used, it must be applied uniformly to both the baseline and annual audiograms in accordance with the procedures and values listed in § 62.160(c) (1) through (4).

OSHA's noise standard also permits the use of presbycusis correction factors. MSHA's proposal would be essentially the same as OSHA's Appendix F: Calculations and Application of Age Corrections to Audiograms. Both MSHA's proposal and OSHA's Appendix F adopt the procedures and age correction tables used by NIOSH in its criteria document (1972).

Commenters to OSHA's Hearing Conservation Amendment (48 FR 9763) suggested that the use of such presbycusis factors also would account for those cases of NIHL that arise from causes other than occupational noise exposure. In the preamble to its Hearing Conservation Amendment (48 FR 9763), OSHA states that:

* * * these correction factors will aid in distinguishing between occupationally induced and age-induced hearing loss. This is particularly important because the pattern of hearing loss due to aging closely resembles that of noise-induced hearing loss [NIHL]. * * * Therefore, although * * * the use of a correction factor may complicate calculation procedures and cause some errors, * * * professional supervision of the hearing conservation program will ensure that audiometric technicians understand how to use the age correction chart * * *

Most commenters who addressed this issue in MSHA's ANPRM, contend that the use of presbycusis correction factors is appropriate. Many of these commenters supported MSHA's use of the same criteria as in OSHA's Appendix F. Other commenters recommended age corrections different than those used by OSHA. One commenter suggested that MSHA use the ISO 1999.2 (1989) standard. Another one suggested that, because the NIOSH criteria is almost 20 years old, ''The criteria used should be the most recent and [accepted] data.''

Several commenters believed that applying presbycusis factors would reduce unnecessary recordkeeping and follow-up procedures. One stated that:

Many audiometric computer programs used for processing data have this correction calculation built in the software. To change to some other criteria or to remove this factor will result in the modification of numerous systems and a need to switch back and forth,

depending on whether the operator is OSHA or MSHA regulated.

Another of these suggested that MSHA require the use of such correction factors, rather than allow their use to be optional, because such optional use could result in discrepancies in results among audiometric testing services.

A few commenters suggested that it would be better not to adjust audiometric test results for presbycusis. They maintained that the place to claim credit for presbycusis is in determining workers' compensation and not in the institution of an HCP. These commenters believed that not everyone who ages loses their hearing to the same degree, and that the use of presbycusis corrections might mask changes for older adults who have previously had good hearing.

Finally, one commenter recommended that MSHA seek medical advice from national sources to determine what the medical community recognizes as changes occurring from aging.

In contrast to NIOSH's presentation of one set of presbycusis data, the ISO Document ISO 1999:1990(E) (1990) gives a dual set of values for the non-industrial noise exposed population. These data are offered in two tables. One table represents a highly screened, otologically normal population, i.e., persons in a normal state of health, free from all signs and symptoms of ear disease and obstructing wax in the ear canals, and having no history of undue exposure to noise. The second table represents an unscreened population from an industrialized country. The ISO states that the choice of using the screened or unscreened data base depends on what question is to be answered. It states:

> For example, if the amount of compensation that could be due to a population of noise-exposed workers is to be estimated, and otological irregularities and non-occupational noise exposure are not considered in compensation cases, unscreened populations will form the more appropriate data bases.

The ISO further states, however, that its standard ''* * * is based on statistical data and therefore shall not be used to predict or assess the hearing impairment or hearing handicap of individual persons.'' The ISO data would be more difficult to use than NIOSH data because its interpretation would require a higher level of statistical and mathematical expertise.

NIOSH (1995) now recommends that audiograms not be corrected for presbycusis. NIOSH believes that it is inappropriate to apply presbycusis correction factors from a population to an individual. Furthermore, there are no data to confirm that a 50 year old in 1995 will incur the same hearing loss due to aging that a 50 year old did in 1970. If the worker's audiogram is to be corrected for presbycusis, then the hearing loss of a non-occupational noise exposed group with the same demographic characteristics as the worker should be used. However, these kinds of data are not complete nor are they readily available.

The following is an example of the use of presbycusis correction factors as proposed in MSHA's noise standard—

(a) Determine from Tables 62–3 or 62–4 the age correction values for the miner by—

(1) Finding the age at which the baseline audiogram (or supplementary baseline audiogram if appropriate) was taken and recording the corresponding values of age correction at 2000 Hz through 4000 Hz; and

(2) Finding the age at which the most recent audiogram was taken and recording the corresponding values of age correction at 2000 Hz through 4000 Hz.

(b) Subtract the value found in step (1) from the value found in step (2). The differences calculated represent that portion of the change in hearing that may be due to aging.

(c) Subtract the value found in step (b) from the hearing threshold level found in the annual audiogram to obtain the adjusted annual audiogram hearing threshold level.

(d) Subtract the hearing threshold in the baseline audiogram (or supplemental baseline audiogram as appropriate) from the adjusted annual audiogram hearing threshold level to obtain the age-corrected threshold shift.

Example: A miner is a 32-year-old male. The audiometric history in decibels is shown below for his right ear. A threshold shift of 10 dB at 2000 and 3000 Hz and 20 dB at 4000 Hz exists between the audiograms taken at ages 27 and 32. A retest audiogram has confirmed this shift.

Miner's age	Audiometric test frequency (Hz)		
	2000	3000	4000
26	5	5	10
*27	0	0	5
28	0	0	10
29	0	5	15
30	5	10	20
31	10	20	15
+32	10	10	25

An asterisk (*) has been used to identify the supplemental baseline audiogram and a plus (+) the most recent audiogram. The annual audiogram taken at age 27 becomes a supplemental baseline audiogram (and is used in calculating hearing loss) because it shows a significant improvement over the baseline audiogram taken at age 26.

Steps (a) and (b). Find the age correction values (in dB) at age 27 and age 32 in Table 62–3. The difference, shown below, represents the amount of hearing loss that may be attributed to aging in the time period between the baseline audiogram and the most recent audiogram.

	Frequency (Hz)		
	2000	3000	4000
Age 32	5	7	10
Age 27	4	6	7
Difference	1	1	3

Step (c). Subtract the difference determined in step (b) from the hearing levels in the most recent audiogram. In this example, the adjusted hearing threshold levels are as follows:

	Frequency (Hz)		
	2000	3000	4000
Age 32	10	10	25
Correction	1	1	3
Adjusted	9	9	22

Step (d). Subtract the hearing threshold level in the baseline audiogram from the adjusted annual audiogram hearing threshold to obtain the age-corrected threshold shift.

	Frequency (Hz)		
	2000	3000	4000
Adjusted	9	9	22
Baseline	0	0	5
Shift	9	9	17

The average threshold shift at 2000, 3000, and 4000 Hz *without* age correction is (10+10+20)/3=13.3 dB. The average age-corrected threshold shift at 2000, 3000, and 4000 Hz is (9+9+17)/3=11.7 dB. This shift is an STS because it exceeds 10 dB, but it is not, as yet, a reportable hearing loss (25 dB). Intervention at this point should prevent further loss and subsequent impairment.

MSHA agrees that not all individuals are affected by presbycusis to the same degree. Additionally, studies have

shown that individuals in environments free from noise exposure display little evidence of presbycusis. MSHA is concerned that the use of presbycusis corrections may allow some miners to incur excess work-related hearing loss. For example, some miners may not have off-the-job noise exposure and may not have a decrement in their hearing due to aging at the levels specified in the presbycusis correction table. Nevertheless, MSHA maintains that at this time, allowing the adjustment of audiometric test results for presbycusis is both reasonable and appropriate. In industrial audiometry, this correction is often used to determine occupational NIHL by adjusting the measured hearing level to compensate for the normal loss of hearing due to aging. This is particularly important because the pattern of hearing loss due to aging resembles that of NIHL. The use of age corrections will help the mine operator judge how well the HCP is working. Such adjustments are consistent with current scientific practice, OSHA's standard, and the recommendations of the majority of the commenters to MSHA's ANPRM.

MSHA selected the NIOSH presbycusis data so that all mine operators who correct audiograms for aging will be using the same data. Though there may be slight variations at individual frequencies, the NIOSH presbycusis values are similar to those of other well known presbycusis data bases, such as the U.S. Public Health Service data, those used by Robinson and Burns, and those of Passchier-Vermeer. The NIOSH data are for a highly screened population which excluded individuals with any significant noise exposure on-the-job, off-the-job, or during military service. Using a single set of presbycusis values will standardize the process of determining STS nationwide. If MSHA allowed mine operators to select their own presbycusis values, there could be major nonuniformity in determining STS's and reportable hearing losses. Nevertheless, the Agency is concerned about locking-in particular presbycusis adjustment tables, and requests additional comments on how to provide for a presbycusis adjustment in a regulatory context.

In conclusion, MSHA believes that, at this time, scientific data and the consensus of commenters support allowing the use of the presbycusis correction factors presented in Tables 62–3 and 62–4. Although this is the position taken in the proposal, MSHA notes that the latest NIOSH advice on this topic has advised against the use of presbycusis correction factors. MSHA, therefore, requests additional comments on whether to use presbycusis corrections for audiograms.

Section 62.170 Follow-up Evaluation When Audiogram Invalid

This section of the proposal provides that when a valid audiogram cannot be obtained due to a suspected medical pathology of the ear, and the physician or audiologist evaluating the audiogram believes that the problem was caused or aggravated by the miner's exposure to noise or the wearing of hearing protectors, a miner must be referred for a clinical audiological or otological evaluation as appropriate at mine operator expense.

This section also provides that if the physician or audiologist concludes that the suspected medical pathology of the ear which prevents obtaining a valid audiogram is unrelated to the miner's exposure to noise or the wearing of hearing protectors, the miner be advised of the need for an otological evaluation; but in such cases, no financial obligation would be imposed on mine operators.

Finally, this section would require the mine operator to instruct the physician or audiologist not to reveal to the mine operator any specific findings or diagnoses unrelated to the miner's exposure to noise or the wearing of hearing protectors without the written consent of the miner.

OSHA's noise standard has similar follow-up requirements, except for the nondisclosure provision. MSHA's current noise standards have no follow-up evaluation provisions.

In response to MSHA's ANPRM, many commenters supported OSHA's or similar requirements for referring employees to a physician for a medical follow-up. A few commenters, however, stated that ''MSHA need not include criteria for directing miners for further medical follow-up nor require a physician, audiologist, or other qualified medical personnel to evaluate the audiograms.''

Another commenter stated the following regarding who should pay for these follow-up evaluations:

> * * * I have a standard recommendation when working with companies that they pay for all initial medical evaluations in order to determine disposition. I think it is as important to them to have documentation that an employee has a medical problem just as [when] he has an occupational one.

The decision as to which type of evaluation, clinical audiological evaluation or otological, is appropriate will depend upon the circumstances. Standards from the international community and the U.S. Armed Forces vary to some degree regarding certain elements, such as the extent of follow-up examinations. A clinical audiological evaluation is generally more comprehensive, intensive, and accurate than the routine audiometric testing conducted for HCP purposes. For example, such testing may be warranted if an unusually large threshold shift occurs in one year given relatively low noise exposures. An otological evaluation, on the other hand, is a medical procedure conducted by a physician specialist (e.g., otolaryngologist) to identify a medical pathology of the ear. Audiometric testing can imply the existence of such a medical pathology. For example, a hearing loss in only one ear can indicate the existence of an acoustic neuroma (type of tumor) at an early stage. Such discovery could be potentially life saving. Another more common reason for an otological examination would be for the removal of impacted ear wax (cerumen) which reduces hearing acuity and can be aggravated by the use of insert-type hearing protectors.

Making the determinations under this section would not require a diagnosis by a physician specialist confirming a medical pathology. The proposal is intended to allow the audiologist or physician authorized to review the audiograms to make a determination as to whether a follow-up examination is appropriate—and who pays for it. Accordingly, the word ''suspected'' precedes the words ''medical pathology'' in this section.

If the person evaluating the audiogram believes that the suspected medical pathology is related to occupational noise exposure or to the wearing of hearing protectors, the proposal would require the mine operator to pay for the miner's follow-up medical evaluations. MSHA believes that the mine operator has the primary responsibility for work-related medical problems. On the other hand, if the person evaluating the audiogram determines that the suspected medical pathology is not related to the wearing of hearing protectors, then the proposal would require the mine operator to instruct the medical professional to inform the miner of the need for medical follow-up, but would not require the mine operator to pay for it or to be informed of the findings. In such cases, therefore, the follow-up otological examination would be at the miner's expense. Although MSHA agrees that taking action to keep miners healthy would be beneficial to the mine operator, the Agency contends that it would be inappropriate to require mine

operators to pay for non-work-related medical problems.

MSHA also does not believe that it would be appropriate for mine operators to be informed of medical findings that are unrelated to the miner's occupational noise exposure or to the wearing of hearing protectors. If a mine operator would want this information, the proposal would permit the release of this information only upon the written consent of the miner. MSHA has included this provision out of concern for the privacy rights of the miner. A related provision is considered in somewhat more detail in the discussion of proposed § 62.160.

Section 62.180 Follow-Up Corrective Measures When STS Detected

MSHA's proposal would require that, unless a physician or audiologist determines that an STS is neither work-related nor aggravated by occupational noise exposure, mine operators would have 30 calendar days after the finding of an STS to—

(1) Retrain the miner in accordance with § 62.130;

(2) Provide the miner with the opportunity to select a hearing protector, or a different hearing protector if the miner has previously selected one, from the selection offered under § 62.125; and

(3) Review the effectiveness of any engineering and administrative controls to identify and correct any deficiencies. In addition, pursuant to proposed § 62.120(b), an operator would be required to ensure that a miner who has incurred an STS wears provided hearing protection.

A hearing loss of 10 dB from a miner's prior hearing level is of enough significance to warrant intervention by a mine operator, unless it is determined the loss is not work-related. If the controls in place are effective—including the training—this loss should not be occurring. It should be noted that the retraining required is to take place within 30 days after the finding of the STS, and thus it is unlikely mine operators can satisfy this requirement through their part 48 training programs.

MSHA's proposal does not include a provision for transferring a miner who incurs repeated STS's or a reportable hearing loss. A miner transfer program would be complex to administer, and would probably not be feasible in the metal and nonmetal sector. This sector consists largely of smaller mines which may be unable to rotate workers to other assignments on a long-term basis.

Most commenters on this issue suggested that MSHA adopt OSHA's requirements. One of these commenters, however, disagreed with OSHA's allowance for discontinued use of hearing protectors when an STS was found to be temporary. The remaining two commenters recommended that the mine operator only be required to retrain the miner in the use and fit of the hearing protector.

OSHA's noise standard requires that the work-relatedness of an STS be determined only by a physician. Employees, who have a work-related STS and are not using hearing protectors, must be fitted with hearing protectors, be trained in their use and care, and be required to use them. Employees who have an STS and are using hearing protectors must be refitted, be retrained, and be provided with hearing protectors offering greater attenuation when necessary. OSHA does not stipulate a time frame for conducting follow-up procedures.

MSHA believes that audiologists have sufficient training and medical expertise to determine the work-relatedness of an STS, and that it would be needlessly restrictive to limit this determination to a physician as in OSHA's standard.

MSHA, however, like OSHA would not permit technicians to make this determination. MSHA believes that while qualified to conduct and evaluate audiograms under the supervision of a physician or audiologist, technicians do not have the necessary training nor medical expertise to determine if an STS is work related. MSHA has determined that it is necessary to have a physician or audiologist determine the possible work relatedness of any STS. For example, the physician may determine that a miner's STS resulted from: a bad cold or sinus condition; taking certain medication, such as heavy doses of aspirin; or an acoustic neuroma (type of tumor). Careful diagnosis may, on the other hand, reveal that the STS is work related and caused by improper fit of the hearing protector.

MSHA, after reviewing comments and related regulations, believes that the proposed corrective measures are adequate and necessary to prevent further deterioration of the miner's hearing acuity after an STS has been determined. MSHA believes that the 30 day requirement for retraining, selection of a hearing protector or different hearing protector, and evaluation of noise controls is reasonable.

Retraining

If a miner has an STS, § 62.180(a) of this proposal would require that the miner be retrained in accordance with § 62.130, and a record kept of such training.

The specific training elements contained in § 62.130 are discussed in the provisions of this preamble describing those respective sections, including the required certification thereof. Such retraining could be conducted in conjunction with the annual refresher training, under 30 CFR part 48, but only if the latter is so approved and scheduled to be completed within 30 days of the finding of an STS. If the annual refresher training is not conducted within 30 days, the retraining for miners with an STS would have to be conducted separately. It would not be permissible to wait until the next annual refresher training.

Provide Opportunity To Select a Hearing Protector or Different Hearing Protector

In the mining industry, miners are typically exposed to high sound levels and some of the miners may be more susceptible to hearing loss from the noise exposures than others. Consequently, if a miner is diagnosed with an STS, then he or she must be given the opportunity to select a hearing protector or different hearing protector.

Section 62.180(b) of this proposal directs the mine operator to afford the miner the opportunity to select adequate hearing protection from those offered by the mine operator under § 62.125. While that section of the proposal only requires the mine operator to offer one type of ear plug and one type of ear muff, MSHA presumes that most mine operators will offer a range of each. Pursuant to § 62.120(b), the operator is required to ensure that a miner with an STS wears the hearing protector.

The choice of hearing protectors from this selection will be based on the miner's personal preference. The benefits of allowing the miner to select his/her hearing protector are discussed under § 62.125 *Selection of hearing protector.* MSHA believes that even though a miner may select a protector with a noise reduction rating lower than that which might be selected by a mine operator in such cases, factors such as comfort are more critical in ensuring that the miner will fully utilize this critical piece of personal protective equipment. Moreover, as discussed in the section on *Hearing protector effectiveness,* MSHA has concluded that there is no standardized objective method to determine whether an additional or different hearing protector would provide the miner with greater protection. MSHA requests further comment on this issue.

Review Effectiveness of Controls

Upon the finding of an STS, MSHA would require, under § 62.180(c) of the proposal, the mine operator to review the effectiveness of any engineering and administrative controls. The mine operator would need to correct any deficiencies. The implementation and maintenance of either engineering or administrative controls or a combination of such controls above the PEL is the primary method for reducing a miner's noise exposure and, thus, reducing the risk of hearing loss. OSHA's current noise regulation does not require a review of the effectiveness of engineering and administrative controls when an STS is found.

The inadequacy of engineering or administrative controls or a combination of such controls may well be the contributing factor in the development of a miner's STS. Thus, the proposal would require the mine operator to review the effectiveness of controls and update or modify them, as necessary and feasible, to reduce the miner's noise exposure.

Miner Transfer

The Federal Mine Safety and Health Act of 1977 (30 U.S.C. 811) requires health standards to include, as appropriate, provisions for removing a miner from hazardous exposure where that miner may suffer material impairment of health or functional capacity. MSHA has decided not to include such a provision in its proposal.

MSHA's current noise standards do not contain such a transfer provision. Nor does the OSHA noise standard have such a requirement.

In its ANPRM, MSHA requested comments regarding the need for a transfer provision in the proposed rule for a miner with a diagnosed occupational hearing loss. In response, many commenters stated that a miner transfer provision is not appropriate. Some of the concerns expressed by the commenters included: the negotiation of disability accommodation sections in labor contracts; problems with rate retention and seniority provisions in existing contracts; the contribution of non-occupational noise exposure to the hearing loss; uncertainty as to the etiology of the hearing loss; and the impracticality in small operations. However, several commenters disagreed, indicating that the transfer of a miner is appropriate when other efforts to halt the progression of the hearing loss have failed. They added that the safety of a miner with a hearing loss would be jeopardized, due to the inability to hear warning signals and/or understand verbal instructions in the noisy environment (a hazard to other miners as well).

Several of the U.S. Armed Forces, and some other countries, allow for removal or transfer of employees from noisy areas.

Although MSHA would encourage mine operators to transfer miners who have incurred a hearing impairment, MSHA believes that a miner transfer provision would not be feasible, at the vast majority of small mining operations, because of limited personnel and non-noise exposed occupations. At larger mines transfer may be feasible; however, MSHA believes that the obligation to utilize all feasible administrative (as well as engineering controls) would reduce miner exposure time to harmful noise in much the same way as a transfer provision but without unwarranted complexity.

Section 62.190 Notification of Results; Reporting Requirements

This section of the proposal would require that miners be notified of audiometric test findings, and that the Agency be notified of any instances of ''reportable hearing loss.''

The proposal would require the mine operator, within 10 working days of receiving the results of an audiogram, or the results of a follow-up evaluation pursuant to § 62.170(a)—those follow-ups on which the mine operator would receive results—to notify the miner in writing of the results and interpretations, including any finding that an STS or reportable hearing loss has occured. The notification would include an explanation of the need and reasons for any further testing or evaluation that may be required.

MSHA believes that informing miners of the results of their audiometric tests in a timely manner is critical to the success of an HCP. Immediate feedback upon completion of the testing provides the greatest benefit.

The proposal would require mine operators to inform MSHA of any reportable hearing loss, unless the physician or audiologist has determined the loss is neither work-related nor aggravated by occupational noise exposure. This essentially restates for noise the requirements of 30 CFR part 50, but with an explicit definition of reportable hearing loss for the first time. Having a uniform definition will ease reporting burdens on mine operators while promoting the development of an improved data base on hearing loss in the mining community.

The proposal would define a reportable hearing loss as a change in hearing acuity for the worse relative to the miner's baseline audiogram of an average of 25 dB or more at 2000, 3000, and 4000 Hz in either ear. Should an annual audiogram actually indicate an improvement in hearing at any time, this audiogram would, pursuant to § 62.140, become the baseline for purposes of determining whether a reportable hearing loss has occurred. As noted herein, MSHA is seeking comment on whether part 50 should collect information on harm on less dramatic shifts in hearing acuity, and how reporting should be accomplished in cases in which an operator lacks audiometric data.

Notification of the Miner

Section 62.190(a) of MSHA's proposal would require that within 10 working days of receiving the results of an audiogram or follow-up evaluation, the mine operator shall notify the miner in writing of—

(1) the results and interpretation of an audiometric test, including any finding of an STS or a reportable hearing loss; and

(2) if applicable, the need and reasons for any further testing or evaluation.

MSHA has no current requirements in this area. The proposed time frame is consistent with the time frame for notification to the Agency, under part 50, of cases of reportable hearing loss. MSHA's proposal would differ from OSHA's standard in this regard and in several other respects: the miner would be informed of the need and reason for further medical evaluations, and the miner would be informed of the finding of a reportable hearing loss. Moreover, OSHA's requirement does not specify how long, following the annual audiogram, an employer can take to make this determination.

All commenters on this issue favored notifying the employee of the results of audiometric testing and follow-up examinations. They differed, however, as to the time to be allotted for such notification and the requirements of such notification.

Many commenters endorsed OSHA's requirements. One commenter agreed that written notification be provided within 21 days, the same as OSHA, but recommended that such notice be provided for all audiometric test results. This commenter stated:

> It is our policy to notify all employees of the results of their audiometric tests in writing. An appropriate time frame would be 21 days from the time the employee's facility is made aware of the results. If the time frame for notification is 21 days from the time of the actual test, many problems may arise. If a mobile testing service is utilized, the results may not be sent in for analysis for at least

a week. Our audiological staff reviews all of our audiograms in-house rather than relying on outside services for analysis. Some of our testing services microfilm the tests or analyze them separately which means that a delay of a few weeks may occur. The purpose should be that the employee receive results in a timely enough fashion so that they are meaningful.

One commenter recommended that written notification be provided to the miner within 30 days of determining a confirmed STS. Another commenter recommended that miners be notified of an STS, including any optional retest, within 30 days of the testing. This commenter stated that:

> Service providers have taken undue advantage of a perceived grace period in the OSHA Hearing Conservation Amendment to inform employees of a shift in hearing. By the time audiometric tests are administered, entered into a computer, returned to an employer, and then finally returned to the employee, the lag time may total six to eight weeks. This is a disservice to the employee, and is certainly preventable.
>
> Notification of STS, including the optional retest of STS-affected employees, should be completed within a 30-day period following testing. OSHA's time limit of 21 days following notification to the employer creates a loophole which makes the employee wait all too long for feedback regarding STS.

Other commenters recommended notifying miners of the results of their audiometric tests, but did not specify a time frame.

The U.S. Armed Forces regulations, and standards of some members of the international community, vary on the time frame for notification.

The time frame in MSHA's proposal is shorter than the time frame for notification in OSHA's standard, but is consistent with MSHA's requirement that the Agency be notified of reportable hearing losses within 10 working days. MSHA's proposal would also differ from OSHA's standard in that the miner would be informed of the need and reason for further medical evaluations; and the miner would be informed of the finding of a reportable hearing loss. In addition, pursuant to § 62.170(b), MSHA's proposal would require the mine operator to instruct the physician to notify the miner of the need for an otological examination based upon a medical pathology of the ear that is unrelated to the affected miner's noise exposure or the wearing of hearing protectors. MSHA believes that miners have a right to know the results of any medical tests conducted on them.

MSHA believes that it is appropriate to require written notification. Under proposed § 62.200, the miner would in any event have access to all required records under this part upon written request. Providing the notices in writing would ensure there are no misunderstandings on the part of miners as to the severity of the problem.

MSHA believes that informing miners of the results of their audiometric tests in a timely manner is critical to the success of an HCP. Immediate feedback upon completion of the testing provides the greatest benefit. Generally, the employee shows the most interest and concern regarding the effects of noise on his/her hearing immediately following testing. Providing the results several weeks or months later may have less of an impact. In many cases, however, it may not be feasible or practical to inform miners immediately of the results of their audiometric tests. The proposal, consequently, would allow mine operators up to 10 working days to inform the miner (the same time period as provided under part 50 for notification of MSHA of cases of reportable hearing loss). Because the proposal would allow up to 30 calendar days to evaluate audiograms, it could be as long as 44 days following testing before the miner is informed of the results. In the case of an audiometric retest, it could be as long as 104 days before the miner is informed of the results of the retest. MSHA believes that it is necessary to specify a maximum time frame for informing miners of the audiometric test results in order to prevent undue delays.

Reporting Noise-Induced Hearing Loss (NIHL)

Section 62.190(b) of this proposal would require the mine operator to report hearing loss under 30 CFR part 50, if the results of an audiogram or follow-up evaluation indicate that a miner has incurred a ''reportable hearing loss.'' This section is designed to refine, in light of this proposal, MSHA's existing reporting requirements for injuries and illnesses in 30 CFR part 50, so as to ease reporting burdens on employers while promoting the development of an improved data base on hearing loss in the mining community.

The current reporting requirements provide that mine operators report a hearing loss whenever a physician determines that it is work related, or whenever an award of compensation is made. NIHL is specifically listed among the examples of occupational illnesses to be reported when it is work related. The proposal would establish the reporting definition for this purpose: but the report would only be required under part 50 if the hearing loss is suspected to be work related.

OSHA does not have reporting requirements: i.e., a level which triggers notification to the agency so that it can intervene. It does, however, have recording requirements for noise, so that information is gathered about NIHL and is available to employers, employees, and agency personnel. In June 1991, OSHA issued its current policy (1991) for reporting NIHL (on the OSHA Form 200). This policy requires employers to record a work-related shift in hearing of 25 dB or more in either ear from the original baseline audiogram averaged over 2000, 3000, and 4000 Hz. The recording criteria use identical evaluation frequencies as required for determining an STS. The policy allows a correction for presbycusis when determining reportability. In January 1996, OSHA published a proposal to revise agency recordkeeping standards. Under the proposal's mandatory Appendix B, the recording requirement would drop to a work-related shift in hearing of 15 dB or more in either ear. OSHA notes it is proposing this change to ensure the recording of any STS (a 10 dB shift under OSHA's standard), with some allowance made for instrumentation variance.

In its ANPRM, MSHA discussed the problems that the Agency is experiencing with its existing reporting requirements. Of the commenters addressing this issue, many recommended that MSHA require reporting of a 10-dB average loss in either ear at 2000, 3000, and 4000 Hz (the OSHA STS criteria). One commenter favored reporting any job-related loss and another stated that the criteria of reporting an STS was too high because ''* * * the worker['s] hearing loss has progressed too far with this shift to be a reliable preventative measure.'' Other commenters stated that the STS criteria represent a slight change in hearing and is not meaningful for reporting purposes. Two commenters recommended that the criteria for reporting be that used for defining impairment (the AAO–HNS 1979 criteria).

Some hearing conservation associations have opposed OSHA's current policy, arguing that employers should record the NIHL when the employee incurs an STS. Driscoll and Morrill (1987) presented the position of the American Industrial Hygiene Association (AIHA) in a paper entitled ''A Position Paper on a Recommended Criterion for Recording Occupational Hearing Loss on OSHA Form 200''. AIHA concluded that ''a confirmed STS which results from workplace noise exposure is considered an appropriate

measure for surveillance or recordkeeping purposes.''

The National Hearing Conservation Association (NHCA) in a letter from their President, Susan Cooper Megerson (1994), to Joseph Dear, Assistant Secretary of Labor for Occupational Safety and Health, urged OSHA to require the recording of an occupational hearing loss when an STS was confirmed. NHCA contends that recording hearing loss after it reaches an average of 25 dB or more at 2000, 3000, and 4000 Hz is ''dangerously underprotective and not technically well founded.''

Suter (1994) in a letter to Sue Andrei of OSHA's Policy Directorate urged OSHA to adopt a policy of recording persistent occupational hearing loss at an STS instead of at an average of 25 dB or more at 2000, 3000, and 4000 Hz.

MSHA's proposal would define a ''reportable hearing loss'' as a change in hearing threshold relative to the miner's original baseline audiogram of an average of 25 dB or more in either ear at 2000, 3000, and 4000 Hz. If a physician determines that the hearing loss is neither work-related nor aggravated by occupational noise exposure, then it would not be considered a reportable illness under part 50. As discussed in connection with proposed § 62.140, if an audiological exam showed a significant improvement in hearing acuity, the original baseline would be supplemented to reflect this: a correction which would then affect the reportability of hearing loss. Furthermore, as noted in the discussion of proposed § 62.160, the proposal would allow the correction of audiograms for presbycusis when determining the reportability of shifts in hearing threshold levels.

In selecting its reporting criteria, MSHA took into account that a loss of this magnitude is one that diminishes quality of life and the ability to understand speech in noisy environments. MSHA's reporting criteria, although not impairment per se, represent a substantial loss which would provide a reliable indication of the effectiveness of MSHA's rule and enforcement programs. Moreover, the calculation would be the same as that used to determine an STS and, thus, not an extra burden. The use of other criteria, such as the AAO–HNS 1979 criteria for impairment, would require an additional set of calculations at different frequencies.

MSHA is concerned, however, that reporting only losses of 25 dB may not provide MSHA a full picture of hearing loss in the mining industry. A loss of 25 dB is used by many states as a basis for making disability awards. Some have recommended that any STS (10 dB loss) should be captured in a hearing loss data base. OSHA, which currently requires any 25 dB loss to be captured in an employer's log, has proposed to capture any 15 dB loss. MSHA accordingly solicits comment on this point.

An important goal of the proposal is to clarify the level of hearing loss which is reportable. MSHA believes that its current reporting requirements are vague; consequently, cases of NIHL are inconsistently reported or not reported. Some mine operators have reported even a small loss, while others only reported when a miner received an award of compensation. In other cases, mine operators have not reported when an award of compensation was granted because the miners had retired. Inconsistent reporting also results because worker compensation regulations vary from state to state, i.e., the same hearing loss would be compensable and thus reportable in some states and not in others. For these reasons, current hearing loss data reported to MSHA under part 50 cannot be used to accurately characterize either the prevalence or the degree of hearing loss in the mining industry.

Reporting at a specified level, as required by the proposal, would eliminate reliance on workers' compensation awards as a criteria for defining NIHL to be reported. Nevertheless, part 50 would still require that awards of compensation be reported in those cases when the loss had not been previously reported. Two general examples of such cases are (1) if the miner had incurred the loss before the current mine operator conducted the baseline or pre-employment audiogram and subsequent testing did not measure a reportable loss, and (2) if the miner had not been in an HCP or had not received an audiometric test while employed by the operator.

In this regard, MSHA would like comment on how to define ''reportable'' hearing loss for those operators who do not have audiometric test data. Not all mine operators will be required to obtain audiometric test data under the proposed rule; thus, such operators may not be able to use a definition of reportable hearing loss defined in this manner. MSHA also requests specific suggestions on how to capture data on work-related NIHL: (1) that is not discovered until after the miner's employment is terminated; and (2) that the miner had accumulated from work with several employers.

MSHA does not expect mine operators to report the same reportable hearing loss each year that a miner works at the mine. The next reportable hearing loss would not be reported until the miner incurs another 25 dB shift (50 dB shift from the original baseline). MSHA does intend for each ear to be treated independently in terms of a reportable event, unless the reportable loss occurs in both ears during a particular year. (For example, 28.7 dB, left ear, 25.9 dB, right ear, not corrected for presbycusis.) Although not specifically required in its proposal, MSHA anticipates that mine operators would indicate when reporting to MSHA—

(1) the actual average hearing loss;

(2) in which ear(s) the loss occurred; and

(3) whether the audiograms were corrected for presbycusis. (For example, 28.7 dB, left ear, corrected for presbycusis.)

Section 62.200 Access to Records

Authorized representatives of the Secretaries of Labor and Health and Human Services would have immediate access to all records required under this part.

Moreover under the proposal, a miner or former miner, or his/her designated representative with written consent, would have access to all the records that the mine operator is required to maintain under this part for that individual miner or former miner. Also, the miners' representative is in all cases to have access, for miners they represent, to noise training records and notices required under § 62.120(f) to be given to miners exposed to noise above various levels.

The mine operator would have 15 days from receipt of a written request to provide such access. The proposal would define ''access'' as the right to examine and copy records. The first copy of any record requested by a person is to be provided without cost to that person, and any additional copies requested by that person are to be provided at reasonable cost.

Upon termination of employment, mine operators would be required to provide a miner without cost an actual copy of all his/her own records (those required under this part).

MSHA has no uniform records access provision that address these issues—though the Agency and NIOSH do have statutory rights to access. The provisions proposed here are similar to those in other health standards proposed in recent years by the Agency.

Section 103(c) of the Mine Act states that:

> The Secretary, in cooperation with the Secretary of Health, Education, and Welfare, [now Health and Human Services] shall issue regulations requiring operators to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under any applicable mandatory health or safety standard promulgated under this Act. Such regulations shall provide miners or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provisions for each miner or former miner to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents.

OSHA's requirements for access to records incorporate its standards for ''Access to Employee Exposure and Medical Records'' [29 CFR § 1910.20(a)–(e) and (g)–(i)]. OSHA's requirements and MSHA's proposal are essentially the same.

All of the commenters addressing this issue favored providing affected miners with reasonable access to required records. Most of these commenters also recommended that the request for access to records be in writing.

The Agency agrees, after reviewing comments and related regulations, that access to noise records by both employees and the government is essential, and does not believe the costs of providing such access will be significant. As noted by OSHA, in its preamble to its proposed Hearing Conservation Amendment (46 FR 4161)—

> Such access will serve to educate employees as to the state of their hearing and the effectiveness of the program, and will encourage their conscientious participation in it. The information in the records will be invaluable to the Assistant Secretary in the enforcement of the amendment and will be useful in research into the effects of occupational noise exposure. The Director of NIOSH will also be primarily interested in the records for research purposes.

MSHA also agrees that requests from miners, miner's designated representatives, and miner's representatives be in writing. This requirement would benefit both the miners and mine operators by protecting them in matters of dispute regarding the date on which the request was submitted. MSHA's access to records requirements would not preclude the mine operators from requiring the requester to sign a receipt after receiving the records. In addition, the definition of miner's ''designated representative'' specifies that such person have written authorization to request records for each miner or former miner represented. Because requested records may contain personal, private information, MSHA intends that the miner's designated representative would present such authorization to the mine operator when requesting records on behalf of a miner or former miner.

According to the proposal the mine operator would have 15 days to provide the miner, former miner, or miner's designated representative access to the requested records. MSHA believes that it is reasonable to require the mine operator to provide access because the proposal would require the records to be maintained at the mine site.

The mine operator has some choice as to how to provide records requested by an employee or representative. The mine operator could provide a copy, make available mechanical copying facilities, or loan the record to the requester for a reasonable time to enable a copy to be made. The proposal provides that if a copy is requested, however, it shall be provided, and the first copy shall be at no cost. If a copy of the record had been provided previously without cost, the proposal would allow the mine operator to charge reasonable, non-discriminatory administrative costs for providing an additional copy of the record. The mine operator, however, could not charge for the first copy of new information which subsequently had been added to the record.

MSHA believes that its proposed requirements for access to records are both reasonable and necessary to meet its mandate under the Mine Act. MSHA would welcome comments on what actions are required, if any, to facilitate the maintenance of records in electronic form by those mine operators who desire to do so, while ensuring access in accordance with these proposed requirements.

Section 62.210 Transfer of Records

The proposed standard would require mine operators to transfer all records (or a copy thereof) required by this part to any successor mine operator. The successor mine operator would be required to receive these records and maintain them for the period required. Additionally, the successor mine operator would be required to use the baseline audiogram obtained from the original mine operator (or supplemental baseline audiogram as appropriate) for determining an STS and reportable hearing loss.

MSHA's existing noise standards do not address the transfer of records, nor does MSHA have general standards on this point. The provisions proposed here are similar to those in other health standards proposed in recent years by the Agency. OSHA's standard requires transfer of records and, in addition, incorporates by reference transfer provisions found in its ''Access to Employee Exposure and Medical Records'' standards (29 CFR 1910.20 (h)). MSHA's proposal regarding the transfer of records is essentially the same as in OSHA's regulations.

MSHA's ANPRM did not address the transfer of records and no comments were received on this subject. MSHA considered OSHA's requirements and believes that they are both reasonable and necessary to ensure that records are maintained for the required periods of time when a mine operator ceases to do business.

Requiring successor mine operators to use the prior baseline audiogram will provide the miners with a greater degree of protection by assuring that an STS or reportable hearing loss is based on the original or supplemental baseline taken under the original mine operator, instead of based on a new baseline. Generally if a new baseline would be established by a successor mine operator, the miner would need to lose additional hearing acuity before the corrective action triggered by the occurrence of an STS is implemented or a hearing loss is required to be reported.

IV. Feasibility

MSHA has tentatively concluded that it is feasible for the mining industry to take the actions specified in the proposed rule. MSHA has also tentatively concluded that at this time, it may not be feasible for the mining industry to comply with two changes that would otherwise be warranted to further reduce the risk of impairment from occupational NIHL—reducing the PEL to a TWA_8 of 85 dBA, and reducing the exchange rate from 5-dB to 3-dB.

As background, this part begins with a review of the pertinent legal requirements for setting health standards under the Mine Act and an economic profile of the mining industry.

Pertinent Legal Requirements

Section 101(a)(6)(A) of the Mine Act requires the Secretary to set standards which most adequately assure, on the basis of the best available evidence, that no miner will suffer material impairment of health over his/ her working lifetime. In addition, the Mine Act requires that the Secretary, when promulgating mandatory standards pertaining to toxic materials or harmful physical agents, consider other factors, such as the latest scientific data in the field, the feasibility of the standard and experience gained under the Act and other health and safety laws. Thus, the

Mine Act requires that the Secretary, in promulgating a standard, attain the highest degree of health and safety protection for the miner, based on the ''best available evidence,'' with feasibility a consideration.

Feasibility in this context refers to both economic and technological feasibility. It also refers to what is feasible for an entire industry, not an individual mine operator; although for this purpose, MSHA has considered independently the situations of the coal mining sector and the metal and nonmetal mining sector.

In relation to feasibility, the legislative history of the Mine Act states that:

> * * * This section further provides that ''other considerations'' in the setting of health standards are ''the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.'' While feasibility of the standard may be taken into consideration with respect to engineering controls, this factor should have a substantially less significant role. Thus, the Secretary may appropriately consider the state of the engineering art in industry at the time the standard is promulgated. However, as the circuit court of appeals have recognized, occupational safety and health statutes should be viewed as ''technology-forcing'' legislation, and a proposed health standard should not be rejected as infeasible when the necessary technology looms in today's horizon. *(AFL–CIO* v. *Brennan,* 530 F.2d 109); (CA 3 1975) *Society of Plastics Industry* v. *OSHA,* 509 F.2d 1301 (CA 2), *cert. denied,* 427 U.S. 992 (1975).
>
> Similarly, information on the economic impact of a health standard which is provided to the Secretary of Labor at a hearing or during the public comment period, may be given weight by the Secretary. In adopting the language of [this section], the Committee wishes to emphasize that it rejects the view that cost benefit ratios alone may be the basis for depriving miners of the health protection which the law was intended to insure. S. Rep. No. 95–181, 95th Cong., 1st Sess. 21 (1977).

Thus, standards may be economically feasible even though industry considers them economically burdensome.

Though the Mine Act and its legislative history are not specific in defining feasibility, the courts have clarified the meaning of feasibility. The Supreme Court, in *American Textile Manufacturers' Institute* v. *Donovan* (OSHA Cotton Dust), 452 U.S. 490, 508–509 (1981), defined the word ''feasible'' as ''capable of being done, executed, or effected.'' The Court stated that a standard would not be considered economically feasible if an entire industry's competitive structure was threatened. According to the Court, the appropriate inquiry into a standard's economic feasibility is whether the standard is capable of being achieved.

Courts do not expect hard and precise predictions from agencies regarding feasibility. Under the ''arbitrary and capricious standard,'' used in judicial review of agency rulemaking under the Administrative Procedures Act, an agency need only base its predictions on reasonable inferences drawn from the existing facts. An agency is required to produce a reasonable assessment of the likely range of costs that a new standard will have on an industry. The agency must show that a reasonable probability exists that the typical firm in an industry will be able to develop and install controls that will meet the standard. *United Steelworkers of America* v. *Marshall,* 647 F.2d 1189 (D.C. Cir. 1980).

In developing a new health standard, an agency must also show that modern technology has at least conceived some industrial strategies or devices that are likely to be capable of meeting the standard, and which industry is generally capable of adopting. *United Steelworkers of America* v. *Marshall,* supra at 1272. If only the most technologically advanced companies in an industry are capable of meeting the standard, then that would be sufficient demonstration of feasibility (this would be true even if only some of the operations met the standard for some of the time). *American Iron and Steel Institute* v. *OSHA,* 577 F. 2d 825 (3d Cir. 1978) at 832–835, see also *Industrial Union Dep't., AFL-CIO* v. *Hodgson,* 499 F. 2d 467 (D.C. Cir. 1974).

In evaluating the feasibility of particular requirements under these legal tests, MSHA took into account how it anticipates interpreting those requirements. For example, in the case of the requirement that mine operators use all feasible engineering and administrative controls, the Agency considered legal guidance from the Federal Mine Safety and Health Review Commission as to what MSHA must consider, for enforcement purposes, as a feasible noise control at a particular mine. This guidance is discussed in the ''Questions and Answers'' in part I (see Question 12). MSHA also used its expert knowledge of particular equipment or methods of noise control available in the industry, and considered exposure data indicating the extent to which the industry would be out of compliance should a particular proposal be adopted.

Industry Profile

Determining the feasibility of controls for the mining sector requires consideration of the composition and economics of that sector. The following information is reprinted from MSHA's preliminary Regulatory Impact Analysis (RIA), and was considered by the Agency in reaching preliminary conclusions.

Overall Structure of the Mining Industry

MSHA divides the mining industry into two major segments based on commodity, the coal mining industry and the metal and nonmetal mining industry. These major industry segments are further divided based on type of operation (underground mines, surface mines, and independent mills, plants, shops, and yards). MSHA maintains its own data on mine type, size, and employment. MSHA also collects data on the number of contractors and contractor employees by major industry segment.

MSHA categorizes mines as to size based on employment. For the purpose of analyzing this proposed rule, MSHA defines small mines to be those having fewer than 20 employees and large mines to be those having at least 20 employees. Table IV–1 presents the number of small and large mines and the corresponding number of miners, excluding contractors, by major industry segment and mine type. Although MSHA does not maintain a data base of the numbers of miners by job title, Table IV–2 presents an estimate of the numbers of miners by job title groups based in part on research conducted by the U.S. Department of the Interior, Bureau of Mines. The Agency does not maintain a data base which would allow determination of the types of services provided by independent contractors or the job titles of contractor employees. Table IV–3, however, presents MSHA data on the numbers of independent contractors and the corresponding numbers of employees by major industry segment and the size of the operation based on employment.

TABLE IV–1.—DISTRIBUTION OF OPERATIONS AND EMPLOYMENT (EXCLUDING CONTRACTORS) BY MINE TYPE, COMMODITY, AND SIZE

Mine type	Small (<20 EES)		Large (>20 EES)		Total	
	Number of mines	Number of miners	Number of Mines	Number of Miners	Number of Mines	Number of Miners
Coal:						
Underground	466	4,630	606	49,370	1,072	54,000
Surface	875	5,337	396	30,173	1,271	35,510
Shp/Yrd/Mll/Plnt	421	2,701	132	5,169	553	7,870
Office workers	.....	752	.....	5,030	.....	5,782
Coal Subtotal	1,762	13,420	1,134	89,742	2,896	103,162
Metal/nonmetal (M/NM):						
Underground	141	1,191	134	16,736	275	17,927
Surface	8,838	49,214	1,192	79,230	10,030	128,444
Shp/Yrd/Mll/Plnt	288	2,146	223	18,889	511	21,035
Office workers	.....	8,530	.....	18,644	.....	27,174
M/NM Subtotal	9,267	61,081	1,549	133,499	10,816	194,580
Total all mines	11,029	74,501	2,683	223,241	13,712	297,742

Source: U.S. Department of Labor, Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, based on preliminary 1995 MIS data (quarter 1–quarter 4, 1995). MSHA estimates assume that operator office workers are distributed the same as non-office workers.

TABLE IV–2.—MINING WORKFORCE ESTIMATES BY JOB TITLE GROUPS (INCLUDING OFFICE WORKERS AND EXCLUDING CONTRACTOR EMPLOYEES)

Job title groups	Coal mining		M/NM mining		Total	
	Percent	Miners	Percent	Miners	Percent	Miners
Backhoe-crane-dragline-shovel operator	1.9	2,004	2.5	4,938	2.3	6,942
Beltman-belt cleaner (coal)-belt repairman	3.4	3,473	0.4	800	1.4	4,273
Blaster	0.8	810	0.3	605	0.5	1,415
Continuous miner & related machine operator	4.2	4,282	([1])	([1])	1.4	4,282
Deckhand-barge & dredge operator	0.2	156	0.6	1,103	0.4	1,259
Dozer-heavy & mobile equipment operator	6.8	7,038	2.7	5,289	4.1	12,326
Driller-auger operator (coal)-rock bolter (m/nm)	1.9	1,910	1.9	3,700	1.9	5,611
Electrician-wireman (coal)-lampman	4.0	4,127	1.9	3,780	2.7	7,908
Front-end loader-forklift (m/nm) operator	2.8	2,876	7.2	13,943	5.7	16,820
Grader-scraper operator	1.6	1,636	0.7	1,323	1.0	2,959
Laborer-miner-utility man	15.0	15,477	10.3	20,021	11.9	35,498
Longwall operator	0.7	689	([1])	([1])	0.2	689
Manager-foreman-supervisor	11.1	11,423	10.1	19,685	10.5	31,108
Mechanic-welder-oiler-machinist	15.0	15,457	14.7	28,546	14.8	44,003
Mine technical support	4.4	4,521	6.7	13,039	5.9	17,561
Office workers	5.6	5,782	14.0	27,174	11.1	32,956
Plant operator-warehouseman	3.8	3,921	14.0	27,315	10.5	31,236
Roof bolter-rock driller (coal)	5.3	5,459	0	0	1.8	5,459
Scoop tractor operator-motorman (coal)	3.4	3,510	0	0	1.2	3,510
Shuttle car-tram (m/nm) operator	3.6	3,756	0.8	1,607	1.8	5,363
Stone cutter-finisher	0	0	0.5	879	0.3	879
Truck driver	4.7	4,854	10.7	20,832	8.6	25,686
Total	100	103,162	100	194,580	100	297,742

[1] Continuous miner and longwall operators at metal/nonmetal mines are included in the job group ''laborer-miner-utility man.''
Extrapolated from U.S. Bureau of Mines, *Characterization of the 1986 Coal Mining Workforce* (IC 9192) and *Characterization of the 1986 Metal and Nonmetal Mining Workforce* (IC 9193), 1988.

TABLE IV–3.— DISTRIBUTION OF CONTRACTORS (CONTR) AND CONTRACTOR EMPLOYEES (MINERS) BY MAJOR INDUSTRY SEGMENT AND SIZE OF OPERATION

Contractors	Small (<20)		Large (≥20)		Total	
	Number of contr.	Number of miners	Number of contr.	Number of miners	Number of contr.	Number of miners
Coal:						
Other than office	3,580	14,310	291	12,863	3,871	27,173

TABLE IV–3.— DISTRIBUTION OF CONTRACTORS (CONTR) AND CONTRACTOR EMPLOYEES (MINERS) BY MAJOR INDUSTRY SEGMENT AND SIZE OF OPERATION—Continued

Contractors	Small (<20)		Large (≥20)		Total	
	Number of contr.	Number of miners	Number of contr.	Number of miners	Number of contr.	Number of miners
Office workers	.....	1,291	.....	1,160	.....	2,451
Coal Subtotal	3,580	15,601	291	14,023	3,871	29,624
Metal/nonmetal (M/NM):						
Other than office	2,656	12,921	352	20,975	3,008	33,896
Office workers	.....	734	.....	1,191	.....	1,925
M/NM Subtotal	2,656	13,655	352	22,166	3,008	35,821
Total	6,236	29,256	643	36,189	6,879	65,445

Source: U.S. Department of Labor, Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, based on preliminary 1995 MIS data (quarter 1–quarter 4, 1995). MSHA estimates assume that contractor office workers are distributed the same as non-office workers.

Economic Characteristics

The U.S. mining industry's 1995 production is worth in excess of $58 billion in raw mineral resources. Coal mining contributed about $20 billion to the Gross Domestic Product in 1995 and metal and nonmetal mining contributed about $38 billion. Another $17 billion is reclaimed annually from recycled metal and mineral materials such as scrap iron, aluminum, and glass.

The Agency obtained financial information on the various mineral commodities primarily from the U.S. Department of the Interior, Bureau of Mines, and the U.S. Department of Energy, Energy Information Administration.

Structure of the Coal Mining Industry

MSHA separates the U.S. coal mining industry into two major commodity groups, bituminous and anthracite. The bituminous group includes the mining of subbituminous coal and lignite. Bituminous operations represent over 93% of the coal mining operations, employ over 98% of the coal miners, and account for over 99% of the coal production. About 60% of the bituminous operations are large; whereas about 90% of the anthracite operations are small.

Underground bituminous mines are more mechanized than anthracite mines in that most, if not all, underground anthracite mines still hand-load. Over 70% of the underground bituminous mines use continuous mining and longwall mining methods. The remaining use drills, cutters, and scoops. Although underground coal mines generally use electrical equipment, a growing number of underground coal mines use diesel haulage equipment.

Surface mining methods include drilling, blasting, and hauling and are similar for all commodity types. Most surface mines use front-end loaders, bulldozers, shovels, or trucks for coal haulage. A few still use rail haulage. Although some coal may be crushed to facilitate cleaning or mixing, coal processing usually involves cleaning, sizing, and grading.

Preliminary data for 1995 indicate that there are about 2900 active coal mines of which 1760 are small mines (about 61% of the total) and 1130 are large mines (about 39% of the total).

These data indicate employment at coal mines to be about 103,200 of which about 13,400 (13% of the total) worked at small mines and 89,700 (87% of the total) worked at large mines. MSHA estimates that the average employment is 8 miners at small coal mines and 79 miners at large coal mines.

Structure of the Metal/Nonmetal Mining Industry

The metal and nonmetal mining industry consists of about 70 different commodities including metals, industrial minerals, stone, and sand and gravel. Preliminary data for 1995 indicate that there are about 10,820 active metal and nonmetal mines of which 9270 are small mines (about 86% of the total) and 1550 are large mines (about 14% of the total).

These data indicate employment at metal and nonmetal mines to be about 194,600 of which about 61,100 (31% of the total) worked at small mines and 133,500 (69% of the total) worked at large mines. MSHA estimates that the average employment is 7 miners at small metal and nonmetal mines and 86 miners at large metal and nonmetal mines. Table II–4 presents the number of metal and nonmetal mines and miners by major commodity category, mine size, and employment. In addition, MSHA estimates that about 350 mines are owned by state, county, or city governments.

TABLE IV–4.—ESTIMATED DISTRIBUTION OF METAL/NONMETAL MINES AND MINERS [1]

Commodity	Small (<20 EES)		Large (>20 EES)		Total	
	Number of Mines	Number of Miners	Number of Mines	Number of Miners	Number of Mines	Number of Miners
Metal	176	1,199	193	46,296	369	47,495
Nonmetal	546	3,496	231	25,436	777	28,932
Stone	2,640	23,003	894	53,157	3,534	76,160
Sand and Gravel	5,905	33,383	231	8,610	6,136	41,993
Total	9,267	61,081	1,549	133,499	10,816	194,580

[1] Includes office workers. Excludes contractors.

Metal Mining

Metal mining in the U.S. consists of about 25 different commodities. Most metal commodities include only one or two mining operations. Metal mining operations represent about 3% of the metal and nonmetal mines, employ about 24% of the metal and nonmetal miners, and account for about 35% of the value of metal and nonmetal minerals produced in the U.S. About 48% of the metal mining operations are small.

Underground metal mining uses a few basic mining methods, such as stope, room and pillar, and block caving with primary noise sources being diesel haulage equipment, pneumatic drills, and mills. Larger underground metal mines use more hydraulic drills and track-mounted haulage; whereas, smaller underground metal mines use more hand-held pneumatic drills. Stope mining uses more hand-held equipment. Surface metal mines include some of the largest mines in the world. Surface mining methods (drill, blast, haul) use the largest equipment and are similar for all commodity types.

Nonmetal Mining

For enforcement and statistical purposes, MSHA separates stone and sand and gravel mining from other nonmetal mining. There are about 35 different nonmetal commodities, not including stone or sand and gravel. About half of the nonmetal commodities include less than 10 mining operations; some include only one or two mining operations. Nonmetal mining operations represent about 7% of the metal and nonmetal mines, employ about 15% of the metal and nonmetal miners, and account for about 34% of the value of metal and nonmetal minerals produced in the U.S. About 70% of the nonmetal mining operations are small.

Nonmetal mining uses a wide variety of underground mining methods. For example, potash mines use continuous miners similar to coal mining; oil shale uses in-situ retorting; and gilsonite uses hand-held pneumatic chippers. Some nonmetal commodities use kilns and dryers in ore processing. Others use crushers and mills similar to metal mining. Underground nonmetal mining operations generally use more block caving, room and pillar, and retreat mining methods; less hand-held equipment; and more electrical equipment than metal mining operations. As with underground mining, surface mining methods vary more than for other commodity groups. In addition to drilling, blasting, and hauling, surface nonmetal mining methods include other types of mining methods, such as evaporation beds and dredging.

Stone Mining

There are basically only eight different stone commodities of which seven are further classified as either dimension stone or crushed and broken stone. Stone mining operations represent about 33% of the metal and nonmetal mines, employ about 39% of the metal and nonmetal miners, and account for about 19% of the value of metal and nonmetal minerals produced in the U.S. About 75% of the stone mining operations are small.

Stone generally is mined from quarries using only a few different methods and diesel haulage to transfer the ore from the quarry to the mill. Crushed stone mines typically drill and blast; whereas, dimension stone mines typically use channel burners, drills, or wire saws. Milling typically includes jaw crushers, vibratory crushers, and vibratory sizing screens.

Sand and Gravel Mining

Based on the number of mines, sand and gravel mining represents the single largest commodity group in the U.S. mining industry. About 57% of the metal and nonmetal mines are sand and gravel operations. They employ about 22% of the metal and nonmetal miners and account for about 11% of the value of metal and nonmetal minerals produced in the U.S. Over 95% of the sand and gravel operations are small.

Construction sand and gravel is generally gathered from surface deposits using dredges or draglines and only washing and screening milling methods. As in other surface mining operations, sand and gravel uses diesel haulage equipment, such as front-end loaders, trucks, and bulldozers. In addition, industrial sand and silica flour operations mill the ore using crushers, ball mills, screens, and classifiers.

Economic Characteristics of the Coal Mining Industry

The U.S. Department of Energy, Energy Information Administration, reported that the U.S. coal industry produced a record 1.03 billion tons of coal in 1994 with a value of about $20 billion. Of the several different types of coal commodities, bituminous and subbituminous coal account for 91% of all coal production (940 million tons). The remainder of U.S. coal production is lignite (86 million tons) and anthracite (4 million tons). Although anthracite offers superior burning qualities, it contributes only a small and diminishing share of total coal production. Less than 0.4% of U.S. coal production in 1994 was anthracite.

Mines east of the Mississippi account for about 53% of the current U.S. coal production. For the period 1949 through 1995, coal production east of the Mississippi River fluctuated relatively little from a low of 395 million tons in 1954 to 630 million tons in 1990. (It was 568 million tons in 1994.) During this same period, however, coal production west of the Mississippi increased each year from a low of 20 million tons in 1959 to a record 490 million tons in 1995. The growth in western coal is due in part to environmental concerns that led to increased demand for low-sulfur coal, which is concentrated in the West. In addition, surface mining, with its higher average productivity, is much more prevalent in the West.

Preliminary MSHA data for 1995 indicate that small mines produced about 4% of the total coal mine production (about 44 million tons) and large mines produced about 96% of the total (983 million tons). MSHA calculations indicate that the average total production per miner for 1995 was about 3,500 tons at small mines and 11,400 tons at large mines. The average total coal production for 1995 was about 25,000 tons per small mine and 867,000 tons per large mine.

The 1994 estimate of the average value of coal at the point of production is about $19 per ton for bituminous coal and lignite, and $36 per ton for anthracite. MSHA chose to use $19 per ton as the value for all coal production because anthracite contributes such a small amount to total production that the higher value per ton of anthracite does not greatly impact the total value. The total value of coal production in 1995 was about $20 billion of which about $0.9 billion was produced by small mines and $19.1 billion was produced by large mines. On a per mine basis, the average coal production was valued at $0.5 million per small mine and $17 million per large mine.

Coal is used for several purposes including the production of electricity. The predominant consumer of coal is the U.S. electric utility industry which used 829 million tons of coal in 1995 or 80% of the coal produced. Other coal consumers include coke plants (33 million tons), residential and commercial consumption (6 million tons), and miscellaneous other industrial uses (73 million tons). This last category includes the use of coal products in the manufacturing of other products, such as plastics, dyes, drugs, explosives, solvents, refrigerants, and fertilizers.

The current rate of U.S. coal production exceeds U.S. consumption by roughly 90 million tons annually. In 1995, 89 million tons of this excess production was exported and the remainder was stockpiled. Japan (11.8 million tons), Canada (9.4 million tons), and Italy (9.1 million tons) were the top three importers of U.S. coal. Year-to-year fluctuations in exports of U.S. coal vary more than domestic consumption. During the 1990's, changes in exports from the previous year varied from a 24% increase to a 27% decrease; whereas, changes in domestic consumption only varied from a 4% increase to a 1% decrease.

The U.S. coal industry enjoys a fairly constant domestic demand. Its demand by electric utilities continues to increase annually. MSHA does not expect a substantial change in coal demand by utilities in the near future because of the high conversion costs of changing a fuel source in the electric utility industry. Energy experts predict that coal will continue to be the dominant fuel source of choice for power plants built in the future. Nuclear and hydropower currently comprise, and are anticipated in the future to comprise, a small fraction of fuel sources for utilities.

The international market for coal was marked by several notable events in the 1990's. The breakup of the Soviet Union (USSR), a new political regime in South Africa, and economic policy changes in the United Kingdom and Germany contributed to price and demand changes in coal's global marketplace; newly independent, former USSR republics provided competition to U.S. companies for a share of the European coal market; and the deep European recession of 1993–1994 caused exports of coal to decrease. Similarly, the cessation of the economic boycott of South Africa, and its new political leadership, has led to new interest in South African exports. South Africa ranks third after Australia and the U.S. in coal exports. Its coal exploration and mining have the nation poised to maintain its global position. The privatization of British power companies and the elimination of coal subsidies in Germany have led to an increased interest in U.S. coal. These international economic policy changes are predicted to create a substantial export opportunity for U.S. coal over the long term.

The net effect of these aforementioned international activities appears to be a continued demand for U.S. coal at or near current level. The U.S. can expect additional competition, however, from other current coal producing countries (e.g., Australia, South Africa, former USSR republics, Poland), as well as from new suppliers in Colombia, Venezuela, China, and Indonesia. The U.S. coal industry has vast reserves of unmined coal which is predicted to sustain coal's demand for another half millennium if mined at the current rate.

The economic health of the coal industry may be summarized as a fairly stable market which may be subject to periodic price and demand fluctuations. These fluctuations are largely functions of domestic supply disruptions and increased international competition. The 1993 average profit as a percent of revenue for the coal mining industry was about 3–4% after taxes.

Economic Characteristics of the Metal and Nonmetal Mining Industry: Summary

The 1995 value of all metal and nonmetal mining output is about $38 billion. Metal mining contributes $13.2 billion to this total and includes metals such as aluminum, copper, gold, and iron. Nonmetal mining is valued at $12.9 billion and includes commodities such as cement, clay, and salt. Stone mining contributes about $7.2 billion and sand and gravel contributes about $4.3 billion to this total.

The entire metal and nonmetal mining industry is markedly diverse not only in terms of the breadth of minerals, but also in terms of each commodity's usage. For example, metals such as iron and aluminum are used to produce vehicles and other heavy duty equipment, as well as consumer goods such as household equipment and soda pop cans. Other metals, such as uranium and titanium, have limited uses. Nonmetals like cement are used in construction while salt is used as a food additive and on roads in the winter. Soda ash, phosphate rock, and potash also have a wide variety of commercial uses. Stone and sand and gravel are used in numerous industries including the construction of roads and buildings.

A detailed economic picture of the metal and nonmetal mining industry is difficult to develop because most mines are either privately held corporations or sole proprietorships, or subsidiaries of publicly owned companies. Privately held corporations and sole proprietorships do not make their financial data available to the public. Further, parent companies are not required to separate financial data for subsidiaries in their reports to the Securities and Exchange Commission. As a result, financial data are available for only a few metal and nonmetal companies and these data are not representative of the entire industry. Each commodity has a unique market demand structure. The following discussion focuses on market forces on a few specific commodities of the metal and nonmetal industry.

Metal Mining

Historically, the value of metals production has exhibited considerable instability. In the early 1980's, excess capacity, large inventories, and weak demand depressed the international market for metals while the strong dollar placed U.S. producers at a competitive disadvantage with foreign producers. Reacting to this, many metal mining companies reduced work forces, eliminated marginal facilities, sold non-core businesses, and restructured. At the same time, new mining technologies were developed and wage increases were restrained. As a result, the metal mining firms now operating are more efficient and have lower break-even prices than those that operated in the 1970's.

For the purposes of this analysis, MSHA uses the Standard and Poor's methodology of dividing metal mining into two categories: iron ore and alloying metals, and copper and precious metals. Metal mine production is valued in excess of $13 billion. Copper, aluminum, gold, and iron are the highest revenue producers of the metal industry.

Variations in the prices for iron and alloying metals, such as nickel, aluminum, molybdenum, vanadium, platinum, and lead, coincide closely with fluctuations in the market for durable goods, such as vehicles and heavy duty equipment. As a result, the market for these metals is cyclical in nature and is impacted directly by changes in aggregate demand and the economy in general.

Both nickel and aluminum have experienced strong price fluctuations over the past few years; however, with the U.S. and world economies improving, demand for such alloys is improving and prices have begun to recover. It must be noted that primary production of aluminum will continue to be impacted by the push to recycle. Recycling of aluminum now accounts for 30% of the aluminum used and this percent is expected to rise in the coming years. Due to the increase in aluminum recycling, prices have been falling and inventories rising since the mid to late 1980's.

The market for copper and precious metals, such as gold and silver, is marked by great uncertainty and price volatility. Prices for gold and silver fluctuated by as much as 17 to 25%, respectively, during 1993. The copper market recovered substantially during

1994, posting a 3.7% growth in demand by 1995. The gold and silver markets, however, continue to be marred with speculative demand spurs; consistent recovery and growth have been difficult to achieve due to uncertainty of U.S. buyers and shifts in production in South Africa and Russia. In 1993, Russia began to cut back its gold production which had generated low prices in the global market since 1990.

Overall, the production from metal mining increased by about 5.5% from 1987 to 1995; 1995 estimates put capacity utilization at 84%. MSHA expects that the net result for the metal mining industry may be reduced demand but sustained prices. The 1993 average profit as a percent of revenue for the metal mining industry was about a 1.3% loss after taxes.

Nonmetal Mining, Including Stone and Sand and Gravel

Nonmetal mine production is valued at more than $24 billion. Included in this figure is the production of granite, limestone, marble, slate, and other forms of crushed and broken or dimension stone. Other prosperous commodities in the nonmetal category include salt, clay, phosphate rock, and soda ash. Market demand for these products tends not to vary greatly with fluctuations in aggregate demand. Stone is the leading revenue generator with 1994 production valued at $7.2 billion. Construction sand and gravel and industrial sand 1995 production is valued at about $4.3 billion.

Evaluating financial information for nonmetal mining operations is particularly difficult. Financial data are available only for relatively large mining operations and these often engage in a wide variety of activities of which mining is typically only a small part. Many large mining firms have financial interests in mines or mills of different commodities, thereby making it difficult to evaluate the financial aspects of any specific commodity. Publicly held firms are not required to separate financial data for their subsidiaries in their reports to the Securities and Exchange Commission and financial data are not available for most of the small mines because they are not publicly owned. (About 98% of the small metal and nonmetal mining operations are stone, sand and gravel, or other nonmetal operations.) This discussion of the economic characteristics of the nonmetal mining industry does not separately address sand and gravel, stone, and miscellaneous other nonmetal mining operations as was done in the discussion of the nonmetal mining industry's structure.

Sand and gravel and stone products, including cement, have a cyclical demand structure. As a recession intensifies, demand for these products sharply decreases. Some stability in the market was achieved during 1993 and early 1994. Demand for stone, particularly cement, is expected to grow by as much as 4.8% and demand for sand and gravel is expected to grow by as much as 2.3%.

The U.S. is the largest soda ash producer in the world with its 1994 production valued at about $650 million. Soda ash is used in the production of glass, soap and detergents, paper, and food. Both salt and soda ash have a fairly constant demand structure due to the products' uses and the lack of suitable substitutes. A 1994 industry analysis indicates shifts in the world demand for salt. European demand, impelled by the economic breakdown of Central and Eastern Europe, has declined; however, growth in demand has increased in Asia and the Far East.

Phosphate rock, which is used primarily to manufacture fertilizer, has an unusual market structure. U.S. production and exports of phosphate rock have declined in recent years and imports from Morocco increased by 180% from 1991 to 1992.

The remaining nonmetal commodities which include boron fluorspar, oil shale, and other minerals are produced typically by a small number of mining operations. Despite this fact, annual production of pumice, perlite, vermiculite, and some others is valued at the tens of millions of dollars for each product.

Overall, the production from nonmetal mining remained relatively stable from 1987 to 1995; 1995 estimates put capacity utilization for stone and earth minerals at about 97%. The net result for the nonmetal mining industry may be higher demand for stone and various other commodities and increased prices. The 1993 average profit as a percent of revenue was about 3–4% for nonmetal mine production, excluding stone and sand and gravel; about 8% for stone mining; and about 5% for sand and gravel.

Feasibility of Requiring the Use of Engineering and Administrative Controls at a TWA_8 of 90 dBA

In this proposal, MSHA has determined that the Mine Act's objective to protect miners from material impairment of health can be met by requiring mine operators to use all feasible engineering and administrative controls. This approach is close to that already required in the metal and nonmetal sector of the industry. In the coal sector, attenuation of hearing protectors have been considered in determining compliance with the PEL, and in practice this has meant that few mine operators have had to institute engineering or administrative controls.

The approach gives mine operators flexibility to choose those controls or combinations of controls which would be the most effective in reducing exposure to noise. If the institution of administrative controls does not adequately protect the miners in a given work situation, MSHA will require the implementation of feasible engineering controls. Under this approach, the Agency has to determine in the particular situation that the proposed engineering controls are feasible prior to requiring their implementation. Likewise, if the engineering controls prove inadequate, the Agency will require the implementation of feasible administrative controls.

In the metal and nonmetal industry where this approach is currently implemented, smaller operations predominate. As a result, administrative controls are seldom feasible, and engineering controls may not be economically feasible for some operations. Moreover, given the technology available in this sector, in a few cases complete engineering solutions may not be technologically feasible. However based on the information on available controls reviewed in part III, including methods developed by the former Bureau of Mines, MSHA believes there are few cases in which noise cannot be significantly reduced through some sort of engineering control (including miner isolation). The Agency has specifically solicited comments on the feasibility of controls for metal and nonmetal equipment and operations identified as generating sound levels above a TWA_8 of 105 dBA; as noted in part III, exposures exceeding this level constitute less than one-quarter of one percent of all exposures, and many mine operators do manage to control the exposures from such equipment. And the Agency welcomes comments on other specific feasibility concerns. Based on its review, MSHA believes most metal and nonmetal mine operators will find feasible engineering controls that meet their requirements.

In the coal industry, many mine operators are larger and the technology is different. Many coal mine operators are large enough to be able to use administrative controls where engineering controls are not economically feasible. Moreover, based

on the information reviewed in part III, MSHA is confident that engineering solutions are available that can significantly reduce noise in almost all situations in which coal mining noise exceeds the PEL. Moreover, the Agency notes that the available engineering solutions are constantly changing—for example, it may be easier today than it used to be to find retrofit cabs for older equipment. Even in problem areas like coal preparation plants and highwall areas there are available solutions. In coal preparation plants, motor enclosures, operator control booths, material dampening of chutes and transfer points, and process area enclosures can bring about significant reductions in exposure; for highwall areas, exhaust mufflers and compressor barriers can do the same. The Agency would be interested in comments on problems encountered in controlling noise in coal operations and on solutions that have proved effective.

In concluding that such requirements are feasible in the mining industry, MSHA takes into account that the proposed rule would require a mine operator to use all feasible engineering and administrative controls. On the one hand this means that MSHA will require mine operators to consider all possible controls so as to find a combination that will in fact reduce noise as much as possible. MSHA's enforcement policy in this regard has been noted earlier in this section (and in the Question and Answer section in part I). On the other hand, there may be situations where no combination of engineering and administrative controls to reduce exposures to the PEL is economically or technologically feasible. In such cases, the proposed standard specifies the other actions a mine operator must take to protect workers to the maximum extent possible—including the use of engineering and administrative controls to reduce exposures to the maximum extent that is feasible.

Following is further discussion of the feasibility of administrative controls and engineering controls, respectively.

Feasibility of Administrative Controls

Administrative controls refers to the practice of limiting the exposure of individual miners to a noise source. Administrative controls reduce exposure through such actions as rotation of miners to areas having lower sound levels, rescheduling of tasks, modifying work activities, or limiting the amount of time that a miner is exposed to noise.

The feasibility of administrative controls to solve particular noise problems in any mine may be limited by a number of factors: limitations on the number of qualified miners capable of handling a specific task, labor/management agreements affecting duty assignments, or difficulty in ensuring that miners adhere to the administrative controls. Further, because the effectiveness of administrative controls is based on adherence to these strict time periods, mine operators may find it difficult to verify compliance with the administrative procedures.

As explained in the discussion of proposed § 62.120(c), it is MSHA's experience that administrative controls are relatively more feasible for mines with many employees and relatively less feasible for mines with fewer employees. As demonstrated by the industry profile, the mines in the coal industry are generally larger mines. It is MSHA's experience that many coal mine operators may prefer administrative controls as the primary noise control. This is, in fact, the reasons proposed § 62.120(c) was designed to preserve mine operator choice. The use of such controls is much less feasible in the smaller mines that characterize the metal and nonmetal industry.

Feasibility of Engineering Controls

If administrative controls are not feasible, or cannot by themselves reduce noise to the PEL, mine operators are to use all feasible engineering controls. This discussion is divided into two parts: the technological feasibility of such controls, and the economic feasibility of such controls.

Technological Feasibility of Engineering Controls

MSHA is an active and knowledgeable partner in continually refining and improving existing noise control technology. At the request of MSHA's Coal Mine Safety and Health or Metal and Nonmetal Mine Safety and Health, MSHA's Technical Support actively assists mine operators in developing noise controls. Based upon this knowledge, and MSHA's experience, the Agency has determined that feasible engineering controls exist for the majority of equipment used in mining.

MSHA has evaluated under actual mining conditions newly developed noise controls for surface self-propelled equipment, underground diesel powered haulage equipment, jumbo drills, track drills, hand-held percussive drills, draglines/shovels, portable crushers, channel burners, and mills, and has found them to be effective in reducing miners' noise exposure. Some of these feasible engineering controls are already designed into new equipment. In many cases, effective and feasible controls are available through retrofitting or the proper use of noise barriers. A more detailed discussion regarding the availability of these controls is contained in part III of this preamble (see *Engineering Noise Controls for Mining Equipment,* in the discussion of proposed § 62.120(c) in part III). Part V of this preamble contains a list of publications of the former USBOM evaluating noise controls for various types of mining equipment.

As noted previously, there are some instances where current noise control technology still cannot reduce sound levels to within a TWA_8 of 90 dBA and where quieter replacement equipment may not be feasible. An example of this is a pneumatic jackleg drill used in hardrock mining. MSHA's data on equipment producing high levels of noise are discussed in part III (see the discussion of a possible dose ceiling in proposed § 62.120(e)).

Economic Feasibility of Engineering Controls

The data from MSHA's dual-threshold survey, presented in Tables II–11 and II–12 in part II of this preamble, indicate that even with the proposed new threshold level (80 dBA), almost three-quarters of the metal and nonmetal samples, and almost two-thirds of the coal samples, already are below the PEL. No additional controls would be required in these cases.

The Agency has determined that the incremental costs of the requirements for engineering controls would be $3.5 million a year for ten years, of which $2.2 million is allocable to the coal sector and $1.3 million to the metal and nonmetal sector. (The additional costs to the metal and nonmetal sector reflect in part the proposed lowering of the threshold, which will result in the measurement of more overexposures than at present.)

As described in more detail in the Agency's preliminary RIA, to calculate the costs for engineering controls, MSHA evaluated various engineering controls and their related costs.

In determining which engineering controls the metal and nonmetal industry will have to use under the proposed rule, MSHA considered the engineering controls that are used under the current rule. MSHA believes that metal and nonmetal mine operators may generally have exhausted the least costly engineering controls to comply with the current rule for some job groups. Compliance with the proposed rule for these job groups would require

that the mine operator use more expensive controls—specifically, retrofitting equipment—or purchase new equipment. For other job groups, however, mine operators may have used only those controls necessary to comply with the PEL and the less costly controls may still be available. To determine the cost of engineering controls, MSHA looked at the average cost of such engineering controls.

For the coal industry, HPDs have generally been substituted for engineering and administrative controls, so the industry has not exhausted the use of relatively inexpensive controls which have been demonstrated to be capable of bringing about significant reductions of sound levels. Even though the average cost of such controls would be less than for the metal and nonmetal industry, the change in approach would require controls be used much more often than at present. This is why the industry would experience a relatively higher expense for engineering controls.

MSHA believes the requirements for engineering and administrative controls clearly meet the feasibility requirements of the law. Based on the comments received in response to its ANPRM and discussed below, MSHA believes some in the industry may misunderstand the nature of the engineering controls required. In many cases, inexpensive controls may effectively eliminate overexposures.

Comments on Feasibility of Engineering and Administrative Controls

MSHA received numerous comments indicating that engineering controls were not feasible to reduce a miner's noise exposure to within the PEL for many types of mining equipment. Several commenters stated that engineering controls are most effective when they are designed into equipment versus applied by retrofitting. Other commenters stated that retrofit noise controls are often not as durable or effective as controls installed by the equipment manufacturer. One commenter suggested that MSHA establish approval and certification procedures for equipment noise emissions, similar to those established in part 18 for permissible equipment used in gassy mines.

In response to the commenters who indicated that engineering controls were not feasible for many types of mining equipment, MSHA would point out that significant progress has been made in developing quieter mining equipment since the mid-1970's when MSHA's existing noise standards were promulgated. Currently, almost all pneumatic drill manufacturers offer exhaust mufflers where few were available in the early 1970's. Similarly, almost all manufacturers of mobile surface equipment offer environmental and/or acoustically treated cabs. Some manufacturers also offer acoustically treated cabs for underground mining equipment, such as jumbo drills and scoop trams. As noted, the availability of feasible engineering noise controls is discussed in greater detail in the section of the preamble on *Engineering Noise Controls for Mining Equipment.*

MSHA does not agree with the commenter who suggested that MSHA establish approval and certification for equipment noise emissions similar to part 18. Such a process could be more costly and limit a mine operator's flexibility in implementing noise control procedures.

The most cited disadvantage of engineering controls is cost. In particular, some commenters are concerned that they would be required to install controls that would not, by themselves, be adequate to attain compliance. If this occurs, the proposal would also require that administrative controls be used to reduce exposure to the PEL; moreover, if a combination of controls does not reduce exposures to the PEL, hearing protectors must be worn and the affected miners enrolled in an HCP. These commenters believe that in such cases, costs to install engineering controls are wasted since they still may have to resort to these additional controls. More significantly, mine operators are concerned that requiring engineering controls will usually require the purchase of new equipment.

The first concern is misplaced. Controlling noise requires the hierarchy of requirements proposed by § 62.120(c). A mine operator has a choice as to what mix of engineering and administrative controls to use as long as together they reduce noise exposures to the PEL or as close thereto as feasible. Hearing protectors and enrollment in a hearing conservation program are helpful when nothing more can feasibly be done to reduce noise exposure, but they are not a substitute.

MSHA generally agrees with the commenters who stated that engineering controls are most effective when factory installed. The Agency would encourage mine operators to purchase mining machinery equipped with appropriate noise controls offered by the original equipment manufacturer rather than retrofitting noise controls. Almost every piece of mining equipment currently manufactured has optional noise control packages. Based on comments and MSHA's experience in noise control, the Agency has concluded that engineering controls designed and installed by the manufacturer for a particular unit will generally be more effective and durable than a retrofit control of similar design. Additionally, the cost of such controls may in some cases be substantially higher if it is purchased from the equipment manufacturer on a retrofit basis, rather than at the time the unit was originally built.

At the same time, as discussed in part III, MSHA has determined that some retrofit controls may be as effective as controls offered by equipment manufacturers. Examples of engineering controls which are routinely retrofitted onto existing mining equipment include: environmental cabs; control booths; sound barriers and baffles; exhaust mufflers; and the application of acoustical materials to equipment firewalls and the inside walls of cabs and control booths. Moreover, many successful retrofit noise controls (e.g., cabs, barrier shields, and drill exhaust mufflers) were developed by operators using materials readily available. Often the miners who use the equipment offer valuable suggestions on improving the design and effectiveness of these controls. Some of the controls developed by the mine operators have been adopted by manufacturers for use on both existing and new equipment. MSHA has determined that allowing the mine operator to develop controls provides the mine operator with maximum flexibility in complying with the standard thereby eliminating the need in those cases to purchase manufacturer installed controls.

Infeasibility of PEL at TWA_8 of 85 dBA

MSHA seriously considered lowering the PEL to a TWA_8 of 85 dBA because of its conclusion that there is a significant risk of material impairment from noise exposures at or above this level. The Agency has tentatively concluded, however, that it may not be feasible at this time for the mining industry to reduce noise to that level.

Exposure data collected by MSHA indicate that with a PEL at a TWA_8 of 85 dBA and an 80 dBA threshold, over two-thirds of the mine operators in the metal and nonmetal industry, and over three-quarters of the mine operators in the coal industry, would need to use engineering and administrative controls to reduce current exposures. (See Tables II–11 and II–12 in part II.)

Moreover, the engineering controls needed to reduce those exposures would be more expensive, because they would have to reduce the exposures further than with a PEL set at a TWA_8 of 90 dBA. Accordingly, the Agency

does not believe it can demonstrate that a reasonable probability exists that the typical mine operator will currently be able to develop and install controls that will meet such a standard.

It is true that the proposed standard only requires that individual mine operators use those controls which are feasible for that mine operator. The feasibility requirement under the statute, however, is that the Agency make a reasonable prediction, based on the ''best available evidence,'' as to whether an industry can generally comply with a standard within an allotted period of time. The Agency must show that a reasonable probability exists that the typical mine operator will be able to develop and install controls that will meet the standard. Accordingly, MSHA believes that if most mine operators are unlikely to be able to use engineering and administrative controls to bring noise levels to a TWA_8 of 85 dBA, the standard is not feasible for the industry as a whole.

Infeasibility of Exchange Rate of 3-dB

The exchange rate is a measure of how quickly the dose of noise doubles. Accordingly, the measure is the rate determining how much a miner's exposure must be limited to compensate for increasing dose. For example, at a 5-dB exchange rate, the exposure permitted at a sound level of 90 dBA is half that permitted at a sound level of 85 dBA; a miner gets the same noise dose in 4 hours at 90 dBA as at 8 hours at 85 dBA.

The Agency gave serious consideration to changing the exchange rate from 5-dB to 3-dB, and is specifically seeking comment on this important matter. There is a consensus in the recent literature that noise dose actually doubles more quickly than measured by the 5-dB rate, and in particular consensus for an exchange rate of 3-dB. Moreover, MSHA has concluded that the type of noise exposure in the mining environment tends to warrant an exchange rate that does not assume significant time for hearing to recover from high sound levels—the current exchange rate incorporates such an assumption. A full discussion of the scientific merits of various exchange rates, and of the rates used by various regulatory authorities, can be found in part III of the Preamble (as part of the discussion of proposed § 62.120(a), dose determination).

Nevertheless, the Agency is proposing to retain the existing 5-dB exchange rate because of feasibility considerations. Changing to a 3-dB rate from a 5-dB rate would significantly reduce the amount of time that miners could be exposed to higher sound levels without exceeding the permissible exposure limit. For example, MSHA estimates that the percentage of miners whose exposure would be in violation of a PEL set at a TWA_8 of 90 dBA would about double if a 3-dB exchange rate is used. (See Table III–3 in the exchange rate discussion in part III. The table also indicates what would happen if the PEL were set at a TWA_8 of 85 dBA). This means mine operators would have to utilize controls to reduce exposures to the PEL more frequently. Moreover, more expensive controls would often be required, since the need to reduce exposures more to get them down to the PEL.

The feasibility requirement under the statute is that the Agency make a reasonable prediction, based on the ''best available evidence,'' as to whether an industry can generally comply with a standard within an allotted period of time. The Agency must show that a reasonable probability exists that the typical mine operator will be able to develop and install controls that will meet the standard. The exposure data noted indicate it may be difficult for MSHA to make such a showing.

Furthermore, if a 3-dB exchange rate is used, it is extremely difficult to reduce the noise exposures to below the PEL with currently available engineering or administrative noise controls or a combination thereof.

Accordingly, MSHA has tentatively concluded that moving the industry to a 3-dB exchange rate may not be feasible at this time.

Conclusion

Based on the information before it, the Agency has tentatively concluded that the proposed rule meets the statutory requirements for feasibility, and that it may not be feasible for the mining industry, as a whole, at this time, to require a more protective regimen.

The Agency is particularly interested in receiving additional data that would be relevant in making final determinations on the points discussed above.

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List of Subjects

30 CFR Parts 56 and 57

Metal and nonmetal, Mine safety and health, Noise.

30 CFR Part 62

Mine safety and health, Noise.

30 CFR Parts 70 and 71

Coal, Mine safety and health, Noise.

Dated: November 26, 1996.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

It is proposed to amend Chapter I of Title 30 of the Code of Federal Regulations as follows:

PART 56—[AMENDED]

1. The authority citation for part 56 continues to read as follows:

Authority: 30 U.S.C. 811, 957, 961.

2. Section 56.5050 and the undesignated center heading preceding it are removed.

PART 57—[AMENDED]

3. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811, 957, 961.

4. Section 57.5050 and the undesignated center heading preceding it are removed.

PART 70—[AMENDED]

5. The authority citation for part 70 continues to read as follows:

Authority: 30 U.S.C. 811 and 961.

6. Subpart F (§§ 70.500–70.511) is removed.

PART 71—[AMENDED]

7. The authority citation for part 71 continues to read as follows:

Authority: 30 U.S.C. 811, 951, 957, 961.

8. Subpart I (§§ 71.800–71.805) is removed.

9. Subchapter M is redesignated as subchapter I, subchapter N is redesignated as subchapter K, and Subchapter N is reserved.

10. A new Subchapter M is added, ''Uniform Mine Health Regulations.''

11. A new part 62 is added to new Subchapter M to read as follows:

PART 62—OCCUPATIONAL NOISE EXPOSURE

Sec.

Authority: 30 U.S.C. 811, 857, 861.

§ 62.100 Purpose and scope; effective date.

The purpose of these standards is the prevention of occupational noise-induced hearing loss among miners. This part sets forth mandatory health standards for each surface and underground metal, nonmetal, and coal mine subject to the Federal Mine Safety and Health Act of 1977. The provisions of this part shall take effect (one year from the date of publication of the final rule).

§ 62.110 Definitions.

The following definitions apply in this part:

Access. The right to examine and copy records.

Audiologist. A professional, specializing in the study and rehabilitation of hearing, who is certified by the American Speech-Language-Hearing Association (ASHA) or licensed by a state board of examiners.

Baseline audiogram. The audiogram recorded pursuant to § 62.140 against which subsequent audiograms are compared to determine the extent of hearing loss, except in those specific situations in which this part requires the use of a supplemental baseline audiogram for such a purpose.

Criterion level. The sound level which if constantly applied for 8 hours results in a dose of 100% of that permitted by the standard.

Decibel (dB). A unit of measure of sound levels. MSHA defines decibel in two different ways depending upon the use.

(1) For measuring sound pressure levels, the decibel is 20 times the common logarithm of the ratio of the measured sound pressure to the standard reference pressure of 20 micropascals (μPa), which is the threshold of normal hearing acuity at 1000 Hz.

(2) For measuring hearing threshold levels, the decibel is the difference between audiometric zero (reference pressure equal to 0 hearing threshold level) and the threshold of hearing of the individual being tested at each test frequency.

Decibel, A-weighted (dBA). Sound levels measured using the A-weighting network. A-weighting refers to the frequency response network closely corresponding to the frequency response of the human ear. This network attenuates sound energy in the lower and upper frequencies (<1000 and >5000 Hz) and slightly amplifies those frequencies between 1000 and 5000 Hz to which the ear is more sensitive.

Designated representative. Any individual or organization to whom a miner gives written authorization to exercise a right of access to records.

Exchange rate. The amount of increase in sound level, in decibels, which would require halving of the allowable exposure time to maintain the same noise dose.

Hearing conservation program (HCP). The term is used in this part as a generic reference to the requirements of §§ 62.140 through 62.190, such as audiometric testing, evaluation and follow-up examinations.

Hearing protector. Any device or material, capable of being worn on the head or in the ear canal, sold wholly or in part on the basis of its ability to reduce the level of sound entering the ear, and that has a scientifically accepted indicator of noise reduction value.

Hertz (Hz). Unit of measurement of frequency numerically equal to cycles per second. The audible range of frequencies for humans with normal hearing is 20 to 20000 Hz.

Medical pathology. A condition or disease affecting the ear.

Qualified technician. A technician who has been certified by the Council for Accreditation in Occupational Hearing Conservation (CAOHC) or by another recognized organization offering equivalent certification.

Reportable hearing loss. A change in hearing acuity for the worse, relative to the miner's baseline audiogram or, in the case of a supplemental baseline audiogram established pursuant to § 62.140(d)(2), relative to such supplemental baseline audiogram, of an average of 25 dB or more at 2000, 3000, and 4000 Hz in either ear.

Sound level. The sound pressure level measured in decibels using a weighting network (e.g., A-weighted) and exponential time averaging (e.g., slow response). The A-weighting network and the slow response time are defined in ANSI S1.4–1983, ''American National Standard Specification for Sound Level Meters.''

Standard threshold shift (STS). A change in hearing acuity for the worse relative to the miner's baseline audiogram, or relative to the most recent supplemental baseline audiogram where one has been established, of an average of 10 dB or more at 2000, 3000, and 4000 Hz in either ear.

Supplemental baseline audiogram. An annual audiogram designated, as a result of the circumstances set forth in § 62.140(d)(1) or those set forth in § 62.140(d)(2), to be utilized in lieu of a miner's original baseline audiogram in measuring changes in hearing acuity.

Time-weighted average-8 hour (TWA_8). That sound level, which if constant over 8 hours, would result in the same noise dose as is measured.

§ 62.120 Limitations on noise exposure.

(a) *Dose determination.*

(1) A miner's noise dose (D) is computed by the formula: $D = 100(C_1/T_1 + C_2/T_2 + * * * + C_n/T_n)$, where C_n is the total time of exposure at a specified sound level, and T_n is the reference duration of exposure at that sound level set forth in Table 62–1.

(2) Table 62–2 is to be utilized when converting noise measurements from dosage readings to equivalent TWA_8 readings.

TABLE 62–1.—REFERENCE DURATION

L (dBA, slow-response sound level)	Reference Duration, T (hour)
85	16.0
86	13.9
87	12.1
88	10.6
89	9.2
90	8.0
91	7.0
92	6.1
93	5.3
94	4.6
95	4.0
96	3.5
97	3.0
98	2.6
99	2.3
100	2.0
101	1.7
102	1.5
103	1.3
104	1.1
105	1.0
106	0.87
107	0.76
108	0.66
109	0.57
110	0.50
111	0.44
112	0.38
113	0.33
114	0.29
115	0.25

Note: For any value, the reference duration (T) in hours is computed by: $T = 8/2^{(L-90)/5}$, where L is the measured A-weighted, slow-response sound level.

TABLE 62–2.—CONVERSION FROM "DOSE" TO EQUIVALENT TWA_8

Dose (percent noise exposure)	TWA_8
25	80.0
29	81.0
33	82.0
38	83.0
44	84.0
50	85.0
57	86.0
66	87.0
76	88.0
87	89.0
100	90.0
115	91.0
132	92.0
152	93.0
174	94.0
200	95.0
230	96.0
264	97.0
303	98.0
350	99.0
400	100.0
460	101.0
530	102.0
610	103.0
700	104.0
800	105.0
920	106.0
1056	107.0
1213	108.0
1393	109.0
1600	110.0
1838	111.0
2111	112.0
2425	113.0
2786	114.0
3200	115.0
3676	116.0
4222	117.0
4850	118.0
5572	119.0
6400	120.0

Interpolate between the values found in this Table, or extend the table, by using the formula: $TWA_8 = 16.61 \log_{10} (D/100) + 90$.

(3) A miner's noise exposure measurement shall:

(i) Not be adjusted on account of the use of any hearing protector;

(ii) Integrate all sound levels from 80 dBA to at least 130 dBA during the miner's full workshift;

(iii) Use a 90 dBA criterion level and a 5-dB exchange rate; and

(iv) Use an A-weighting and a slow-response instrument setting.

(b) *Action level.* When a miner's noise exposure exceeds a TWA_8 of 85 dBA during any workshift, or equivalently a dose of 50%, the operator shall take the actions specified in paragraphs (b)(1) and (2) of this section and, at the request of the miner, also take the actions specified in paragraph (b)(3) of this section.

(1) An operator shall provide the miner training that includes the instruction required by § 62.130, at the time exposure exceeds the action level and every 12 months thereafter that exposure continues to exceed the action level.

(2) An operator shall enroll the miner in a hearing conservation program which shall meet the requirements of §§ 62.140 through 62.190. Moreover, the operator shall, with respect to any miner enrolled in such program, provide hearing protection in accordance with the requirements of § 62.125 until such time as a baseline audiogram has been obtained. If it takes more than 6 months to conduct the baseline audiogram, or if the miner is determined to have incurred an STS, the operator shall ensure that the hearing protection is provided to the miner and worn by the miner.

(3) At the request of any miner, the operator shall provide hearing protection to the miner in accordance with the requirements of § 62.125.

(c) *Permissible exposure level (PEL).* No miner shall be exposed to noise exceeding a TWA_8 of 90 dBA (PEL) during any workshift, or equivalently a dose of 100%.

(1) If a miner's noise exposure exceeds the PEL, the operator shall, in addition to taking the actions required under paragraph (b) of this section, use all feasible engineering and administrative controls to reduce the miner's noise exposure to the PEL. When administrative controls are used to reduce a miner's exposure, the operator shall post these procedures on the mine bulletin board and provide a copy to affected miners.

(2) If a miner's noise exposure exceeds the PEL despite the use of the controls required by paragraph (c)(1) of this section, the operator shall take the actions required by this paragraph for that miner.

(i) The operator shall use the controls required by paragraph (c)(1) of this section to reduce the miner's noise exposure to as low a level as is feasible.

(ii) The operator shall ensure that a miner whose exposure exceeds the PEL takes the hearing examinations offered through enrollment in the hearing conservation program.

(iii) The operator shall provide hearing protection to a miner whose exposure exceeds the PEL and shall ensure the use thereof. The hearing protection shall be provided and used in accordance with the requirements of § 62.125.

(d) *Dual hearing protection level.* Whenever a miner's noise exposure exceeds a TWA_8 of 105 dBA during any workshift, or equivalently a dose of 800%, the operator shall ensure that the miner is provided and uses both ear plug and ear muff type protectors pursuant to § 62.125.

(e) *Ceiling level.* At no time shall a miner be exposed to sound levels exceeding 115 dBA.

(f) *Operator exposure evaluation; employee notification.*

(1) Operators shall establish a system of monitoring which effectively evaluates each miner's noise exposure.

(2) Whenever a miner's exposure is determined to exceed the action level, the permissible exposure level, the dual hearing protection level, or the ceiling level established by this section, according to exposure evaluations conducted either by the operator or by representatives of the Secretary of Labor, and the miner has not received notification of exposure at such level within the prior 12 months, the operator shall, within 15 calendar days, notify the miner in writing of the exposure determination and the corrective action being taken. The operator shall maintain at the mine site a copy of any such miner notification, or a list on which the relevant information about that miner's notice is recorded, for the duration of the affected miner's exposure above the action level and for at least 6 months thereafter.

§ 62.125 Hearing protectors.

When hearing protection is required pursuant to this part, an operator shall:

(a) Allow the miner, after such miner has received the training specified by § 62.130 at least once, to choose a hearing protector from at least one muff type and one plug type, and in the event dual-hearing protection is required, to choose one of each type;

(b) In those cases in which the operator is required to ensure the use by a miner of hearing protection, ensure that the protector is worn by the miner when exposed to sound levels which are required to be integrated into a miner's noise exposure measurement;

(c) Ensure that the hearing protection is fitted and maintained in accordance with the manufacturer's instructions;

(d) Provide the hearing protectors and necessary replacements at no cost to the miner; and

(e) Allow the miner to choose a different hearing protector if wearing the selected protector is subsequently precluded due to medical pathology of the ear.

§ 62.130 Training.

(a) Miner training required by this part shall include the following instruction:

(1) The effects of noise on hearing;

(2) The purpose and value of wearing hearing protectors;

(3) The advantages and disadvantages of the hearing protectors to be offered;

(4) The care, fitting, and use of the hearing protector worn by the miner and the various types of hearing protectors offered by the operator;

(5) The general requirements of this part;

(6) The operator's and miner's respective tasks in maintaining mine noise controls; and

(7) The purpose and value of audiometric testing and a summary of the procedures.

(b) The training requirement under this part shall only be met if the operator certifies the date and type of training given each miner. The type of training may be initial noise training of a miner, annual retraining of a miner, or special retraining required for a miner as a result of the detection of an STS. The certification shall be signed by the person conducting the training. The operator shall maintain the miner's most recent certification at the mine site for as long as the miner is exposed to noise above the level which required the training and for at least 6 months thereafter.

§ 62.140 Audiometric testing program.

(a) Audiometric tests performed pursuant to this part shall be conducted by a physician, an audiologist, or a qualified technician under the direction or supervision of a physician or an audiologist, and pursuant to the procedures set forth in § 62.150.

(b) *Baseline audiogram.* A miner enrolled in a hearing conservation program shall be offered a valid baseline audiogram of the miner's hearing acuity against which subsequent annual audiograms can be compared.

(1) The valid baseline audiogram shall be offered within 6 months of enrolling the miner in an HCP, except that where mobile test vans are used to meet the audiometric test requirements of this section, the valid baseline audiogram shall be offered within 12 months of enrolling the miner in an HCP. An existing audiogram of the miner's hearing acuity may be used as the baseline audiogram if it meets the audiometric testing requirements of this part.

(2) The operator shall not expose the miner to workplace noise for at least 14 hours before conducting the baseline audiogram. Hearing protectors shall not be used as a substitute for this quiet period.

(3) The operator shall notify miners of the need to avoid high levels of noise during the 14-hour quiet period before taking the baseline audiogram.

(4) The operator shall not revise either a miner's baseline audiogram, or supplemental baseline audiogram where one has been established, due to changes in enrollment status in the HCP except for periods of unemployment exceeding 6 consecutive months.

(c) *Annual audiogram.* After establishing the baseline audiogram, the operator shall offer a subsequent valid audiogram at intervals not exceeding 12 months for as long as the miner remains in the HCP.

(d) *Supplemental baseline audiogram.* An annual audiogram shall be deemed to be a supplemental baseline audiogram when, in the judgment of the audiologist or physician:

(1) The standard threshold shift (STS) revealed by the audiogram is permanent; or

(2) The hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram.

§ 62.150 Audiometric test procedures.

(a) The operator shall assure that all audiometric testing required under this part is conducted in accordance with scientifically validated procedures. Audiometric tests shall be pure tone, air conduction, hearing threshold examinations, with test frequencies including as a minimum 500, 1000, 2000, 3000, 4000, and 6000 Hz. Each ear shall be tested separately.

(b) The operator shall obtain from the physician, audiologist, or qualified technician who conducts an audiometric test required under this part, a certification that the testing was conducted in accordance with paragraph (a) of this section.

(c) The operator shall compile an audiometric test record for each miner tested. Such record shall include the following:

(1) Name and job classification of the miner who has undergone the audiometric test(s);

(2) A copy of all of the miner's audiograms required under this part;

(3) Certification(s) as required under paragraph (b) of this section;

(4) Any exposure determination for the miner; and

(5) The results of any follow-up examination(s).

(d) Audiometric test records shall be maintained at the mine site for the duration of the affected miner's employment plus at least 6 months.

§ 62.160 Evaluation of audiogram.

(a) The operator shall:

(1) Inform persons evaluating audiograms of the requirements of this part and provide them with a copy of the miner's audiometric test records;

(2) Have a physician, an audiologist, or a qualified technician who is under the direction or supervision of a physician or audiologist:

(i) Determine if the audiogram is valid; and

(ii) Determine if an STS or a reportable hearing loss, as defined in this part, has occurred;

(3) Instruct the physician or audiologist not to reveal to the operator any specific findings or diagnoses unrelated to the miner's exposure to noise or wearing of hearing protectors without the written consent of the miner; and

(4) Obtain the results, and the interpretation of the results of any audiogram conducted under this part within 30 calendar days of conducting the audiogram.

(b)(1) The operator shall conduct an audiometric retest within 30 calendar days of receiving a determination that a required audiogram is invalid and that any medical pathology has improved to the point that a valid audiogram may be obtained.

(2) If the results of an annual audiogram demonstrate that the miner has incurred an STS or reportable hearing loss, the operator may conduct one retest within 30 calendar days of receiving the results of the audiogram and consider the results of the retest as the annual audiogram.

(c) In determining whether an STS or reportable hearing loss has occurred, allowance may be made for the contribution of aging (presbycusis) to the change in hearing level by adjusting the audiograms used in making those determinations according to the following procedures:

(1) Determine from Tables 62–3 or 62–4 the age correction values for the miner by:

(i) Finding the age at which the baseline audiogram, or supplemental baseline audiogram as appropriate, was taken, and recording the corresponding values of age corrections at 2000, 3000, and 4000 Hz; and

(ii) Finding the age at which the most recent audiogram was taken and recording the corresponding values of age corrections at 2000, 3000, and 4000 Hz.

(2) Subtract the value determined in paragraph (c)(1)(i) of this section from the value determined in paragraph (c)(1)(ii) of this section. The differences calculated represent that portion of the change in hearing that may be due to aging.

(3) Subtract the value determined in paragraph (c)(2) of this section from the hearing threshold level found in the annual audiogram to obtain the adjusted annual audiogram hearing threshold level.

(4) Subtract the hearing threshold in the baseline audiogram or supplemental baseline audiogram from the adjusted annual audiogram hearing threshold level determined in paragraph (c)(3) of this section to obtain the age-corrected threshold shift.

TABLE 62–3.—AGE CORRECTION VALUE IN DECIBELS FOR MALES

Years	Audiometric test frequencies (Hz)		
	2000	3000	4000
20 or younger	3	4	5
21	3	4	5
22	3	4	5
23	3	4	6
24	3	5	6
25	3	5	7
26	4	5	7
27	4	6	7
28	4	6	8
29	4	6	8
30	4	6	9
31	4	7	9
32	5	7	10
33	5	7	10
34	5	8	11
35	5	8	11
36	5	9	12
37	6	9	12
38	6	9	13
39	6	10	14
40	6	10	14
41	6	10	14
42	7	11	16
43	7	12	16
44	7	12	17
45	7	13	18
46	8	13	19
47	8	14	19
48	8	14	20
49	9	15	21
50	9	16	22
51	9	16	23
52	10	17	24
53	10	18	25
54	10	18	26
55	11	19	27
56	11	20	28
57	11	21	29
58	12	22	31
59	12	22	32
60 or older	13	23	33

TABLE 62–4.—AGE CORRECTION VALUE IN DECIBELS FOR FEMALES

Years	Audiometric test frequencies (Hz)		
	2000	3000	4000
20 or younger	4	3	3
21	4	4	3
22	4	4	4
23	5	4	4
24	5	4	4
25	5	4	4
26	5	5	4
27	5	5	5
28	5	5	5
29	5	5	5
30	6	5	5
31	6	6	5
32	6	6	6
33	6	6	6
34	6	6	6
35	6	7	7
36	7	7	7
37	7	7	7
38	7	7	7
39	7	8	8
40	7	8	8
41	8	8	8
42	8	9	9
43	8	9	9
44	8	9	9
45	8	10	10
46	9	10	10
47	9	10	11
48	9	11	11
49	9	11	11
50	10	11	12
51	10	12	12
52	10	12	13
53	10	13	13
54	11	13	14
55	11	14	14
56	11	14	15
57	11	15	15
58	12	15	16
59	12	16	16
60 or older	12	16	17

§ 62.170 Follow-up evaluation when audiogram invalid.

(a) If a valid audiogram cannot be obtained due to a suspected medical pathology of the ear which the physician or audiologist believes was caused or aggravated by the miner's exposure to noise or the wearing of hearing protectors, the operator shall refer the miner for a clinical audiological evaluation or an otological examination, as appropriate, at no cost to the miner.

(b) The operator shall instruct the physician or audiologist that if a valid audiogram cannot be obtained due to a suspected medical pathology of the ear which the physician or audiologist concludes is unrelated to the miner's exposure to noise or the wearing of hearing protectors, the physician or audiologist shall inform the miner of the need for an otological examination.

(c) The operator shall instruct the physician or audiologist not to reveal to the operator any specific findings or diagnoses unrelated to the miner's exposure to noise or the wearing of hearing protectors without the written consent of the miner.

§ 62.180 Follow-up corrective measures when STS detected.

Unless a physician or audiologist determines that an STS is neither work-related nor aggravated by occupational noise exposure, the operator shall within 30 calendar days of receiving evidence of an STS or receiving the results of a retest confirming an STS:

(a) Retrain the miner, including the instruction required by § 62.130;

(b) Provide the miner with the opportunity to select a hearing protector, or a different hearing protector if the miner has previously selected a hearing protector, from among those offered by the operator pursuant to § 62.125; and

(c) Review the effectiveness of any engineering and administrative controls to identify and correct any deficiencies.

§ 62.190 Notification of results; reporting requirements.

(a) Within 10 working days of receiving the results of an audiogram, or receiving the results of a follow-up evaluation required under § 62.170(a), the operator shall notify the miner in writing of:

(1) The results and interpretation of the audiometric test, including any finding of an STS or reportable hearing loss; and

(2) If applicable, the need and reasons for any further testing or evaluation.

(b) If evaluation of the audiogram shows that a miner has incurred a reportable hearing loss as defined in this part, the operator shall report such loss to MSHA as a noise-induced hearing loss in accordance with part 50 of this title unless a physician or audiologist has determined that the loss is neither work-related nor aggravated by occupational noise exposure.

§ 62.200 Access to records.

(a) The authorized representatives of the Secretaries of Labor and Health and Human Services shall have access to all records required under this part. Upon written request, the operator shall provide, within 15 calendar days of the request, access to records as indicated below:

(1) The miner, former miner, or, with the miner's written consent, the miner's designated representative shall have access to all records that the operator is required to maintain for that individual miner under this part; and

(2) The miners' representative shall in all cases have access to training records compiled pursuant to section § 62.130, and to copies of notices made pursuant to § 62.120(f)(2), for the miners whom they represent.

(b) Upon termination of a miner's employment, the operator shall provide the miner without cost with a copy of all records that the operator is required to maintain for that individual miner under this part.

(c) If a person who has access to certain records under this section requests a copy of a record, the operator shall provide the first copy of such record requested by a person at no cost to that person, and any additional copies requested by that person at reasonable cost.

§ 62.210 Transfer of records.

(a) Whenever an operator ceases to do business, that operator shall transfer all records required to be maintained by this part, or a copy thereof, to any successor operator who shall receive these records and maintain them for the required period.

(b) The successor operator shall use the baseline audiogram, or supplemental baseline audiogram as appropriate, obtained by the original operator for determining the existence of an STS or reportable hearing loss.

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Part III

Department of Commerce

International Trade Administration

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews; Notice

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–801, A–428–801, A–475–801, A–588–804, A–559–801, A–401–801, A–412–801]

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews.

SUMMARY: On December 7, 1995, the Department of Commerce (the Department) published the preliminary results of its administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof (AFBs) from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom (the Italian results were published in a separate notice). The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof, as described in more detail below. The reviews cover 64 manufacturers/exporters. The review period is May 1, 1993, through April 30, 1994.

Based on our analysis of the comments received, we have made changes, including corrections of certain inadvertent programming and clerical errors, in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms for each class or kind of merchandise are listed below in the section entitled ''Final Results of the Reviews.''

EFFECTIVE DATE: December 17, 1996.

FOR FURTHER INFORMATION CONTACT: The appropriate case analyst, for the various respondent firms listed below, of Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC. 20230; telephone: (202) 482–4733.

France

Andrea Chu (AVIAC, SNFA, SNR), Davina Hashmi (INA), Hermes Pinilla (Technofan), Matthew Rosenbaum (Franke & Heydrich, Hoesch Rothe Erde, Rollix Defontaine, SKF), or Kris Campbell.

Germany

Kris Campbell (Cross-Trade, Delta, EXTA Aussenhandel), Chip Hayes (NTN Kugellagerfabrik), Andrea Chu (SNR), Davina Hashmi (INA), Hermes Pinilla (Hepa Walzlager, Schaumloffel), Matthew Rosenbaum (Fichtel & Sachs, Franke & Heydrich, Hoesch Rothe Erde, Rollix Defontaine, SKF), Thomas Schauer (FAG), Kris Campbell, or Richard Rimlinger.

Italy

Davina Hashmi (Meter), Mark Ross (FAG), Thomas Schauer (SKF), Kris Campbell, or Richard Rimlinger.

Japan

J. David Dirstine (Koyo, NSK, ITOCHU, Godo Kogyo, Santest Co.), Chip Hayes (Mitsubishi, Nachi, Nankai Seiko, NTN), Lyn Johnson (I&OC, Kongo Colmet, Marubeni, Mihasi, Inc., Sanken Trading, Sanko Co., Taikoyo Sangyo, Takeshita, Tomen), Michael Panfeld (Izumoto Seiko, Nissho-Iwai, NPBS, Origin Electric), Mark Ross (Asahi Seiko, Minamiguchi, Mitsui, Naniwa Kogyo, Nichimen, Nichinan Sangyo, Nihon K.J., Shima Trading, Sumitomo, Toei Buhin, TOK Bearing Co.), Thomas Schauer (Matsuo Bearing Co., Nippon Thompson Co., Phoenix International, THK Co., Tsubakimoto PP), or Richard Rimlinger.

Singapore

Lyn Johnson (NMB/Pelmec) or Richard Rimlinger.

Sweden

Davina Hashmi (SKF) or Kris Campbell.

United Kingdom

Hermes Pinilla (FAG/Barden, NSK/RHP) or Kris Campbell.

SUPPLEMENTARY INFORMATION:

Background

On December 7, 1995, the Department published in the Federal Register the preliminary results of its administrative reviews of the antidumping duty orders on AFBs from France, Germany, Japan, Singapore, Sweden, and the United Kingdom (60 FR 62817) and the preliminary results of its administrative reviews of the antidumping duty orders on AFBs from Italy (60 FR 62813). We gave interested parties an opportunity to comment on our preliminary results.

At the request of certain interested parties, we held hearings on case-specific issues for Germany on February 14, 1996 and for Japan on February 15, 1996.

We are terminating the review with respect to Mitsubishi, Mitsui, Phoenix International, Shima Trading, and Sumitomo. The suppliers to these firms had knowledge at the time of sale that the merchandise was destined for the United States. Consequently, these firms are not resellers as defined in 19 CFR 353.2(s) because their sales cannot be used to calculate the U.S. price (USP).

Scope of Reviews

The products covered by these reviews are AFBs and constitute the following ''classes or kinds'' of merchandise: ball bearings and parts thereof (BBs), cylindrical roller bearings and parts thereof (CRBs), and spherical plain bearings and parts thereof (SPBs). For a detailed description of the products covered under these classes or kinds of merchandise, including a compilation of all pertinent scope determinations, see the ''Scope Appendix,'' which is appended to this notice of final results.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

Best Information Available

In accordance with section 776(c) of the Tariff Act, we have determined that the use of the best information available (BIA) is appropriate for a number of firms. For certain firms, total BIA was necessary while, for other firms, only partial BIA was applied. For a discussion of our application of BIA, see the ''Best Information Available'' section of the Issues Appendix.

Sales Below Cost in the Home Market

The Department disregarded sales below cost for the following firms and classes or kinds of merchandise:

Country	Company	Class or kind of merchandise
France	SKF	BBs
	SNR	BBs
Italy	FAG	BBs
	SKF	BBs
Germany	FAG	BBs, CRBs, SPBs
	INA	BBs, CRBs
	SKF	BBs, CRBs, SPBs

Country	Company	Class or kind of merchandise
Japan	Asahi Seiko	BBs
	Koyo	BBs, CRBs
	Nachi	BBs, CRBs
	NSK	BBs, CRBs
	NTN	BBs, CRBs, SPBs
Singapore	NMB/Pelmec	BBs
Sweden	SKF	BBs, CRBs
United Kingdom.	Barden	BBs
	FAG	BBs
	NSK/RHP	BBs, CRBs

Changes Since the Preliminary Results

Based on our analysis of comments received, we have corrected certain programming and clerical errors in our preliminary calculations. Any alleged programming or clerical errors with which we do not agree are discussed in the relevant sections of the Issues Appendix.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these concurrent administrative reviews of AFBs are addressed in the ''Issues Appendix'' which is appended to this notice of final results.

Final Results of Reviews

We determine that the following percentage weighted-average margins exist for the period May 1, 1993, through April 30, 1994:

Company	BBs	CRBs	SPBs
France			
AVIAC	0.47	(2)	(2)
Franke & Heydrich	[1] 66.42	(3)	(3)
Hoesch Rothe Erde	(2)	(3)	(3)
INA	66.42	18.37	42.79
Rollix Defontaine	(2)	(3)	(3)
SKF	3.75	(2)	18.80
SNFA	66.42	18.37	(3)
SNR	70.73	2.08	(3)
Technofan	14.59	(2)	(2)
Germany			
Cross-Trade GmbH	132.25	76.27	118.98
Delta Export GmbH	(2)	(2)	(2)
EXTA Aussenhandel GmbH	68.89	55.65	114.52
FAG	13.06	13.58	2.00
Fichtel & Sachs	19.60	(3)	(3)
Franke & Heydrich	[1] 132.25	(3)	(3)
Hepa Walzlager GmbH	(2)	(2)	(2)
Hoesch Rothe Erde	(2)	(3)	(3)
INA	31.29	52.43	(2)
NTN	12.50	(3)	(3)
Rollix & Defontaine	(2)	(3)	(3)
Schaumloffel Technik GmbH	(2)	(2)	(2)
SKF	2.67	9.46	14.30
SNR	3.69	0.99	(3)
Italy			
FAG	1.79	0.00	(3)
Meter	3.75	(3)	(3)
SKF	3.26	(3)	(3)
Japan			
Asahi Seiko	1.61	(2)	92.00
Godo Kogyo	(2)	(2)	(2)
I & OC	(2)	(2)	(2)
ITOCHU	(2)	(2)	(2)
Izumoto Seiko	2.28	(2)	(2)
Kongo Colmet	(2)	(2)	(2)
Koyo Seiko	14.90	6.53	[1] 0.00
Marubeni	(2)	(2)	(2)
Matsuo Bearing	(2)	(2)	(2)
Mihasi	(2)	(2)	(2)
Minamiguchi Bearing	106.61	51.82	92.00
Nachi-Fujikoshi	13.79	9.72	(3)
Naniwa Kogyo	106.61	51.82	92.00
Nankai Seiko	0.55	(2)	(2)
Nichinan Sangyo	(2)	(2)	(2)
Nichimen	106.61	51.82	92.00
Nihon K.J.	(2)	(2)	(2)
NPBS	45.83	(3)	(3)

Company	BBs	CRBs	SPBs
NSK Ltd.	19.39	15.37	(2)
Nippon Thompson	10.16	51.82	59.63
Nissho-Iwai	106.61	51.82	92.00
NTN	14.34	11.05	32.33
Origin Electric	106.61	51.82	92.00
Sanken Trading	106.61	51.82	92.00
Sanko	(2)	(2)	(2)
Santest	(2)	(2)	(2)
Taikoyo Sangyo	106.61	51.82	92.00
Takeshita Seiko	0.89	(3)	(3)
THK	106.61	51.82	92.00
Toei Buhin	(2)	(2)	(2)
TOK Bearing	106.61	51.82	92.00
Tomen	106.61	51.82	92.00
Tsubakimoto	7.77	(3)	(3)
Singapore			
NMB/Pelmec	4.32	(3)	(3)
Sweden			
SKF	2.22	0.00	(3)
United Kingdom			
Barden	1.49	1 8.22	(3)
FAG	3.32	1 8.22	(3)
NSK/RHP	10.21	10.35	(3)

1 No shipments or sales subject to this review. Rate is from the last relevant segment of the proceeding in which the firm had shipments/sales.
2 No shipments or sales subject to this review. The firm has no individual rate from any segment of this proceeding.
3 Not subject to review.

Cash Deposit Requirements

To calculate the cash deposit rate for each exporter, we divided the total dumping margins for each exporter by the total net USP value for that exporter's sales for each relevant class or kind during the review period under each order.

In order to derive a single deposit rate for each class or kind of merchandise for each respondent (*i.e.*, each exporter or manufacturer included in these reviews), we weight-averaged the purchase price and exporter's sales price (ESP) deposit rates (using the United States price (USP) of purchase price sales and ESP sales, respectively, as the weighting factors). To accomplish this where we sampled ESP sales, we first calculated the total dumping margins for all ESP sales during the review period by multiplying the sample ESP margins by the ratio of total weeks in the review period to sample weeks. We then calculated a total net USP value for all ESP sales during the review period by multiplying the sample ESP total net value by the same ratio. We then divided the combined total dumping margins for both purchase price and ESP sales by the combined total USP value for both purchase price and ESP sales to obtain the deposit rate.

We will direct Customs to collect the resulting percentage deposit rate against the entered Customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice.

Entries of parts incorporated into finished bearings before sales to an unrelated customer in the United States will receive the exporter's deposit rate for the appropriate class or kind of merchandise.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of AFBs entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rates for the reviewed companies will be the rates shown above, except that for firms whose weighted-average margins are less than 0.50 percent, and therefore *de minimis,* the Department shall require a zero deposit of estimated antidumping duties; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be the ''All Others'' rate for the relevant class or kind and country made effective by the final results of review published on July 26, 1993 (*see Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order,* 58 FR 39729 (July 26, 1993)). These rates are the ''All Others'' rates from the relevant LTFV investigations.

These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews.

Assessment Rates

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Because sampling and other simplification methods prevent entry-

by-entry assessments, we will calculate wherever possible an exporter/importer-specific assessment rate for each class or kind of antifriction bearings.

1. Purchase Price Sales

With respect to purchase price sales for these final results, we divided the total dumping margins (calculated as the difference between foreign market value (FMV) and USP) for each importer by the total number of units sold to that importer. We will direct Customs to assess the resulting unit dollar amount against each unit of merchandise in each of that importer's entries under the relevant order during the review period. Although this will result in assessing different percentage margins for individual entries, the total antidumping duties collected for each importer under each order for the review period will be almost exactly equal to the total dumping margins.

2. Exporter's Sales Price Sales

For ESP sales (sampled and non-sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margin against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. While the Department is aware that the entered value of sales during the POR is not necessarily equal to the entered value of entries during the POR, use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties which would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR.

For calculation of the ESP assessment rate, entries for which liquidation was suspended, but for which ultimately we do not collect antidumping duties under the ''Roller Chain'' principle, are included in the assessment rate denominator to avoid over-collecting. (The ''Roller Chain'' principle excludes from the collection of antidumping duties bearings which were imported by a related party and further processed, and which comprise less than one percent of the finished product sold to the first unrelated customer in the United States. See the section on ''Further Manufacturing and Roller Chain'' in the Issues Appendix.)

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

These administrative reviews and this notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 5, 1996.

Jeffrey P. Bialos,

Acting Assistant Secretary for Import Administration.

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Scope Appendix

A. Description of the Merchandise

The products covered by these orders, antifriction bearings (other than tapered roller bearings), mounted or unmounted, and parts thereof (AFBs), constitute the following classes or kinds of merchandise:

1. *Ball Bearings and Parts Thereof:* These products include all AFBs that employ balls as the roller element. Imports of these products are classified under the following categories: Antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof. Imports of these products are classified under the following Harmonized Tariff Schedule (HTS) subheadings: 4016.93.10, 4016.93.50, 6909.19.5010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.10, 8482.99.35, 8482.99.70, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.70.6060, 8708.93.6000, 8708.99.06, 8708.99.3100, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.58, 8708.99.8015, 8708.99.8080.

2. *Cylindrical Roller Bearings, Mounted or Unmounted, and Parts Thereof:* These products include all AFBs that employ cylindrical rollers as the rolling element. Imports of these products are classified under the following categories: Antifriction rollers, all cylindrical roller bearings (including split cylindrical roller bearings) and parts thereof, housed or mounted cylindrical roller bearing units and parts thereof.

Imports of these products are classified under the following HTS subheadings: 4016.93.10, 4016.93.50, 6909.19.5010, 8482.50.00, 8482.80.00, 8482.91.00, 8482.99.25, 8482.99.6530, 8482.99.6560, 8482.99.70, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.8080.

3. *Spherical Plain Bearings, Mounted or Unmounted, and Parts Thereof:* These products include all spherical plain bearings that employ a spherically shaped sliding element, and include spherical plain rod ends.

Imports of these products are classified under the following HTS subheadings: 6909.19.5010, 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8485.90.00, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.8080.

The HTS item numbers are provided for convenience and Customs purposes.

They are not determinative of the products subject to the orders. The written description remains dispositive.

Size or precision grade of a bearing does not influence whether the bearing is covered by the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if (1) they have been heat treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation.

The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scope of these orders.

B. Scope Determinations

The Department has issued numerous clarifications of the scope of the orders. The following is a compilation of the scope rulings and determinations the Department has made.

Scope determinations made in the *Final Determinations of Sales at Less than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany (AFBs Investigation of SLTFV),* 54 FR 19006, 19019 (May 3, 1989):

Products Covered

- Rod end bearings and parts thereof
- AFBs used in aviation applications
- Aerospace engine bearings
- Split cylindrical roller bearings
- Wheel hub units
- Slewing rings and slewing bearings (slewing rings and slewing bearings were subsequently excluded by the International Trade Commission's negative injury determination (see *International Trade Commission: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom,* 54 FR 21488, (May 18, 1989))
- Wave generator bearings
- Bearings (including mounted or housed units, and flanged or enhanced bearings) ultimately utilized in textile machinery

Products Excluded

- Plain bearings other than spherical plain bearings
- Airframe components unrelated to the reduction of friction
- Linear motion devices
- Split pillow block housings
- Nuts, bolts, and sleeves that are not integral parts of a bearing or attached to a bearing under review
- Thermoplastic bearings.
- Stainless steel hollow balls.
- Textile machinery components that are substantially advanced in function(s) or value.
- Wheel hub units imported as part of front and rear axle assemblies; wheel hub units that include tapered roller bearings; and clutch release bearings that are already assembled as parts of transmissions.

Scope rulings completed between April 1, 1990, and June 30, 1990 (see *Scope Rulings,* 55 FR 42750 (October 23, 1990)):

Products Excluded

- Antifriction bearings, including integral shaft ball bearings, used in textile machinery and imported with attachments and augmentations sufficient to advance their function beyond load-bearing/friction-reducing capability.

Scope rulings completed between July 1, 1990, and September 30, 1990 (see *Scope Rulings,* 55 FR 43020 (October 25, 1990)):

Products Covered

- Rod ends.
- Clutch release bearings.
- Ball bearings used in the manufacture of helicopters.
- Ball bearings used in the manufacture of disk drives.

Scope rulings completed between April 1, 1991, and June 30, 1991 (see *Notice of Scope Rulings,* 56 FR 36774 (August 1, 1991)):

Products Excluded

- Textile machinery components including false twist spindles, belt guide rollers, separator rollers, damping units, rotor units, and tension pulleys.

Scope rulings published in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof; Final Results of Antidumping Administrative Review (AFBs I),* 56 FR 31692, 31696 (July 11, 1991):

Products Covered

- Load rollers and thrust rollers, also called mast guide bearings.
- Conveyor system trolley wheels and chain wheels.

Scope rulings completed between July 1, 1991, and September 30, 1991 (see *Scope Rulings,* 56 FR 57320 (November 8, 1991)):

Products Covered

- Snap rings and wire races.
- Bearings imported as spare parts.
- Custom-made specialty bearings.

Products Excluded

- Certain rotor assembly textile machinery components.
- Linear motion bearings.

Scope rulings completed between October 1, 1991, and December 31, 1991 (see *Notice of Scope Rulings,* 57 FR 4597 (February 6, 1992)):

Products Covered

- Chain sheaves (forklift truck mast components).
- Loose boss rollers used in textile drafting machinery, also called top rollers.
- Certain engine main shaft pilot bearings and engine crank shaft bearings.

Scope rulings completed between January 1, 1992, and March 31, 1992 (see *Scope Rulings,* 57 FR 19602 (May 7, 1992)):

Products Covered

- Ceramic bearings.
- Roller turn rollers.
- Clutch release systems that contain rolling elements.

Products Excluded

- Clutch release systems that do not contain rolling elements.
- Chrome steel balls for use as check valves in hydraulic valve systems.

Scope rulings completed between April 1, 1992, and June 30, 1992 (see *Scope Rulings,* 57 FR 32973 (July 24, 1992)):

Products Excluded

- Finished, semiground stainless steel balls.
- Stainless steel balls for non-bearing use (in an optical polishing process).

Scope rulings completed between July 1, 1992, and September 30, 1992 (see *Scope Rulings,* 57 FR 57420 (December 4, 1992)):

Products Covered

- Certain flexible roller bearings whose component rollers have a length-to-diameter ratio of less than 4:1.
- Model 15BM2110 bearings.

Products Excluded

- Certain textile machinery components.

Scope rulings completed between October 1, 1992, and December 31, 1992 (see *Scope Rulings,* 58 FR 11209 (February 24, 1993)):

Products Covered

- Certain cylindrical bearings with a length-to-diameter ratio of less than 4:1.

Products Excluded

- Certain cartridge assemblies comprised of a machine shaft, a machined housing and two standard bearings.

Scope rulings completed between January 1, 1993, and March 31, 1993 (see *Scope Rulings,* 58 FR 27542 (May 10, 1993)):

Products Covered

- Certain cylindrical bearings with a length-to-diameter ratio of less than 4:1.

Scope rulings completed between April 1, 1993, and June 30, 1993 (see *Scope Rulings,* 58 FR 47124 (September 7, 1993)):

Products Covered

- Certain series of INA bearings.

Products Excluded

- SAR series of ball bearings.
- Certain eccentric locking collars that are part of housed bearing units.

Scope rulings completed between October 1, 1993, and December 31, 1993 (see *Scope Rulings,* 59 FR 8910 (February 24, 1994)):

Products Excluded

- Certain textile machinery components.

Scope rulings completed after March 31, 1994:

Products Excluded

- Certain textile machinery components.

Scope rulings completed between October 1, 1994 and December 31, 1994 (see *Scope Rulings,* 60 FR 12196 (March 6, 1995)):

Products Excluded

- Rotek and Kaydon—Rotek bearings, models M4 and L6, are slewing rings outside the scope of the order.

Scope rulings completed between April 1, 1995 and June 30, 1995 (see *Scope Rulings,* 60 FR 36782 (July 18, 1995)):

Products Covered

- Consolidated Saw Mill International (CSMI) Inc.—Cambio bearings contained in CSMI's sawmill debarker are within the scope of the order.
- Nakanishi Manufacturing Corp.—Nakanishi's stamped steel washer with a zinc phosphate and adhesive coating used in the manufacture of a ball bearing is within the scope of the order.

Scope rulings completed between January 1, 1996 and March 31, 1996 (see *Scope Rulings,* 61 FR 18381 (April 25, 1996)):

Products Covered

- Marquardt Switches—Medium carbon steel balls imported by Marquardt are outside the scope of the order.

Scope rulings completed between April 1, 1996 and June 30, 1996. (see *Scope Rulings,* 61 FR 40194 (August 1, 1996)):

Products Excluded

- Dana Corporation—Automotive component known variously as a center bracket assembly, center bearings assembly, support bracket, or shaft support bearing, is outside the scope of the order.

Issues Appendix

Company Abbreviations

Asahi Seiko (Asahi)
FAG/Barden [1]—The Barden Corporation (U.K.) Ltd.; The Barden Corporation; FAG (U.K.) Ltd.
FAG Germany—FAG Kugelfischer Georg Schaefer KGaA
FAG Italy—FAG Italia S.p.A.; FAG Bearings Corp.
Fichtel & Sachs—Fichtel & Sachs AG; Sachs Automotive Products Co.
GMN—Georg Muller Nurnberg AG; Georg Muller of America
Hoesch—Hoesch Rothe Erde AG
Honda—Honda Motor Co., Ltd.; American Honda Motor Co., Inc.
INA—INA Walzlager Schaeffler KG; INA Bearing Company, Inc.
IKS—Izumoto Seiko Co., Ltd.
Koyo—Koyo Seiko Co. Ltd.
Meter—Meter S.p.A.
Nachi—Nachi-Fujikoshi Corp.; Nachi America, Inc.; Nachi Technology Inc.
Nankai—Nankai Seiko Co., Ltd.
NMB/Pelmec—NMB Singapore Ltd.; Pelmec Industries (Pte.) Ltd.
NPBS—Nippon Pillow Block Manufacturing Co., Ltd.; Nippon Pillow Block Sales Co., Ltd.; FYH Bearing Units USA, Inc.
NSK—Nippon Seiko K.K.; NSK Corporation
NSK/RHP—NSK Bearings Europe, Ltd.; RHP Bearings; RHP Bearings, Inc.
NTN Germany—NTN Kugellagerfabrik (Deutschland) GmbH
NTN—NTN Corporation; NTN Bearing Corporation of America; American NTN Bearing Manufacturing Corporation
Rollix—Rollix Defontaine, S.A.
SKF France—SKF Compagnie d'Applications Mecaniques, S.A. (Clamart); ADR; SARMA
SKF Germany—SKF GmbH; SKF Service GmbH; Steyr Walzlager
SKF Italy—SKF Industrie; RIV-SKF Officina de Villar Perosa; SKF Cuscinetti Speciali; SKF Cuscinetti; RFT
SKF Sweden—AB SKF; SKF Mekanprodukter AB; SKF Sverige
SKF UK—SKF (UK) Limited; SKF Industries; AMPEP Inc.
SKF Group—SKF-France; SKF-Germany; SKF-Sweden; SKF-UK; SKF USA, Inc.
SNFA—SNFA Bearings, Ltd.
SNR France—SNR Nouvelle Roulements
SNR Germany—SNR Roulements; SNR Bearings USA, Inc.
Takeshita—Takeshita Seiko Company
Torrington—The Torrington Company

Other Abbreviations

AM—Aftermarket
COP—Cost of Production
COM—Cost of Manufacturing
CV—Constructed Value
ESP—Exporter's Sales Price
FMV—Foreign Market Value
HM—Home Market
HMP—Home Market Price
ISE(s)—Indirect Selling Expenses
LOT—Level of Trade
OEM—Original Equipment Manufacturer
POR— Period of Review
PP—Purchase Price
USP—United States Price
VAT—Value Added Tax

AFB Administrative Determinations

AFBs LTFV Investigation—Final Determinations of Sales at Less than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 19006 (May 3, 1989).
AFBs I—Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 31692 (July 11, 1991).
AFBs II—Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, 57 FR 28360 (June 24, 1992).

[1] The Department requested that FAG and Barden consolidate all information in the original questionnaire, which they did as FAG/Barden. FAG/Barden submitted comments on the preliminary results, referring to aspects of the Department's analysis of FAG and Barden. The Department has determined two separate rates for sales by FAG (U.K.) and Barden in these final results (*see* our response to Comment 1 in Section 4A).

AFBs III—Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, 58 FR 39729 (July 26, 1993).

AFBs IV—Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders, 60 FR 10900 (February 28, 1995).

AFB CIT Decisions

FAG v. *United States,* Slip Op. 95–158, September 14, 1995 (*FAG I*)

FAG Kugelfischer Georg Schaefer KGAa v. *United States,* Slip Op. 96–108 (CIT 1996) (*FAG II*)

FAG UK Ltd. v. *United States,* Slip Op. 96–177 (CIT, November 1, 1996) (*FAG III*)

Federal Mogul Corp. v. *United States,* 813 F. Supp 856 (CIT 1993) (*Federal Mogul I*)

Federal Mogul Corp. v. *United States,* 839 F. Supp 881 (CIT 1993), vacated, 907 F. Supp 432 (1995) (*Federal Mogul II*)

Federal Mogul Corp. v. *United States,* 884 F. Supp 1391 (CIT 1993) (*Federal Mogul III*)

Federal Mogul Corp. v. *United States,* 17 CIT 1015 (CIT 1993) (*Federal Mogul IV*)

Federal Mogul Corp. v. *United States,* 924 F. Supp 210 (CIT April 19, 1996) (*Federal Mogul V*)

Koyo Seiko Co., Ltd. v. *United States,* 796 F. Supp 1526 (CIT 1992) (*Koyo*)

NSK Ltd. v. *United States,* 910 F. Supp 663 (CIT 1995) (*NSK I*)

NSK Ltd. v. *United States,* 896 F. Supp 1263 (CIT 1995) (*NSK II*)

NTN Bearing Corporation of America v. *United States,* 903 F. Supp 62 (CIT 1995) (*NTN I*)

NTN Bearing Corporation of America v. *United States,* 905 F. Supp. 1083 (CIT 1995) (*NTN II*)

SKF USA Inc. v. *United States,* 876 F. Supp 275 (CIT 1995) (*SKF*)

The Torrington Company v. *United States,* 818 F. Supp 1563 (CIT 1993) (*Torrington I*)

The Torrington Company v. *United States,* 832 F. Supp. 379 (1993) (*Torrington II*)

The Torrington Company v. *United States,* 881 F. Supp 622 (1995) (*Torrington III*)

CAFC AFB Decisions

NTN Bearing Corp. v. *United States,* 74 F. 3d 1204 (CAFC 1995) (*NTN I*)

The Torrington Company v. *United States,* 44 F. 3d 1572 (CAFC 1994) (*Torrington IV*)

The Torrington Company v. *United States,* 82 F. 3d 1039 (CAFC 1996) (*Torrington V*)

1. Assessment and Duty Deposits

Comment 1: Torrington contends that the Department should reconsider its position regarding the calculation of deposit rates because the new VAT methodology exacerbates the discrepancy between deposit rates and assessment rates. Torrington suggests that the Department should calculate deposit rates using entered value, not United States price (USP), as the denominator, as it does in calculating assessment rates.

Torrington acknowledges that the Department and the Court of Appeals for the Federal Circuit (CAFC) have previously rejected Torrington's argument that deposit rates should be calculated using entered value as the denominator, citing *AFBs I* at 31692, noting in addition that the CAFC upheld the Department regarding this issue in *Torrington IV* at 1579. Torrington contends, however, that the new VAT methodology adversely affects the Department's deposit rate calculations and increases the disparity between deposit and assessment rates.

Torrington suggests that the new methodology, whereby the Department multiplies HMP by the VAT rate and adds this amount equally to the HMP and USP, increases the USP that serves as the deposit rate denominator while leaving entered value (the assessment rate denominator) unchanged. Torrington acknowledges that the previous VAT methodology (under which the VAT amount that was added to both HMP and USP was derived by multiplying USP, not FMV, by the VAT rate), also increased USP by an amount representing VAT. However, Torrington states that the addition to USP is greater under the new VAT methodology than it was under the old methodology, because HMP is generally greater than USP where there is dumping, and Torrington provides a hypothetical example. Torrington concludes that the new VAT-adjustment methodology is not tax neutral because the deposit rates for respondents in countries with high VAT tax rates will be far lower, everything else being equal, than those in countries with low VAT tax rates. For these reasons, Torrington argues the Department should calculate antidumping duty deposit rates on the same basis that it calculates antidumping duty assessment rates.

FAG, INA, Koyo, NMB/Pelmec, NSK, NTN, and SKF argue that the Department should not alter its deposit-rate methodology. Respondents contend that this methodology has been established practice since the first review of these orders and should not be changed without good reason. Respondents contend that both the Court of International Trade (CIT) and CAFC have affirmed the Department's methodology. Respondents contend that Torrington's arguments regarding the change in VAT methodology do not constitute sufficient cause to alter the deposit-rate methodology.

Department's Position: We disagree with Torrington. As we have noted in previous reviews of these orders, duty deposits are estimates of future dumping liability, and any difference between the estimate and the calculated assessment will be collected or refunded with interest. *See AFBs II* at 28377, *AFBs III* at 39738, and *AFBs IV* at 10905–06. As such, duty deposits need simply to be based on the level of dumping during the POR; how the duty-deposit rate is derived is within the Department's discretion, provided that the derivation is reasonable. Moreover, the duty-deposit rate does not have to be identical to the assessment rate. *See Torrington IV* at 1578–79.

We do not use entered value as the denominator in estimating duty deposits for the following reasons. First, duty deposits calculated on such a basis will not necessarily reflect the final margin of dumping any more accurately than deposit rates calculated based on USP. Because margins generally change from review to review, we have no reason to believe or suspect that one methodology will necessarily be more accurate than another. Second, we do not have entered values for all importers of PP sales. Third, even if we had all entered values, to do as Torrington suggests would require calculating separate deposit rates for all importers, which would create an excessive administrative burden both on us and on the U.S. Customs Service in order to implement a deposit methodology that has not been shown to be more accurate. Finally, as we noted in the 90/91 review of these orders, we must maintain a consistent standard for determining whether margins are *de minimis.* In sum, practical concerns favor the approach we have consistently applied, and there is little theoretical appeal to changing the approach. This is especially true when any difference between the estimate and the assessment is collected (or refunded) with interest when the entries are liquidated.

Nothing in Torrington's argument concerning the new VAT methodology invalidates the reasons provided above for using USP as the denominator in

calculating deposit rates for estimated future liability. As Torrington acknowledges, both the new and old VAT methodologies resulted in the addition to USP of an amount for VAT. In fact, under Torrington's hypothetical example illustrating the difference in deposit rates caused by the new VAT methodology, the deposit rate calculated using the new methodology (19 percent) differed by only one percent from that calculated using the previous methodology (20 percent). Therefore, Torrington has not shown that the new VAT methodology results in deposit rates that are not reasonably based on the level of dumping during the POR. Consequently, we have not changed our methodology for calculating duty-deposit rates for future entries in these final results.

Comment 2: NSK argues that the Department's methodology for calculating dumping duties significantly overstates its dumping liability. NSK contends that the Department's methodology, which calculates POR assessment rates by dividing the amount of antidumping duties determined through its analysis of the six sample week sales (multiplied by a weight factor of 8.69 in order to derive an annual duty amount) by the entered value of the sample week sales (also multiplied by a weight factor of 8.69 to derive an annual entered value amount for POR sales), results in the over collection of duties from NSK when applied to the entered value of POR entries. NSK states that this is due to the fact that the entered value of its POR *entries* significantly exceeded the Department's calculated entered value of NSK's POR *sales*. NSK asserts that the Department should use the total entered value of NSK's POR entries as the denominator in the assessment-rate calculation.

Torrington, citing *Koyo* at *page* 1529, argues that the CIT has held that the Department is afforded ''tremendous deference in selecting the appropriate [assessment] methodology'' and that the Department's assessment-rate methodology is reasonable and in accordance with law. Torrington notes that the Court in *Koyo* also stated that, as long as the methodology the Department selects is reasonable, it is appropriate even if ''another alternative is more reasonable.'' *Id* at *page* 1529. Torrington argues that the Department therefore should apply its established assessment-rate methodology in the final results.

Department's Position: We disagree with NSK. In litigation arising from *AFBs II,* FAG argued (as NSK does here) that we should calculate an assessment rate by dividing the annualized dumping duties due by the entered value of entries during the POR, rather than the entered value of sales during the POR. In our remand determination of May 30, 1995, we explained that the statute requires us to assess an antidumping duty equal to the amount by which the FMV of the merchandise exceeds the USP of the merchandise (section 751(a)(2)(B) of the Act). We stated that both FAG's methodology and our methodology in *AFBs II* meet this standard, since both methods compute the difference between FMV and USP and use that difference as the basis for assessment.

The CIT agreed with our May 30, 1995 remand redetermination, stating that ''[a] comparison of FAG's and Commerce's assessment approaches satisfactorily convinces the Court that Commerce's methodology is the more accurate in spite of the fact that Commerce was aware of FAG's data on the record pertaining to total sales and actual entered values.'' *FAG I* at 9.

Like FAG's method, NSK's method in this review simply uses the difference to compute an amount of duties due for *sales* made during the POR, while the Department's method uses the difference between FMV and USP to compute an amount of duties due on *entries* made during the POR. Similarly, like FAG's methodology in *AFBs II,* NSK's method assumes that the amount of dumping found in the sample pool is representative of the amount of dumping on POR *sales,* whereas the Department's method assumes the rate of dumping found in the same pool is representative of the rate of dumping found on POR *entries* as a whole.

In addition, there is some danger that a change to NSK's methodology from the methodology we used in previous reviews (*i.e.,* the 92/93 review period and the 93/94 review period) will result in estimating duties on a pool of entries twice. If our methodology estimates the amount of duties due on *entries* made during the POR and NSK's methodology estimates the amount of duties due on *sales* during the POR, switching methodologies between two POR's will result in estimating the duties due on merchandise *entered* during the first period and *sold* during the second period in both periods. In fact, such an inconsistency in assessment-rate methodologies would also occur when entries are subject to liquidation without administrative review. NSK's methodology is inconsistent with the assessment methodology we use for automatic assessment because, when we automatically liquidate, we assess duties based on the cash deposit rate at the time of entry. The cash deposit rate is a ''relative'' dumping rate, *i.e.,* it reflects the weighted-average margin of dumping which we have calculated using the value of sales rather than the value of entries made during the POR, which is similar to our assessment-rate methodology.

Because our methodology is reasonable and the CIT has upheld it (*see FAG I*), we have not changed our assessment-rate methodology for these final results.

2. Best Information Available

Section 776(b) of the Tariff Act provides that, in making a final determination in an administrative review, if the Department ''is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action * * *'' In addition, section 776(c) of the Tariff Act requires the Department to use BIA ''whenever a party or any other person refuses or is unable to produce information requested in a timely manner or in the form required, or otherwise significantly impedes an investigation * * *.

In deciding what to use as BIA, section 353.37(b) of our regulations provides that we may take into account whether a party refuses to provide information. For purposes of these reviews and in accordance with our practice we have used the more adverse BIA—generally the highest rate for any company for the same class or kind of merchandise from the same country from this or any prior segment of the proceeding, including the less-than-fair-value (LTFV) investigation—whenever a company refused to cooperate with the Department or otherwise significantly impeded the proceeding. When a company substantially cooperated with our requests for information, but we were unable to verify information it provided or it failed to provide all information requested in a timely manner or in the form requested, we used as BIA the higher or (1) the highest rate (including the ''all others'' rate) ever applicable to the firm for the same class or kind of merchandise from the same country from either the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in this review for any firm for the same class or kind of merchandise from the same country (*see* AFBs III at 39739 (July 26, 1993), and *Empresa Nacional Siderurgica* v. *United States,* Slip Op. 95–33 (CIT March 6, 1995)).

Comment 1: INA contends that the Department's application of second-tier BIA in the preliminary results, based on the results of a three-day verification at

INA's U.S. affiliate (INA–USA), is unduly punitive. INA alleges that the problems experienced at verification were due to its brevity and to the overlapping demands of preparing supplemental questionnaire responses while preparing for verification in the two weeks prior to the verification, and not due to deficient data *per se*. INA notes that the Department issued a large supplemental questionnaire for sections A–C on January 10, 1995, and scheduled the U.S. verification for January 23 through January 25, 1995. INA suggests that, given this schedule, the Department's decision to limit the verification to three days, as opposed to five, adversely affected the company (noting that the U.S. verification in the previous (92/93) review lasted five days and that all five days were needed to complete that verification). INA argues that the verification report suggests that the unresolved issues were due to a lack of sufficient time to complete verification and, while the report implies that INA was responsible due to ''periods of inactivity'' while company officials searched for requested materials, such periods of inactivity do not take into account the time problems inherent in a three-day verification.

INA states that it provided supporting documents for certain items that the verification report nonetheless treated as unverified, as follows: (1) A reconciliation of certain adjustments necessary to tie sales data in the company's sales journal to the financial statements (INA claims it provided this reconciliation but the Department did not review it due to time constraints); (2) a reconciliation of a monthly sales amount, as listed in the general ledger, with the financial statements (INA claims it provided this reconciliation after an initial error but the Department took as an exhibit the initial and incorrect reconciliation); and (3) a reconciliation of the gross monthly sales figures in the transaction register with those in the sales journal (INA claims that the Department misunderstood this reconciliation, mistakenly attributing certain sales figures in a summary worksheet to the transaction register instead of the sales journal). INA suggests the means by which the Department could establish the accuracy of items (2) and (3), above, from information already on the record.

In addition, INA provides explanations for other items that the report states remained open at the end of verification, as follows: (1) An invoice sequence the Department conducted to establish the completeness of the invoices for certain POR months (INA claims that company officials realized during verification that its invoices were not numbered in a strictly chronological sequence but this could not be taken into account in the invoice-sequence test due to time constraints); (2) certain price adjustments, including packing material and labor, inventory carrying costs, technical services/warranties, guarantees and servicing, and commissions (INA claims that supporting documentation for each adjustment was available at the verification site but was not examined due to time constraints); (3) an information request for employee expense vouchers (INA claims that this request was made after the close of business on the last day of verification and that the employee with access to such vouchers was not available); and (4) a missing U.S. sale found at verification (INA claims that this was due to a clerical computer error, which INA later discovered caused the omission of over 300 sales from the U.S. database, as well as the absence of HM sales, CV, and COP data for 35 products involved in the missing U.S. sales; INA requests that it be allowed to submit information to correct this error (*see Comment 6*, below).

Finally, INA addresses certain verification items that the company states were not elements of the Department's decision to apply BIA to the company, but which were still noted in the verification report, as follows: (1) Swap agreements that were not included in the reported credit expense (INA argues that such agreements are not relevant to the cost of credit); (2) magazine publishing expenses that were not included in the reported advertising expense (INA claims that this magazine is published for company employees only); (3) ocean freight and brokerage and handling discrepancies (INA claims that they are negligible); and (4) ''PPAP'' revenues as an offset to indirect expenses (INA claims that this is consistent with generally accepted accounting principles (GAAP)).

INA suggests that the verification problems the company experienced are directly related to the time constraints of a three-day verification, which, given the size and complexity of INA-USA's sales and accounting records, is not a sufficient time in which to complete this verification. INA notes that INA-USA is a major U.S. producer of AFBs, and its sales of purchased bearings, including subject merchandise, account for only a small percentage of its total sales; its accounting system and underlying documentation are more complex, therefore, than those of a related-party importer that is not primarily a bearing manufacturer. INA states that, given these facts, INA's failure to complete verification in three days (along with an inadvertent database error on the U.S. sales listing) does not warrant the application of a BIA rate that could cost the company millions of dollars of additional antidumping duties.

Torrington responds that the Department properly applied second-tier BIA to INA's questionnaire response due to INA-USA's failures at verification. Torrington cites to the Department's May 24, 1995 memorandum concerning the application of BIA to INA and contends that the Department should reject INA's attempt to blame the Department for failing to allot sufficient time for verification for the following reasons: (1) Much of the time at verification was spent conducting routine tests; (2) U.S. sales verifications normally require only three days; (3) according to the report, INA officials were absent from the verification site for long periods of time; and (4) INA should be familiar with routine verification procedures, since this is the fifth annual review. Torrington notes that respondents, not the Department, carry the responsibility of demonstrating the reliability of reported information.

Torrington suggests that BIA is particularly warranted in this case due to the verification finding that INA had omitted certain U.S. sales, along with an undisclosed number of HM sales. Torrington states that, if a single alleged programming error resulted in hundreds of unreported sales, it is a fair concern that the program contains other equally consequential errors.

Department's Position: We disagree with INA and have assigned a cooperative (second-tier) BIA rate to the company for these final results. As noted above, under section 776(b) of the Tariff Act, if we are ''unable to verify the accuracy of the information submitted,'' we are authorized to use BIA. In addition, section 776(c) of the Tariff Act requires that we use BIA ''whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation.'' When a company has substantially cooperated with our requests for information and, to some extent, at verification, but we were unable to verify the information it provided or it failed to provide complete or accurate information, we assign that company second-tier BIA. *See Allied Signal* versus *United States*, 996 F.2d 1195 (CAFC 1993) (concluding that the Department's two-tiered BIA

methodology, under which cooperating companies are assigned the lower, ''second tier'' BIA rate, is reasonable).

INA cooperated with our requests for information and agreed to undergo verification. However, despite our attempts, we were unable to verify the completeness of its response. First, because we were unable to verify INA's total U.S. sales of the subject merchandise, we were unable to establish the proper universe of sales within which we would conduct our analysis. Establishing the completeness of the response with respect to sales of the subject merchandise in the United States is a very significant element of verification. However, as a result of verification, INA subsequently acknowledged that it had omitted over 300 sales from its U.S. database along with the corresponding HM sales, CV, and COP data for 35 products involved in the missing U.S. sales. The completeness of the U.S. sales database is essential because it is used to calculate the dumping duties. It is our practice to examine at verification only a randomly selected subset of the reported U.S. sales, a practice that the CIT has upheld. *See Bomont Industries* versus *United States*, 733 F.Supp. 1507, 1508 (CIT 1990) (''verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally an audit entails selective examination rather than testing of an entire universe.''); *see also Monsanto Co.* versus *United States*, 698 F. Supp. 275, 281 (CIT 1988) (''verification is a spot check and is not intended to be an exhaustive examination of the respondent's business''). Where the Department finds discrepancies in this subset, it must judge the effect on the unexamined portion of the response. In the instant case, ESP sales are reported on a limited, sampled basis due to the large number of transactions. Where we have allowed for reduced reporting but determine that U.S. sales are missing from the database submitted as the complete sampled sales listing, we must be especially concerned about the reliability and accuracy of any margin we might calculate from the database. An omission of this magnitude, by itself, renders the remainder of INA's response inadequate for the purpose of calculating a dumping margin in this review. *See Persico Pizzamiglio, S.A.* v. *United States,* Slip Op. 94–61 (*Persico*) (upholding the Department's use of BIA for a respondent who was unable to demonstrate the completeness of its U.S. sales at verification). *See also* Comment 3, below, regarding INA's request to submit data concerning these sales for the record.

Second, among a number of other problems in establishing the completeness of the reported U.S. sales, we were unable to verify that INA's transaction register (a register allegedly used to record all sales during the POR) was a complete list of all sales. Specifically, we were unable to tie this document to either the financial statements or to the reported sales. *See INA USA Verification Report* at 3–5. This inconsistency raises serious concerns regarding the completeness of INA's reporting because the company, both at verification and in its brief (at 9), identified the transaction register as the basis for the sales reported in INA's response. *See Memorandum from Office Director to DAS, Compliance: Antifriction Bearings from Germany; Use of Best Information Available for the Preliminary Results of the Fifth Administrative Review* (May 24, 1995) (BIA memo). INA contends that the failure to establish the reliability of the transaction register was due to the Department's mistaken belief that a ''bridge'' worksheet was based on the transaction register (INA claims the worksheet was based instead on INA's sales journal). The verification report clearly indicates, however, that INA officials told the Department that the worksheet was based on the transaction register (''the monthly gross sales figures *were claimed to be taken from INA's transaction register,* which is a composite of all sales of subject and non-subject merchandise made during the POR.'' *INA USA Verification Report* at 3).

INA's post-hoc explanations for other significant verification failures with respect to establishing the completeness of its reporting are similarly unconvincing. For instance, the Department attempted to establish the completeness of INA's reporting by examining INA's POR invoices, which the company stated initially were maintained in chronological sequence. However, as INA acknowledges, company officials did not discover until the last day of verification that INA's invoices were not numbered on a chronological basis, but instead were sequentially numbered by warehouse. As the Department stated in the BIA memo, by the time this discovery was made, there was insufficient time to establish the completeness of the reported total volume of sales using these invoices.

For these reasons, we were unable to verify that INA reported all U.S. sales of subject merchandise. Moreover, we could not verify the volume of U.S. sales that may have been unreported. The completeness of the U.S. sales response is a significant element of verification. Further, in the instant case, ESP sales are reported on a limited, sampled basis due to the large number of transactions. Where we have allowed for reduced reporting but determine that U.S. sales are missing from the database submitted as the complete sampled sales listing, we must be especially concerned about the reliability and accuracy of any margin we might calculate from the database.

In accordance with section 776(b) of the Tariff Act, our inability to verify INA's U.S. sales listing was the determining factor in our decision to apply BIA to the company's response. With respect to the other items INA characterized as unresolved due to time constraints, we note that, regardless of the resolution of these issues, we would not be able to use INA's response in calculating the dumping margin, given that we could not verify INA's U.S. sales listing. Further, it is incumbent upon the respondent to establish the accuracy of the information it submits during the time period allotted for verification. As we stated in *Final Determination of Sales at Less Than Fair Value: Photo Albums and Filler Pages from Korea,* 50 FR 43754, at 43755–56 (October 29, 1985), ''[i]t is the obligation of respondents to provide an accurate and complete response prior to verification so that the Department may have the opportunity to fully analyze the information and other parties are able to review and comment on it. The purpose of verification is to establish the accuracy of a response rather than to reconstruct the information to fit the requirements of the Department.'' The time allotted for this verification, three days, is the normal time for which we schedule U.S. sales verifications, despite the size or complexity of respondents' business operations and records. This is the normal time period granted for such verifications and was the time period given for ESP verification of other respondents in this review. Further, as indicated by the CIT, ''[t]here is no statutory mandate as to how long the process of verification must last,'' and the Department ''is afforded discretion when conducting a verification pursuant to 19 U.S.C. 1677e(b).'' *Persico* at 19 (holding that a three-day overseas verification was reasonable). Notably, the Department conducted six other ESP verifications for this review period, all of which were completed in three days, the same amount of time given to INA-USA.

Thus, in accordance with section 776(b) of the Act, we are relying on

cooperative BIA to determine INA's antidumping margin for each class or kind in these reviews.

Comment 2: INA proposes that, instead of applying BIA, the Department should use its discretion to conduct a supplemental verification. INA contends that the Department has the authority to conduct an additional verification and cites to several cases in which the Department has conducted such verifications (*Cyanuric Acid and Its Chlorinated Derivatives from Japan*, 51 FR 45495, 45496 (December 19, 1986); *Cell Site Transceivers from Japan*, 49 FR 43080, 43084 (October 26, 1984); *High Power Microwave Amplifiers and Components Thereof from Japan*, 47 FR 22134 (May 21, 1982); *Fireplace Mesh Panels from Taiwan*, 47 FR 15393, 15395 (April 9, 1982)). INA states that the Department examines the necessity of conducting supplemental verifications on a case-by-case basis, thereby underscoring the discretionary nature of this decision.

INA notes that there are four reasons why the Department may not wish to conduct a supplemental verification: inconvenience, cost, schedule, and precedent. INA argues that none of these reasons justifies a refusal to conduct an additional verification in this case. INA contends that the magnitude of the potential penalty in this case outweighs the inconvenience and cost aspects, that a supplemental verification would not have an adverse impact on the Department's schedule in the fifth reviews, and that the case-specific nature of this decision should alleviate any concern over establishing a burdensome precedent.

INA states that, considering the above facts, the failure to conduct a supplemental verification, while applying total BIA, would constitute an abuse of discretion. INA cites *NTN I* for the general proposition that the dumping law is remedial, not punitive. INA notes that the CAFC has held that the Department's refusal to accept the correction of clerical errors after the deadline for submitting factual information was an abuse of discretion when, *inter alia*, failure to do so ''resulted in the imposition of many millions of dollars in duties not justified under the statute,'' citing *NTN I* at 1208.

Department's Position: We disagree with INA. The facts of this case do not justify taking the extraordinary step of conducting an additional verification. Although we have, in an extremely limited number of cases, conducted a supplemental verification, it is not our policy to permit re-verification of data. *See Sodium Nitrate from Chile: Final Results of Review*, 52 FR 25897 (July 9, 1987).

Conducting a second verification after a company fails its first verification would be an extraordinary action. To do so would signal respondents that a failed verification can be overcome, which would undermine both our ability to obtain complete and accurate information from respondents in time to conduct proper verifications and to complete reviews in a timely manner. As we have indicated on the record in this case, a second verification would cease to be an opportunity to check the accuracy of a response and would become merely an exercise in identifying areas in which a response could be improved. *See Memorandum from DAS, Import Administration to Assistant Secretary, Import Administration: INA Request to Submit New Information* (July 29, 1995) (INA Memorandum).

The most recent of the cases that INA cites occurred in 1986. Further, in each of the cases cited, re-verification was conducted pursuant to requests for additional information requested by the Department, or due to a particular emergency that arose in the case. In contrast, INA's request is based primarily on the general time constraints imposed by a three-day ESP verification. As noted in our response to Comment 1, this is the normal time period granted for such verifications and was the time period given for ESP verification of other respondents in this review. Further, as indicated by the CIT, ''[t]here is no statutory mandate as to how long the process of verification must last,'' and the Department ''is afforded discretion when conducting a verification pursuant to 19 U.S.C. 1677e(b).'' *Persico* at 19 (holding that a three-day overseas verification was reasonable). Accordingly, we have declined to conduct a supplemental verification.

Comment 3: INA requests that it be permitted to submit new information that would correct a programming error discovered at verification. INA states that this error resulted in the omission of over 300 U.S. sales as well as the HM sales, CV, and COP data corresponding to such sales.

INA notes that, pursuant to § 353.31(a) of the Department's regulations, the Department has accepted corrections of clerical errors after verification if the existence of the error and the accuracy of the correction could be determined from the existing administrative record (citing *AFBs III* at 39780). INA contends that, although this is not the case for the data in question, the CAFC held in *NTN III* that the Department's refusal to waive the deadlines established in § 353.31(a) to permit correction of clerical errors that were not apparent from the record constituted an abuse of discretion (at 1207). In light of this decision, INA requests that the Department accept correction of the error found at verification. (INA notes that it previously made this request in a letter to the Department dated January 26, 1996.)

Torrington objects to INA's request that it be allowed to submit additional information regarding these missing transactions, stating that *NTN III* should be limited to its facts and must not be allowed to subvert the traditional role played by antidumping verifications. Torrington contends that INA's error is not a clerical error and is far more sweeping than that involved in *NTN III*.

Department's Position: We disagree with INA's position that the omittance of over 300 U.S. sales as well as the HM sales, CV, and COP data corresponding to such sales constitutes a clerical error, and we have not accepted any post-verification submissions regarding these sales for these final results. As indicated in our response to Comment 1, INA's alleged ''clerical error'' is more appropriately described as a verification failure.

There are several important distinctions between *NTN III* and the present case (*see* INA Memorandum). First, there is a difference in breadth and significance of the error. INA's process and strategy for identifying sales of subject merchandise was flawed; it failed to recognize its own product designations for subject merchandise and devise appropriate means to collect and report all sales. As a result, INA failed to report a significant number of U.S. sales, which, to correct, would require a substantial and fundamental addition to its questionnaire response. INA did not simply misreport a small amount of data requiring a simple correction as occurred in *NTN III*. The court in *NTN III* at 1208 specifically noted that correction of the errors in that case ''would neither have required beginning anew nor have delayed making the final determination'' and that ''a straightforward mathematical adjustment was all that was required.'' *See NTN III* at 1208. In this case, correction of INA's alleged error would require collection of substantial amounts of new information and significant additional time and effort to analyze and examine the new information, as well as additional time to allow the petitioner to comment on the new information.

Second, in *NTN III* the court found that the respondent was first alerted to the probability of error upon examination of the preliminary results at 1207. Here, INA was made aware of a problem with its questionnaire response when we found a missing sale at verification, well before the preliminary results were issued. INA was unable to explain the missing sale at verification or to correct its error at that time. Indeed, INA did not attempt to correct the alleged error until a year after the verification at which the error was uncovered. Further, the error affected an area (total volume and value of sales) that is always a primary focus of verification. The nature of this error is not such that it could only be discovered after the preliminary results of review as was the case in *NTN III*. Thus, INA's alleged ''clerical error'' is more appropriately described as a verification failure.

Third, there is no assurance that any new sales information INA might submit would be complete and accurate.[2] The information INA seeks to submit purports to cover all missing sales. Unlike the information in *NTN III* which could be verified by comparison with a few supporting documents, the accuracy of INA's new information could only be assessed through an entirely new verification which, for the reasons we stated in response to Comment 2, above, is inappropriate in this situation.

In the context of a review in which INA's response has already failed verification, we would have little confidence in the completeness and accuracy of any new ''corrective'' information INA might submit because we would have no assurance that the particular error INA found was the only such error leading to omissions of sales, that any additional sales that INA might report would account for all of the missing sales, or that the new sales information would be accurate (*i.e.*, that the errors identified at verification have been completely remedied). Therefore, we have not accepted a revised response from INA.

Comment 4: Torrington contends that, although the Department correctly applied second-tier BIA to INA's questionnaire response, it did not use the correct second-tier rates. Torrington suggests that the correct preliminary cooperative BIA rates are 38.18 percent and 52.43 percent for BBs and CRBs, respectively, as opposed to the rates of 31 and 52 percent which the Department preliminarily assigned to INA.

INA responds that the CRB rate suggested by Torrington is a ''no shipment'' rate that the Department correctly disregarded in establishing the cooperative BIA rate. With respect to the BB rate, INA contends that the Department appropriately used its discretion not to use the highest calculated rate for this review, using instead INA's highest previous rate.

Department's Position: For these final results, and in accordance with our policy regarding the derivation of the second-tier BIA rate, we are applying a rate to INA's sales based on the higher of (1) the highest rate (including the ''all others'' rate) ever applicable to the firm for the same class or kind of merchandise from the same country from either the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in this review for any firm for the same class or kind of merchandise from the same country. Accordingly, we have applied the second-tier BIA rates of 31.29 percent for BBs and 52.43 percent for CRBs.

Comment 5: NPBS asserts that a re-verification of its response is necessary to correct findings included in the verification report which influenced the Department's application of BIA to NPBS' sales. First of all, NPBS argues that the absence of an interpreter at verification prevented the firm from demonstrating the accuracy and reliability of its response. NPBS notes that it is a family-owned business and that no one at the firm understands English well enough to respond to the intensely nuanced information requests routinely made at verification. Second, NPBS argues that it was prevented from responding to verification report findings because the report did not identify or document specific sale transactions, and because documents taken at verification were destroyed. NPBS states that, as a result, it cannot address the following findings in the Department's verification report: (1) NPBS failed to explain why certain sales of NPBM-manufactured merchandise had been excluded from its response; (2) NPBS failed to report three HM sales out of * * * which were originally priced at zero, but were subsequently adjusted upwards after negotiation with the customer; (3) NPBS failed to report properly quantity adjustments for one out of seven selected HM sales; and (4) NPBS failed to justify the exclusion of sales of certain HM models which the firm initially claimed did not match the families sold in the United States.

Third, NPBS argues that the verification report states crucial facts incorrectly regarding whether the prices reported by NPBS to its largest HM customer were the final and actual prices paid by that customer. NPBS asserts that a statement in the verification report that the sales price which NPBS reported for sales to this customer is not the final price paid is simply false. Finally, NPBS argues that the Department should accept a printout of sales to this particular company which NPBS omitted from the original response due to a clerical error but which it submitted to the Department's representatives at the start of verification. NPBS claims that, because it submitted the information to the Department within 180 days of initiation, under 19 CFR 353.31 (a)(1)(ii), the Department should determine that it is timely.

Torrington responds that the Department's application of BIA was fully warranted by the numerous omissions and errors in NPBS' response. Torrington argues that the Department is statutorily required to use BIA in cases where it is unable to verify the accuracy of the information submitted. Torrington asserts that, as a whole, the number and significance of NPBS' errors and omissions constitute a failed verification, noting that the most serious of NPBS deficiencies was the inability to verify the completeness of the HM and U.S. sales databases. Torrington asserts that the complete and accurate reporting of sales databases goes to the heart of the antidumping proceeding and references *AFBs II* at 28379, where the Department applied BIA to NPBS because NPBS failed to report a substantial number of its HM sales.

With respect to NPBS' argument that it was hampered by the lack of an interpreter, Torrington suggests that NPBS' complaint is without merit since the Department notified NPBS that it was unable to retain an interpreter prior to verification. Torrington contends, moreover, that NPBS is not unfamiliar with the review process and has undergone verification on five previous occasions. To the extent that an interpreter was essential, Torrington maintains it was incumbent on NPBS to arrange for one.

With respect to NPBS' argument that it was unable to demonstrate the accuracy of its response because the Department destroyed certain documents, Torrington states that it

[2] In *NTN III*, the CAFC noted that NTN had been cooperative throughout the proceeding, and the Department did not verify NTN's U.S. sales. Thus, the court indicated that the Department appeared to lack any basis for questioning the accuracy of NTN's correction and, moreover, the argument was raised *post hoc* by counsel, rather than by the Department as a basis for rejecting the information. Conversely, given the verification results in the present case, we have substantial reasons for questioning the accuracy of any corrections made by INA. *See NTN III* at 1204.

cannot meaningfully comment since it did not attend either the verification or disclosure. Torrington notes however that, even if NPBS' assertion that the final price for certain omitted sales was correctly reported is true, NPBS' failure to explain its response adequately at verification cannot be corrected at the case-brief stage of the proceeding. Moreover, Torrington asserts, the Department did not apply BIA because NPBS omitted these sales from its response. Rather, Torrington contends, the Department found discrepancies in the reporting of these sales. Torrington summarizes that, because NPBS failed to support its HM and U.S. responses, the Department correctly applied second-tier BIA.

Department's Position: We disagree with NPBS. The number and degree of discrepancies in both the HM and U.S. verifications render NPBS' response unusable for our margin calculations. Therefore, for these final results, we have applied a second-tier BIA rate for NPBS.

First, NPBS does not dispute the results of the U.S. verification, at which the verification team found, among other discrepancies, missing U.S. sales. The completeness of the U.S. sales database is essential because it is used to calculate the dumping duties. It is our practice to examine at verification only a randomly selected subset of the reported U.S. sales, a practice that the CIT has upheld. *See Bomont Industries* v. *United States,* 733 F.Supp. 1507, 1508 (CIT 1990) (''[v]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally an audit entails selective examination rather than testing of an entire universe.''); *see also Monsanto Co.* v. *United States,* 698 F. Supp. 275, 281 (CIT 1988) (''[v]erification is a spot check and is not intended to be an exhaustive examination of the respondent's business''). Where the verification team finds discrepancies in the subset of information it examines, it must judge the effect on the unexamined portion of the response. In the instant case, ESP sales are reported on a limited, sampled basis due to the large number of transactions. Where we have allowed for reduced reporting but determine that U.S. sales are missing from the database submitted as the complete sampled sales listing, we must be especially concerned about the reliability and accuracy of any margin we might calculate from the database.

In addition to the omissions and discrepancies we found at the U.S. verification, the omission of a large number of HM sales affected our decision to assign NPBS a margin based on BIA. Notwithstanding the magnitude of the omitted HM sales, we attempted to verify these sales. However, the pool of sales that NPBS attempted to place on the record was not accurate. At verification, the Department's officials discovered that the sales price for some of these sales was later adjusted after negotiation with this particular customer. Moreover, company officials acknowledged that the final sales price for an unknown number of sales to this particular customer did not take into account these price adjustments. NPBS was unable to provide the final sales price, after adjustment, and instead, it provided a list of the gross monthly adjustments. Because these omitted sales were not verifiable, we did not accept them voluntarily into the record. After the verification had concluded NPBS submitted, on December 19, 1994, a listing of the omitted sales, stating that, under 19 CFR 353.31(a)(1)(ii), December 19, 1994 was the 180th day on which to submit factual information voluntarily. This submission occurred after verification was completed, however, and we had already found the sales information to be inaccurate.

Regarding the four verification-report findings to which, NPBS claims, it cannot respond, the verification exhibits do not contain evidence documenting the discrepancies revealed at verification. We note, however, that NPBS is not disputing that these discrepancies exist. Rather, NPBS is complaining that it cannot explain the discrepancies because the verification report did not indicate the particular sales or models connected to the discrepancies. By raising this issue only now, in its case brief, NPBS is attempting to demonstrate the accuracy of its response. We agree with Torrington that the case brief is not the appropriate forum for NPBS to demonstrate the accuracy of its response. As indicated in the HM verification report, NPBS did not demonstrate that its response was accurate within the scheduled verification time. The Department took an extraordinary step by rescheduling another firm's verification to allow NPBS an extra day of verification. Thus, NPBS had the opportunity to explain its response at the verification. At some point, the Department must close the record and make a determination based on the information available to it. Moreover, these particular discrepancies were not the primary factors in our decision to apply BIA to NPBS.

Finally, the lack of an interpreter did not prevent NPBS from demonstrating the accuracy of its response. The Department was not required to provide an interpreter and nothing precluded NPBS from supplying one itself. Furthermore, the Department informed NPBS before the start of verification that an interpreter would not be present, and company officials and the Department's verification team agreed that the verification would proceed without an interpreter. The parties also agreed, however, that, if during the course of the verification a problem arose with regard to the ability to interpret an oral answer or translate a document, a service would be contacted. In fact, the company official who led the U.S. verification and co-led the HM verification spoke excellent English and there was no need to seek additional assistance.

Comment 6: Asahi disagrees with the Department's decision to apply first-tier BIA on the basis that the company failed to provide complete information on its sales of SPBs. Asahi notes that it only sold a small quantity of SPBs to the United States and claims that the per-bearing price was high enough to preclude any possibility of dumping. Asahi argues that the sale of SPBs to the United States was outside its normal course of business and was akin to a sample sale that occurred on a one-time basis. Asahi further argues that it is commercially unreasonable for the Department to require a complete submission for such a small quantity of sales when the company has already compiled the required information with regard to its normal commercial line (BBs). Asahi suggests that, instead of assigning first-tier BIA to SPBs, the Department apply the rate it applies to BBs, since BBs are the class or kind of merchandise that Asahi usually sells to the United States. Alternatively, Asahi requests that the Department either treat the company as a no-shipper with respect to SPBs, since it only sold a small quantity of this merchandise to the United States, or assign a cooperative BIA rate to SPBs, since it provided complete information on sales of BBs.

Department's Position: We disagree with Asahi that the application of first-tier BIA was inappropriate. Section 776(c) of the Tariff Act requires the Department to use BIA ''whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required.* * *'' With respect to SPBs, Asahi only provided invoices in response to the Department's questionnaire. The data contained on these invoices does not approximate the transaction-specific price and cost data requested by the questionnaire. As a

result, we do not have the information necessary for calculating a margin on SPBs. Because Asahi failed to produce the information the Department requested on SPBs, we have assigned first-tier BIA to this class or kind of merchandise.

Asahi's suggestion that we assign the same rate to SPBs as that assigned to its sales of BBs is contrary to the Department's practice for establishing BIA rates. As stated above, whenever a company refused to cooperate with the Department or otherwise significantly impeded the proceeding, ''we have used the more adverse BIA—generally the highest rate for any company for the same class or kind of merchandise * * *.'' BBs is a separate class or kind of merchandise from SPBs and constitutes a separate antidumping duty order. Thus, the rate calculated for Asahi's sales of BBs is irrelevant to our review of the antidumping duty order on SPBs.

Comment 7: SNR Germany claims that the Department erroneously applied BIA to sales that it could not match to CV. SNR Germany states that it provided in its questionnaire response the complete CV for each model sold in the United States but that, because the Department erroneously renamed PRODCDE to USMODEL, the computer program could not match the U.S. sales product codes (PRODCDE) with SNR's corresponding CV information.

Department's Position: We agree with SNR Germany that we made a mistake in renaming PRODCDE to USMODEL in our preliminary results. For these final results, we have used the variable PRODCDE in our computer program.

Comment 8: AVIAC states that it erroneously entered the letter ''O'' rather than the correct digit ''zero'' for several product codes in its U.S. data set while entering the codes in its CV data set. AVIAC contends that, due to this error, the Department was not able to match the CV with the product code, resulting in the application of BIA to those products. AVIAC requests that the Department correct the codes so that proper matches will occur.

Department's Position: We find that AVIAC's description of its data input errors is accurate and have corrected this error for the final results. As a result, all the products matched their corresponding CVs, and we did not apply BIA in these final results to AVIAC.

3. Circumstance-of-Sale Adjustments

3A. Technical Services and Warranty Expenses

Comment 1: NSK/RHP argues that the Department should treat technical services associated with ESP transactions as indirect selling expenses (ISEs) as opposed to direct expenses. NSK/RHP asserts that it informed the Department that RHP (U.S.) did not provide technical services in the United States during the review period. NSK/RHP states that the United Kingdom divisions, RHP Industrial and RHP Precision, supplied all technical services for ESP sales. NSK/RHP further argues that the evidence of record conclusively demonstrates that technical service expenses incurred in the United Kingdom were a fixed expense not directly associated with particular transactions. NSK/RHP asserts that the Department verified that expenses for technical services by the United Kingdom divisions qualified as ISEs.

Torrington argues that the Department should continue to classify NSK/RHP's U.S. technical services as direct rather than indirect expenses. Torrington asserts that NSK/RHP has not sufficiently demonstrated that the technical service expenses are truly indirect. Further, Torrington contends that the HM verification report does not refer to technical services in either general terms or specifically with respect to the technical service expenses incurred in the HM on behalf of U.S. sales.

Department's Position: We agree with NSK/RHP. In its August 31, 1994, questionnaire response, NSK/RHP noted that it did not incur direct technical expenses in the U.S. market. During verification, we examined NSK/RHP's methodology for calculating such expenses and found that these costs were not tied to particular transactions. Rather, NSK/RHP allocated these costs across the total sales for two divisions (Industrial Bearings Division and Precision Division). *See* Exhibit 14 of NSK/RHP's August 31, 1994, questionnaire response. Therefore, we have determined that NSK/RHP has properly demonstrated that technical expenses should be considered as an ISE, and we have deducted technical expenses associated with ESP transactions as such.

Comment 2: Torrington argues that the Department incorrectly classified Koyo's HM warranty expenses as direct expenses. Torrington contends that Koyo's warranty-expense factor includes both scope and non-scope merchandise and, consistent with the CAFC's decision in *Torrington V*, the Department cannot adjust FMV for expenses incurred on scope and non-scope merchandise. Torrington maintains that, at best, these expenses should be considered ISEs.

Koyo states that its methodology for reporting its warranty expenses in this review is the same as that it used in a number of previous reviews of the orders on AFBs and tapered roller bearings (TRBs). Koyo further states that the Department has verified and accepted Koyo's methodology in previous reviews and has never challenged Koyo's treatment of warranties.

Department's Position: We agree with Koyo. In general, it is not possible to tie POR warranty expenses to POR sales, since the warranty expenses are incurred on pre-POR sales. Further, although Koyo calculated a warranty expense factor based on the ratio of total warranty claims to total bearing sales, there is no evidence on the record that the calculated warranty expense factor would vary by class or kind of bearing or by customer. Therefore, as in *AFBs IV* (at 10910) and *AFBs III* (at 39743), where Koyo used the same allocation methodology, we find that Koyo reasonably allocated direct warranty expenses, and we have accepted them for the final results.

Comment 3: Torrington argues that NSK's HM technical services primarily support NSK's development and sales of prototypes, and suggests that, since the Department excluded sales of prototypes from the HM sales listing, it should also exclude the technical service expenses provided in support of the development of these prototypes from the expenses allocated to non-prototype sales.

NSK responds that its engineers provided technical service support for NSK's selling activities with respect to all HM customers, not just for those that purchased prototypes, so that no adjustment of its claim is necessary.

Department's Position: We disagree with Torrington. Based on our analysis of the information submitted by NSK in this review, as well as that analyzed at verification, we agree with NSK that its engineers provided technical support for all of its sales. This technical support primarily consists of consultations with customers regarding bearing requirements and applications. Because this expense was both incurred and reported as an indirect expense (*i.e.*, one that does not vary directly with the quantity of merchandise sold), we have treated this expense as an indirect selling expense.

Comment 4: Torrington argues that, since NSK failed to comply with the Department's request to segregate reported U.S. technical service expenses between direct and indirect expenses, the Department should reclassify NSK's U.S. technical service expenses as direct expenses rather than as ISEs.

NSK argues that it provided a complete and responsive submission to the Department's questionnaire. NSK also contends that the Department could not find any means by which to tie the technical service expenses to individual sales at verification and argues, therefore, that its U.S. technical service expense should be treated as indirect expense for the final results.

Department's Position: We agree with Torrington. Our questionnaire specifically requests respondents to separate fixed and variable portions of technical service expenses because we treat fixed servicing costs as indirect expenses and variable servicing costs as direct expenses. Based on NSK's questionnaire response, we determine that NSK could have separated direct and indirect technical service expenses. NSK explained in its questionnaire response that it would need to trace certain expenses, such as travel and travel-related expenses to individual customer calls, manually to separate these expenses between direct and indirect. This difficulty does not relieve it of its responsibility, however, to provide the Department with actual expense information. Therefore, for the final results we have applied BIA and treated NSK's U.S. technical service expense as a direct selling expense.

3B. Inventory Carrying Costs

Comment 1: Torrington argues that, because Koyo has not consistently distinguished between its OEM and AM cost data for other expense categories, the Department should reject Koyo's allocation factors for its reported U.S. inventory carrying costs (ICCs) for OEM and AM sales.

Koyo states that it has reported each of its expenses according to the methodology that most closely represents the manner in which it incurs expenses and maintains its records. Koyo argues further that its methodologies for reporting ICCs, air freight, and technical service expenses are the same in this review as in all recent reviews of AFBs. Koyo contends that the Department verified its methodology closely for calculating ICCs in this review and tied the reported data to the inventory turnover report by product class, as well as by OEM and AM groupings, without finding discrepancies in the calculation of the ICC factors.

Department's Position: We agree with Koyo. We recognize that certain expenses are incurred in different manners and recorded in different ways. During verification we examined Koyo's methodology and tied its data to worksheets and to inventory turnover reports by product class as well as by either AM or OEM. Based on our findings, we are satisfied that Koyo allocated its ICCs between OEM and AM sales properly.

Comment 2: Torrington alleges that NTN's reported inventory carrying turnover period for U.S.-bound merchandise is unreliable and should be rejected in favor of its average inventory carrying turnover period for HM sales. Torrington states that NTN has not supported a reported difference between production-to-shipment inventory periods for U.S. and HM sales, and that the Department should presume that U.S.-destined goods spend an equivalent amount of time in inventory as HM goods. NTN responds that the inventory periods for HM sales are properly calculated for the period from production to the first sale to an unrelated party. Respondent also states that the inventory period for ESP sales includes the time from production to shipment to NTN's U.S. subsidiary and the time in the subsidiary's inventory until sale to the first unrelated customer. NTN notes that this issue has been verified in previous reviews and has been found accurate. NTN asserts that Torrington's demand must be rejected without evidence to rebut the accuracy of the calculation.

Department's Position: We disagree with Torrington. Although we did not verify this particular aspect of NTN's response, we found at both the HM and U.S. verifications that NTN's submitted data are basically reliable. Therefore, because the credibility of NTN's data has been established on an overall basis, we have no reason to disregard NTN's reported inventory period and we have used this information for these final results.

3C. Commissions

Comment 1: NSK argues that the Department incorrectly disallowed its HM stock transfer commission (COMMH2), which consists of a premium paid to distributors for purchasing products from other distributors when a specific part was not available from NSK. NSK contends that its stock transfer commission is a promotional expense, intended to encourage distributors to locate stock, and that this payment should be treated as an indirect expense.

Torrington argues that the Department correctly disallowed NSK's stock transfer commission, since NSK did not demonstrate that the reported COMMH2 is based on commissions paid on sales of in-scope merchandise. Torrington notes that NSK claimed that the Department should treat its stock transfer commission as a direct selling expense in its questionnaire response but it is now claiming it as an indirect promotional expense, and asserts that NSK has changed its position on the appropriate treatment of this expense to avoid the Department's disallowance of the entire expense because NSK allocated it on the basis of both scope and non-scope merchandise.

Department's Position: We agree with NSK. Although NSK refers to this expense as a ''commission,'' it is evident from the record that this expense is not related directly to sales made by NSK to its customers and is properly treated as an indirect selling expense adjustment. This item is a promotional expense that does not relate to any particular sale by NSK and does not vary with the quantity of merchandise that NSK sells. *See Zenith Electronics* v. *United States*, 77 F.3d 426, 431 (CAFC 1996).

We do not accept Torrington's argument that we should disallow this expense because NSK did not demonstrate that the expense is based solely on commissions paid on sales of in-scope merchandise. Just as we would not expect a respondent to be able to establish whether a non-product-specific advertising expense results in more sales of in-scope or out-of-scope merchandise, there is no reasonable way to establish the effect of this particular program on in-scope versus out-of-scope merchandise. As this program was equally available with respect to both kinds of merchandise, and was not associated with any particular sale, NSK's calculation of the expense was reasonable.

3D. Credit

Comment 1: Torrington argues that SKF Italy overstated HM credit expenses by not using net prices in its credit calculation. Torrington argues that the Department should either instruct SKF Italy to modify its reporting of credit expenses for HM sales accordingly or reject SKF Italy's HM credit expenses.

SKF Italy argues that its methodology is the same as that used and approved by the Department in each of the previous four reviews of these AFB orders.

Department's Position: We agree with Torrington. SKF Italy calculated U.S.

credit expense based on prices net of discounts but did not follow a similar methodology for HM credit expense. Because credit calculations should be based on SKF Italy's net prices rather than its gross prices, we have recalculated SKF Italy's HM credit expense based on prices net of discounts for the final results.

Comment 2: Torrington contends that SKF Italy's allocation of HM interest revenue, which is collected for late payments from customers, is improper because it does not account for the facts that (1) such revenues are likely to vary depending on the time elapsed between the due date and actual payment, and (2) SKF Italy might not always collect interest revenue, even if an amount is due. Torrington notes that, while SKF's reporting method for credit expenses reflects the amount of time between invoice date and payment date correctly, its reporting method for interest revenue does not achieve this. Torrington concludes that the Department should either instruct SKF Italy to modify its reporting of interest revenue for HM sales or reject SKF Italy's HM credit expenses.

SKF Italy argues that its methodology is the same as that which the Department used in each of the previous four reviews of these AFBs orders. SKF Italy insists that the Department rejected a similar argument Federal-Mogul Corp. made in the 92/93 review and further argues that Torrington's assertion that interest revenues are likely to vary depending on the time elapsed is hypothetical and not supported by the record evidence pertaining to SKF Italy. SKF Italy contends that it calculated its claimed interest revenue adjustment only on interest revenue it received, not interest revenue due.

Department's Position: We disagree with Torrington that we should disallow HM credit expenses due to alleged deficiencies in the reporting of interest revenue. Although we adjusted SKF Italy's HM credit expense (*see* our response to Comment 1, above), its calculation of credit expenses was reasonable and accurate to the extent practicable. We cannot disallow one claimed adjustment because of claimed deficiencies in another indirectly related adjustment. Therefore, we have used SKF Italy's claimed HM credit expense as we have recalculated it (*see* our response to Comment 1, above) for the final results.

While we agree with Torrington that, in theory, interest revenue should be allocated in a similar manner as credit expense (in this case, on a customer-specific basis), it is unreasonable to do otherwise. In this case, we do not have the data on the record to perform such a reallocation. In fact, we do not have any evidence indicating whether such a reallocation is possible based on SKF Italy's accounting records. Accordingly, we have allowed interest revenue as a direct addition to FMV because it is reasonable to base interest revenue upon the actual amount collected by SKF Italy.

3E. Indirect Selling Expenses

Comment 1: Torrington states that, because ISEs relate to all sales and SNR France allocated HM ISEs according to LOT, the Department should reject the reported HM ISEs for SNR France and apply an adjusted rate to all SNR France's HM sales. Citing *NTN II* at 1094–95, Torrington contends that the ISEs SNR France reported appear to be related to all HM sales or do not vary according to LOT. Torrington states that it is likely that SNR France's HM ISE methodology shifts expenses between LOTs (primarily from non-distributor sales to distributor sales) and reduces margins in the process.

SNR France argues that it has explained its ISE allocation methodology according to LOT in its response, and the Department verified SNR France's allocation methodology fully. SNR France claims that many of its ISEs vary according to LOT and are incurred entirely for one of the two HM LOTs. SNR adds that, as shown in the responses, its ISEs vary either by employee time spent or by sales volume and value through OEMs and distributors that it identified separately and accounted for in its record system as maintained in the ordinary course of trade.

With respect to the shifting of expenses from non-distributor sales to distributor sales, SNR France states that, in fact, expenses associated with distributors are greater than those associated with non-distributor sales. SNR France, therefore, does not agree with Torrington's argument that SNR France's allocation methodology shifts expenses from one level of sales to another. SNR France states that a large majority of the expenses that were reported for distributor sales were incurred *solely* on distributor sales.

Department's Position: We agree with SNR France that it has reported ISEs properly according to LOT. SNR France has demonstrated that it incurs many of its expenses at a particular LOT. SNR France also demonstrated that its records segregate ISEs on a LOT-specific basis. In this respect, SNR France's reporting differs from the respondent in *NTN I* at 1094, which was unable to demonstrate that certain ISEs varied according to LOT. Further, as the Court noted in *NTN I*, our long-established practice has been to accept a respondent's accounting methodology as long as that methodology is reasonable and is used in the respondent's normal course of business. *Id.* at 1094. Accordingly, we have determined that SNR France's ISE-reporting methodology is appropriate.

Comment 2: Torrington claims that SKF Sweden, France, and Italy are each over reporting HM ISEs with respect to sales made by Steyr Walzlager, an SKF affiliate. (Steyr is an Austrian affiliate of the SKF Group that made POR sales of SKF bearings (after purchasing them from the SKF companies) back to customers in Sweden, France, and Italy.) Torrington identifies two alleged deficiencies with respect to the reporting of HM ISEs for such sales: (1) These SKF companies did not adequately demonstrate that their own reported HM ISEs incurred on such sales (reported in the field INDSEL1H) are not duplicative of the expenses that they claim for Steyr on the same sales (reported in the field INDSEL2H); and (2) these SKF companies are improperly claiming additional expenses on such sales (included in the field INDSEL1H) that represent export selling expenses incurred by the SKF companies on the initial sales to Steyr. With respect to the second point, Torrington states that, for a similar situation in *AFBs I*, the Department classified certain expenses incurred by INA in Germany as export selling expenses even though they were incurred by a German parent company in Germany. Torrington suggests that the Department disallow all expenses reported in the INDSEL1H field on all Steyr sales, citing *The Timken Company* v. *United States*, 673 F. Supp. 495, 513 (CIT 1987) (*Timken*), in support of the proposition that the respondent has the burden of supporting favorable adjustments.

These SKF companies respond that they did not report duplicative HM ISEs on sales by Steyr. They state that, for such sales, they reported only expenses that they incurred in selling the products to Steyr, along with indirect expenses incurred by Steyr in selling to the respective markets (*i.e.*, the SKF companies did not report their own ISEs incurred on HM sales). SKF Sweden, France and Italy state that this methodology is consistent with their prior reporting and has been accepted and/or verified by the Department in prior reviews.

Department's Position: We agree with SKF Sweden, France, and Italy. In their questionnaire responses, these SKF companies stated that they incur only

two types of HM ISEs with respect to Steyr sales, namely their export selling expenses in selling to Steyr (INDSEL1H) and Steyr's ISEs incurred on sales made in the respective home markets (INDSEL2H). In *Timken,* the court stated that the Department ''acts reasonably in placing the burden of establishing adjustments on a respondent that seeks the adjustments and that has access to the necessary information.'' *See Timken* at 513. SKF Sweden, France and Italy have met that burden with respect to Steyr sales through the explanations provided in their submissions and through verification. Further, it is the Department's practice to accept the information submitted by respondents as factual, absent verification, unless it has reason to believe otherwise. The record demonstrates clearly that SKF Sweden incurs only two types of ISEs with respect to sales in the HM, and there is nothing on the record to indicate that either of these reported expenses are duplicative.

We also disagree with Torrington's argument that, in *AFBs I,* we determined that selling expenses such as those incurred in connection with sales to Steyr are export selling expenses that should not be reported on HM sales. In *AFBs I,* we found that certain expenses that INA claimed were related to HM sales were in fact incurred on U.S. sales. We treated the selling expenses incurred by INA on U.S. sales as U.S. ISEs, noting that a portion of the cost of INA's export team could be tied to sales made in the United States. *Id.* at 31692. In the present case, SKF Sweden, France and Italy have demonstrated that all reported expenses are associated with HM sales.

Comment 3: Torrington contends that the Department should reject SKF France's and SKF Italy's calculations of separate indirect expenses for OEM sales and AM sales in both the U.S. market and the HM. Torrington states that the Department has rejected similar reporting by other respondents in previous reviews (referencing the Department's position regarding NTN's ISE allocations in *AFBs III* (at 39750) and *AFBs IV* (at 10940)). Torrington argues that these precedents establish that the Department recognized that ISEs are incurred on all sales and, therefore, they should be calculated as one rate for both OEM and AM sales.

The SKF companies claim that the calculation of two separate ISE rates is consistent with how they incurred these expenses and with their reporting methodology in each of the four prior administrative reviews. SKF France adds that the Department verified this methodology and/or accepted it in each of these previous reviews.

Department's Position: We disagree with Torrington. We have determined that both SKF France and SKF Italy have demonstrated that they can segregate such expenses reasonably between OEM and AM sales. We note that SKF France and SKF Italy stated that the AM division sells to small OEMs as well as the AM. We examined this situation and found that the AM factor is the appropriate factor to apply to these small OEMs. These SKF companies claimed, however, the OEM factor for these small OEMs. Nevertheless, the application of the OEM factor, instead of the AM factor, to such sales results in a smaller downward adjustment to FMV and is, therefore, a conservative measure of the expenses incurred in selling to small OEMs. For the above reasons, we have used ISEs for SKF France and Italy as reported for these final results.

Comment 4: Torrington argues that Koyo's HM ISE claim, which the Department accepted, included a miscellaneous category that constituted the fifth largest category of Koyo's ISEs. Torrington maintains that there is insufficient detail regarding this miscellaneous category to determine whether these expenses are permissible. Torrington states that Koyo's ISEs appear to have increased for this POR even though total sales dropped significantly. Torrington argues that, at a minimum, this category of miscellaneous expenses should be deducted from Koyo's total ISEs for the final results.

Koyo maintains that the categories it used for the ISEs worksheet in the response are the same account categories that appear in its accounting records. Koyo notes that this is the same reporting methodology that Koyo has used, and the Department has accepted, in all prior reviews of the AFB orders. Finally, Koyo states that the Department verified its reporting of ''other ISEs'' in this review and noted in its verification report that it was able to tie all selected items to source documents.

Department's Position: We agree with Koyo. When we verified the various items that comprise ''other ISEs', we not only tied selected expenses to source documents but we also examined the nature of these items and found that they were properly included as ISEs.

Comment 5: Torrington contends that the Department should reject certain downward adjustments to NTN's U.S. ISEs, including: (1) An adjustment for interest expenses that NTN allegedly incurred when borrowing to finance cash deposits of estimated antidumping duties, and (2) an adjustment for commissions paid to a related party on certain PP sales.

Torrington objects to NTN's reduction of its pool of U.S. ISEs by the amount it paid in interest expenses on loans taken out to cover cash deposits of estimated antidumping duties for entries during this period. Petitioner notes that the Department rejected NTN's downward adjustment to ISEs for interest paid on loans to finance cash deposits in *AFBs III* and contends that the Department should reject the downward adjustment in this review for the same reasons. Torrington also argues that certain expenses that NTN classified as related-party U.S. commissions appear to be directly related to PP sales to one U.S. customer. Citing *LMI-La Metalli Industriale S.p.A.* v. *United States,* 912 F.2d 455, 459 (Fed. Cir. 1990), Torrington contends that the Department must examine the circumstances surrounding related-party commissions before determining that they should not be used in the Department's analysis. Torrington concludes that the Department should consider these expenses to be direct selling expenses in the U.S. market and contends that, because NTN failed to report the commission rate it paid to the related party, the Department should resort to BIA in determining the commission amount to be deducted. Torrington claims that these actions reflect current Department policy positions.

Department's Position: We disagree with Torrington regarding the adjustment for interest expenses that NTN incurred when borrowing to finance cash deposits of estimated antidumping duties, and consider it proper to allow the downward adjustment to U.S. ISEs. NTN Bearing Company of America (NBCA) incurred expenses on actual loans that it sought specifically to pay antidumping duty cash deposits. As such, the Department considers these expenses to be comparable to expenses for legal fees related to antidumping proceedings. The expenses were incurred only because of the existence of the antidumping duty orders and NTN's involvement therein. Therefore, the expenses cannot be categorized as selling expenses. It is the Department's longstanding practice to not treat expenses related to the dumping proceedings as selling expenses. For example, in *Color Television Receivers From the Republic of Korea; Final Results of Administrative Review of Antidumping Duty Order,* 58 FR 50336, the Department stated that such expenses ''are not expenses incurred in

selling merchandise in the United States.'' The CIT recognized this line of reasoning in *Daewoo Electronics Co.* v. *United States,* 712 F. Supp. 931 (CIT 1989) (*Daewoo*), when it concluded that the classification of such expenses as selling expenses subject to deduction from USP ''would create artificial dumping margins and might encourage frivolous claims . . . which would result in increased margins.'' These expenses were incurred as part of the process attendant to the antidumping duty orders. Had the antidumping duty orders not existed, the expenses would not have been incurred. By their nature, such expenses are not a selling expense, and they should not be deducted from USP.

We clarified our position on this issue in our *Results of Redetermination Pursuant to Court Remand,* Slip Op. 96–37, submitted to the CIT on September 20, 1996. In that remand the Department was ordered to explain its acceptance of the downward adjustment to NTN's ISEs in AFBs III. In the redetermination we determined that the interest expenses to finance cash deposits were not borne, directly or indirectly by NBCA, to sell the subject merchandise in the United States. Consequently, these expenses were not eligible to be deducted from USP under section 772(e) of the Tariff Act. We also stated that we believed that we erred in not allowing the offset to U.S. ISEs in the 92/93 administrative review.

We also disagree with Torrington regarding the related-party commission. NTN stated that it made commission payments to NBCA for expenses that NBCA incurred with respect to sales to a specific PP customer. In its questionnaire responses, NTN provided specific data on the expenses that NBCA incurred with respect to the sales in question. Accordingly, rather than including in our analysis the commission, which is the transfer payment between NTN and NBCA, we have taken into account the actual expenses NBCA incurred with respect to these sales. Further, an examination of the specific types of expenses that NBCA incurred with respect to the sales in question indicates that the expenses are those that we typically consider to be indirect expenses incurred by sales organizations. Therefore, we have used the actual expenses that NBCA incurred with respect to the sales in question in our analysis, and we have treated them as ISEs.

Comment 6: Torrington argues that the Department should reject Koyo's claim for the deduction of imputed interest expense on antidumping cash deposits from its U.S. ISEs.

Department's Position: We disagree with Torrington. The imputed expenses in question represent expenses comparable to expenses for legal fees related to antidumping proceedings. The expenses were incurred only because of the existence of the antidumping duty orders and Koyo's involvement therein. Therefore, these expenses cannot be categorized as selling expenses. We and the CIT have recognized that such expenses should not be included as a cost of selling the merchandise. *See, e.g., Daewoo Electronics Co.* v. *United States,* 712 F. Supp. 931, 947 (CIT 1989).

In *Federal Mogul II,* the CIT recognized our practice of imputing expenses where such expenses are not clearly recorded in a respondent's records. When we impute an expense not otherwise recorded, we adjust a respondent's actual selling expenses by adding to them the amount of the imputed selling expenses. Similarly, with respect to Koyo's interest expense, we removed from selling expenses an amount attributable to cash deposits, which do not represent a selling expense at all. As Koyo properly established the amount of cash deposits it paid during the POR, we must calculate an amount representing the expense to Koyo of the lost use of the cash deposits. This is required by section 772(e)(2) of the Tariff Act, which only permits us to deduct selling expenses from ESP. Therefore, we have allowed Koyo's claimed deduction of imputed interest expense on antidumping duty deposits from its U.S. ISEs.

Comment 7: Torrington argues that the Department should reject NTN's and NTN Germany's allocation of certain indirect expenses to LOTs in the United States and HM, as it did in the two previous reviews, because NTN failed to justify or support with evidence the allocation of these expenses according to LOTs.

Department's Position: We agree with Torrington. The CIT has upheld the Department's decision in *AFBs III* to neutralize the allocation of expenses based on LOTs in *NTN II.* The Department determined in *AFBs III* that the methods NTN and NTN Germany used for allocating their ISEs did not bear any relationship to the manner in which they incurred the expenses in question, thereby leading to distorted allocations. Further, we found that the allocations NTN and NTN Germany calculated according to LOTs were misplaced and that they could not conclusively demonstrate that their ISEs vary across LOTs. In the course of this review respondents did not provide any sufficient evidence demonstrating that their selling expenses are attributable to LOTs. Therefore, we have recalculated NTN's and NTN Germany's expenses to represent selling expenses for all HM sales for the final results.

Comment 8: Torrington notes that NTN submitted selling expenses for CV on the basis of customer category. Petitioner believes such a basis is improper and should be rejected in favor of selling expenses based on all HM sales. Petitioner contends that LOT is irrelevant to the calculation of CV. Petitioner also notes that the Department rejected this calculation methodology in *AFBs III* and *AFBs IV.*

Department's Position: We agree with Torrington. NTN has not provided sufficient evidence demonstrating that selling expenses are attributable to LOT. NTN's allocation of expenses according to LOT is unacceptable for sales used to calculate FMV and, for the same reasons, it is unacceptable for purposes of calculating CV in our analysis of NTN. Therefore, we have recalculated NTN's expenses for CV to represent those expenses for all HM sales.

3F. Differences in Merchandise

Comment 1: NTN contends that the Department's methodology for calculating the 20-percent difference-in-merchandise (DIFMER) ceiling is incorrect. NTN notes that until *AFBs III* the Department had calculated the 20-percent DIFMER ceiling as a percentage of the U.S. variable cost of manufacturing. NTN complains that the Department's change in testing, from examining the ratio of the difference in U.S. and HM variable costs to U.S. variable cost (U.S. variable cost—HM variable cost/U.S. variable cost) to examining the ratio of the difference in U.S. and HM variable costs to U.S. COM (U.S. variable cost—HM variable cost/U.S. COM), was unwarranted, illogical and unnecessary. NTN submits that the new methodology thwarts the Department's intention of defining HM merchandise as similar only when the costs of the HM merchandise are reasonably close to the costs of U.S. merchandise because the new methodology broadens the range of costs, thereby allowing less similar merchandise to be considered comparable.

Department's Position: We disagree with NTN. The Department's standard for commercial comparability was set forth in IA Policy Bulletin 92.2 (July 29, 1992). In that bulletin we explain that:

(a)lthough the 20% guideline has been used for a number of years, there have been some differences in practice in the calculation formula. While the numerator has always

been the difference in variable production cost, different denominators have been used. They have sometimes been price, other times total manufacturing costs, and yet other times the total variable manufacturing costs. * * * Because variable manufacturing costs change as a share of total manufacturing costs from product to product, the size of a 20% difference would consequently vary as well in relation to both the price and total manufacturing costs. Therefore, a more stable basis for the denominator is the total manufacturing costs, and it has been chosen for uniform use.

Since the issuance of this policy bulletin, the Department has used the 20-percent-of-COM guideline to determine whether HM merchandise is reasonably comparable to the exported merchandise. This methodology was employed in *AFBs III* (at 39766) and *AFBs IV* and was upheld by the CIT in *NTN II.*

4. Cost of Production and Constructed Value

4A. Cost-Test Methodology

Comment 1: FAG/Barden asserts that the Department erred in excluding sales below COP for Barden. FAG/Barden argues that the domestic industry has not made an allegation of sales below cost against FAG in the United Kingdom since *AFBs III.* Further, FAG/Barden contends that the cost allegation did not include specific COM data particular to Barden or to Barden products. FAG/Barden points out that the below-cost allegation was brought specifically and exclusively against a particular firm, FAG U.K., and a single product, purchased ball bearings, and the Department did not apply the below-cost test to Barden's product when merging the two companies rates in the prior two reviews. FAG/Barden requests that the Department correct its computer program and exclude Barden's HM sales from the application of the cost test in the final results.

Torrington argues that the Department did not err in applying a cost test to Barden's HM sales. Torrington asserts that the Department was consistent in its practice to exclude such sales because it found that Barden had sold these HM sales at below-cost prices. Further, Torrington argues, given that FAG U.K. and Barden are related parties and have been recognized to constitute a single legal entity for virtually every purpose of this review, the Department had an objective basis to suspect that Barden engaged in below-cost HM sales. Torrington requests that, for purposes of the final results, the Department not exempt Barden's HM sales from the application of the cost test.

Department's Position: Consistent with the CIT's instructions in *FAG II,* we are treating FAG U.K. and Barden as separate companies for this review. However, the court did not issue *FAG II* until July 10, 1996. Prior to that date we considered FAG (U.K.) and Barden to be one entity, and, upon receipt of the consolidated questionnaire response, we applied the cost test to all sales made by that entity. As a result of applying the cost test, there is now information on the record that shows that Barden made below-cost sales.

In light of the Court's decision that we improperly collapsed the two companies, we agree with FAG/Barden that we previously did not have reason to believe or suspect that Barden made below-cost sales. However, we cannot disregard the fact that we found that Barden-made products were being sold in the home market below COP. Therefore, we must proceed in accordance with the statute, which requires that we disregard such sales. *See* section 773(b) of the Tariff Act.

Comment 2: FAG Germany contends that the Department made an error in its margin analysis program by not eliminating models and sales that failed the cost test from the HM database.

Torrington states that FAG Germany is correct in that the Department should eliminate certain below-cost sales from the HM database, but cautions the Department to ensure that, where ninety percent or more of a model's sales fail the cost test, the program will match the U.S. sale to CV instead of matching to HM bearings in the same family.

Department's Position: We disagree with both FAG Germany and Torrington that a clerical error has occurred. When ninety percent or more of sales of a model are below cost, we disregard all sales of this model from our analysis and use CV as the basis for FMV for U.S. sales that match to such models. When between ten and ninety percent of sales of a model are below cost, we disregard the individual below-cost sales in calculating FMV. We use the remaining above-cost sales of such models in our analysis, and match such sales in the same manner that we match all HM sales. We have changed our matching methodology in one respect, however, applicable to all HM sales. We do not match U.S. sales to HM sales of similar models where we have disregarded all *contemporaneous* identical HM sales as below-cost sales. In this instance, we resort directly to CV. The program achieves this result. The ''error'' to which FAG and Torrington refer is not an error in programming, but simply our way of keeping a marker in the HM sales database so that we do not match to similar merchandise when we should be matching to CV.

Section 773(b) of the Act requires that:

> Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than the cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

As explained in Policy Bulletin 92/4, December 15, 1992, ''(i)n determining FMV, if the Department finds that sales of a given model, otherwise suitable for comparison, are sold below the cost of production, and the remaining sales of that model are inadequate to determine FMV, the Department will use constructed value to determine FMV.'' In defining the most similar merchandise, section 771(16) of the Act directs us to descend through a hierarchy of preferences for determining which merchandise sold in the foreign market is most similar to the merchandise sold in the United States. Section 771(16) also states that such-or-similar merchandise is the merchandise that falls into the first hierarchical category in which we can make comparisons. Section 771(16) does not direct us to condition the selection of the best comparison model on any basis other than similarity of the merchandise. Therefore, the Department does not select such or similar merchandise only from models which remain after conducting the below-cost test. As stated in the Policy Bulletin, ''(t)he statute, therefore, directs us to the use of constructed value when the most similar model is sold below cost.''

In conducting administrative reviews, the Department relies on the 90/60-day guideline to establish the contemporaneity of sales from which to choose its HM comparison sales [3]. If we are conducting a COP test, it is possible that we disregard all sales of some HM models within the 90/60-day window, either because between 10 and 90 percent of the entire POR's sales are below cost or because more than 90 percent of the entire POR's sales are

[3] This guideline establishes the following order of preference for matching sales of subject merchandise to HM sales. We first examine whether any identical HM sales were made in the same month as the U.S. sale. If there were no such identical sales in the same month, we look for HM sales in the three months that preceded the U.S. sale. Finally, we look for HM sales in the two months following the U.S. sale. If we do not find HM identical sales during this ''90/60'' day window, we repeat this process for similar merchandise.

below cost. In the AFB cases, we examine first our contemporaneity window to find identical merchandise to use as our comparator. Where there are no sales in the HM of identical merchandise, we identify the ''family'' of bearings as similar merchandise. If we have selected identical merchandise as our comparator with the contemporaneity guideline in mind, but we disregard all contemporaneous sales of that identical model as a result of the COP test, *i.e.*, all sales within the 90/60-day window, the logic of the statute described in the Policy Bulletin still applies. In other words, in determining FMV, if the Department finds that contemporaneous sales of a given model, otherwise suitable for comparison, are sold below COP, and the remaining sales of that model are inadequate to determine FMV, the Department uses CV to determine FMV.

In conducting these administrative reviews of the AFB orders, we have relied either on the 90/60-day guideline to establish the contemporaneity of sales from which to choose HM comparison sales or, as explained in our preliminary results, we have relied on annual-average FMVs. Where we have relied on annual-average FMVs, the applicability of the Policy Bulletin's interpretation of the statute is clear. If between 10 and 90 percent of a model's sales are below cost and we disregard those below-cost sales, above-cost sales remain in the annual-average FMV. Where we have identified that only HM sales which fall within the 90/60-day contemporaneity guideline are suitable as potential matches to U.S. sales, the Policy Bulletin's interpretation of the statute applies equally to the pool of potential matches, *i.e.*, those sales within the 90/60-day window. It would be inappropriate to apply the Policy Bulletin's interpretation differently based on different contemporaneity periods. Moreover, the Department's longstanding practice of applying the 10/90 test across the entire POR is not affected by the 90/60-day guideline, since the 10/90 test is an interpretation of the quantity requirements of section 773(b)(1).

Therefore, for these final results, if we disregarded all contemporaneous sales of the best model because they are below COP, we relied on CV in our determination of FMV.

4B. Research and Development

Comment 1: Torrington claims that the COP and CV formats in SKF Germany's cost response include separate entries only for general research and development (R&D) expenses but that there are no corresponding entries for factory R&D costs. Torrington asks the Department to determine whether SKF Germany allocated its factory R&D expense properly and, if not, to resort to an appropriate BIA.

SKF Germany argues that its overhead variance is computed on a product-division and factory basis, thereby making that variance also specific on a class-or-kind basis. It claims that, as stated in its cost response, basic R&D is conducted by SKF Germany ERC in the Netherlands, and SKF Germany only conducts limited process-engineering and application R&D at the factory level. According to SKF Germany, this limited factory-level R&D is included in the fixed overhead expense of each factory and product division, as adjusted for the product division and factory-specific overhead variances and job order variances. SKF Germany contends that this methodology captures the actual costs of process and application engineering at the factory level in the COM on a class-or-kind basis. SKF Germany asserts that, since the involved operations are not product-specific, inclusion of the factory-level actual process and application engineering costs in factory overhead, and thereby the COM of each bearing, is the proper methodology for reporting the costs. Since these costs are included in overhead costs, SKF Germany concludes, a separate breakout for factory R&D costs is not possible.

Department's Position: We disagree with Torrington. SKF Germany's overhead variance is computed on a product- and factory-specific basis. Hence, the variance is also specific on a class-or-kind basis. SKF Germany's methodology captures the actual costs of process and application engineering at the factory level in the COM on a class-or-kind basis. We have accepted SKF Germany's methodology because the costs of necessary operations are not product-specific but relate to the products generally produced in the product division or are in the factory overhead. In this case, the COM of each bearing on a class-or-kind basis reflects an acceptable methodology for reporting these costs. SKF Germany accounted for its factory-level R&D costs and allocated these costs on a class-or-kind basis appropriately.

Comment 2: Torrington argues that the Department should restate FAG Germany's R&D costs for all products under review. Torrington observes that the questionnaire asked respondents to report ''product-specific or product-line'' R&D costs and, Torrington claims, while FAG Germany reported average amounts for all roller bearing products calculated using a broadly based factor, statements by FAG Germany on the administrative record suggest that actual amounts could have been reported. Torrington asks that the Department restate FAG Germany's R&D cost by substituting partial BIA for R&D costs in FAG Germany's COP and CV datasets.

FAG Germany argues that it incurs the bulk of R&D costs before the first regular production unit is manufactured. FAG Germany contends that, because GAAP requires that most R&D costs be expensed when incurred and the bulk of R&D costs incurred during the POR relate to products which have not yet begun production, R&D costs for individual products reported in its response would be minimal or non-existent if calculated in the manner petitioner suggests. FAG Germany states that, to the extent possible, R&D costs have been assigned to the product lines for which they were incurred. FAG Germany also states that the Department verified FAG Germany's methodology for calculating and allocating R&D costs and found no discrepancies.

Department's Position: We agree with FAG Germany. When we examined FAG Germany's accounting system at verification, we found that allocating FAG Germany's R&D expenses on a product-specific basis would not be feasible because a large portion of R&D projects are on-going and benefit more than one product or category of products. FAG Germany's response and the documentation it provided at verification confirmed that, to the extent possible, R&D expenses have been assigned directly to particular manufacturing and distribution cost-center areas. Thus, we conclude that FAG Germany's allocation method for R&D costs is appropriate.

4C. Profit for Constructed Value

Comment 1: Torrington argues that the Department should recalculate profit for CV to exclude below-cost sales. Torrington acknowledges that the Department has previously rejected this position (citing *AFBs IV* at 10922–23) but argues that, from a policy perspective, the Department should adopt an approach that is consistent with the long-standing construction of ''ordinary course of trade'' under the GATT code and find that below-cost sales are outside the ordinary course of trade and, therefore, inappropriate for use in the CV profit calculation.

Respondents FAG, INA, NSK, NTN, and SKF maintain that it would be incorrect for the Department to disregard below-cost sales in the calculation of profit for CV, arguing that such an action is not supported by the

statute and would be inconsistent with prior reviews. Respondents first note that the Department has rejected Torrington's position in past reviews and that the CV profit methodology used in these previous reviews has been upheld by the CIT (citing *AFBs II* at 28374, *AFBs III* at 39752, *AFBs IV* at 10922, and Torrington I at 633). NSK adds that below-cost sales can only be excluded from the CV profit calculation if such sales are ''outside the ordinary course of trade,'' which does not exclude below-cost sales *per se.* NSK states that it is well accepted that respondents in these reviews make some sales above and some sales below cost as a regular business practice during the ordinary course of trade.

Department's Position: We disagree with Torrington that the calculation of profit should include only sales priced above the COP. Section 773(e)(1)(B) of the Tariff Act directs that profit should be equal to that usually reflected on sales: (1) Of the same general class or kind of merchandise; (2) made by producers in the country of exportation; (3) in the usual commercial quantities; and (4) in the ordinary course of trade. Thus, the statute does not explicitly provide that below-cost sales be disregarded in the calculation of profit. The detailed nature of this subsection suggests that any requirement concerning the exclusion of below-cost sales in the calculation of profit for CV would explicitly be included in this provision. Accordingly, it would be inappropriate to read such a requirement into the statute. *See AFBs III* at 39752 and *AFBs IV* at 10922. Further, the ''ordinary course of trade'' provision in the statute (section 771(15)) does not include or even mention below-cost sales. Finally, Torrington has not demonstrated that the below-cost sales at issue are actually outside the ordinary course of trade. *See also FAG III* and case cited therein.

Comment 2: Torrington argues that, if the Department rejects petitioner's position that below-cost sales should not be included in calculating profit for CV, the Department should assign a profit rate of zero to such sales instead of the actual, negative, profit rates realized. Torrington suggests that this result could be reached by setting the negative profit amounts realized on such sales to zero in the profit ratio numerator, while continuing to include the actual cost of production of unprofitable sales (along with all other sales) in the profit ratio denominator. Torrington contends that the inclusion of negative profit rates on such sales in the CV profit calculation allows respondents to offset or ''mask'' profits on selected sales with losses on unprofitable sales. Torrington states that setting negative profits to zero would be consistent with other Department practices designed to avoid the possibility of manipulation via targeted high-priced and low-priced sales, and cites as an example the Department's practice of setting negative transaction-specific dumping margins to zero when calculating the weighted-average dumping margin.

FAG, INA, NSK, NTN, and SKF respond that Torrington's proposal should be disregarded because the Department's current practice of calculating profit for CV without regard to the profitability of individual sales is statutorily correct and has been upheld by the CIT. SKF notes in addition that Torrington provides no direct statutory or case law support for its position and contends that Torrington's argument is incorrect because: (1) The statute requires that profit be calculated for the general class or kind of merchandise at issue without regard to the inclusion or exclusion of particular sales; (2) Congress intended profit for CV to be a ''representative'' profit (including both below-cost and above-cost sales) and that the remedy that Congress provided for situations involving a profit too low to be considered representative is the eight-percent statutory minimum; (3) Congress addressed the concern regarding ''targeted'' below-cost sales through the below-cost provisions of the statute; and (4) Torrington's suggested calculation methodology is distortive because it excludes below-cost sales in the numerator (total profit) but includes such sales in the denominator (total COP).

FAG adds that the statute requires that the profit must be that ''usually reflected'' in sales of the same general class or kind. FAG contends that Torrington's methodology does not meet this requirement because it excludes profit on certain sales in the general class or kind, namely those made at below-cost prices.

Department's Position: We disagree with Torrington for the same reasons as those provided in Comment 1, above. Specifically, the statute requires that we base profit on sales of the general class or kind of merchandise at issue, provided that they are made in the ordinary course of trade. With respect to such sales, the statute does not provide that the sale, if profit is negative, be treated as a zero-profit sale.

Comment 3: Torrington argues that the Department should calculate profit for CV based on profits observed on reported HM sales made during the designated sample weeks, not on sales of the same general class or kind of merchandise in the HM as calculated by respondents. Torrington notes that the Department has previously rejected this position (citing *AFBs IV* at 10923), but asks that the Department reconsider its position for the following reasons: (1) Use of sample-week sales insures that profit data are based on a verified database of sales of in-scope merchandise; and (2) general class-or-kind profit data are based on the particular cost-accounting methods employed by respondents and do not provide assurance that the reported profits are based on sales of in-scope merchandise.

FAG, INA, and NSK respond that Torrington has provided no new evidence to alter the Department's longstanding position. Respondents contend that the Department's preference for non-sampled profit data is consistent with section 773(e)(1)(B) of the Tariff Act, which requires the use of profit based on sales of the same general class or kind of merchandise, not such-or-similar merchandise.

Department's Position: We disagree with Torrington with respect to calculating profit on the basis of sample-week sales. *See AFBs III* at 39752 and *AFBs IV* at 10923. Because the profit on sales of such-or-similar merchandise may not be representative of the profit for the general class or kind of merchandise, we requested profit information based on the general class or kind of merchandise. This method for calculating profit for CV is in compliance with section 773(e) of the Tariff Act and has been upheld by the CIT. *See FAG III.*

Comment 4: Torrington argues that the Department should exclude from the profit calculation sales to related parties that were not at arm's-length prices. Torrington states that this policy has been employed in other administrative reviews (citing *AFBs IV* at 10921 and *Certain Hot-Rolled, Cold-Rolled, Corrosion-Resistant and Cut-to-Length Carbon Steel Flat Products from Korea,* 58 FR 37176). Torrington requests that the Department ensure that the CV profit calculations for a number of companies, including NTN, Koyo, NSK, and SNR, do not include non-arm's-length sales.

NSK responds that it only made sales to unrelated parties in the HM, and that this issue therefore does not apply to NSK. NTN states that the Department did not exclude any of its related-party sales in the 92/93 review and requests that the Department include all HM sales in the CV profit calculation for this review.

Department's Position: We agree with Torrington, in part. As we stated in *AFBs IV*, contrary to Torrington's contention, there is no basis for automatically excluding, for the purposes of calculating profit for CV, sales to related parties that fail the arm's-length test. Section 773(e)(2) of the Tariff Act provides that a transaction between related parties may be ''disregarded if, in the case of an element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration.'' The arm's-length test, which is conducted on a class-or-kind basis, determines whether sales prices to related parties are equal to, or higher than, sales prices to unrelated parties in the same market. This test, therefore, is not dispositive of whether the element of profit on related-party sales is somehow not reflective of the amount usually earned on sales of the merchandise under consideration.

Related-party sales that fail the arm's-length test do give rise to the possibility, however, that certain elements of value, such as profit, may not fairly reflect an amount usually earned on sales of the merchandise. We considered whether the amount for profit on these sales to related parties was reflective of an amount for profit usually experienced on sales of the merchandise. To do so, we compared profit on sales to related parties that failed the arm's-length test to profit on sales to unrelated parties. If the profit on sales to related parties varied significantly from the profit on sales to unrelated parties, we disregarded related-party sales for the purposes of calculating profit for CV. We first calculated profit on sales to unrelated parties on a class-or-kind basis. If the profit on these sales was less than the statutory minimum of eight percent, we used the eight-percent statutory minimum in the calculation of CV. If the profit on these sales was equal to or greater than the eight-percent statutory minimum, we calculated profit on the sales to related parties that failed the arm's-length test and compared it to the profit on sales to unrelated parties as described above. If the profits on such sales to related parties varied significantly from the profits on sales to unrelated parties, we excluded those related-party sales for the purpose of calculating profit on CV. *See AFBs IV* at 10922.

Comment 5: Torrington argues that the Department improperly accepted the statutory minimum profit figures submitted by a number of companies, including NTN, Koyo, NSK, and NMB/Pelmec, without independently testing them. Torrington argues that the Department should test these claims using the sales and cost data submitted by respondents, adjusted for below-cost sales and sales to related parties.

NMB/Pelmec responds that it calculated weighted-average profit margins and determined whether the actual profit was above or below the statutory minimum before applying it to CV. NMB/Pelmec contends, therefore, that it performed a proper analysis of the profit margins prior to entering the information into the computer database.

Department's Position: We disagree with Torrington. Torrington's proposal amounts to taking the higher of the reported profit for the general class or kind of merchandise or that found using the reported sales and cost data, which is inappropriate for the reasons we stated in response to Comment 3. As noted in that position, we have based profit on all sales of the general class or kind, where this data is available, and not on reported sales and costs. With respect to NMB/Pelmec, we neglected to determine whether NMB/Pelmec's actual profit was greater than the statutory minimum. We have corrected this error for these final results.

Comment 6: Asahi contends that the Department erroneously excluded arm's-length sales to certain related customers when calculating profit for CV. Asahi states that sales to only two customers should have been disregarded under the related-party CV profit test but that the Department excluded sales to a number of other customers as well.

Department's Position: We agree with Asahi that we made an error in our calculation of profit for CV and have corrected this error for the final results.

Comment 7: Torrington argues that NMB/Pelmec arbitrarily calculated profit margins for small and medium-size BBs while the statute refers to the profits earned on the general class or kind of merchandise. Given the requirements of the statute, Torrington argues that the Department should recalculate the actual average profit rate on the basis of all BB sales in Singapore.

Department's Position: We agree with Torrington that the statute requires profit to be calculated on sales of the general class or kind of merchandise and not be based on subsets of bearings. We have recalculated the company's profit rate based on BB sales to reflect profit on the general class or kind of merchandise sold by NMB/Pelmec in Singapore.

4D. Related-Party Inputs

Comment 1: Torrington contends that the Department should scrutinize all related-party material costs and verify data for which questions remain regarding related-party component costs. Torrington argues that the Department should apply BIA to the material costs in question if the Department is not satisfied that all related-party material costs are accurate and sold at arm's length. It claims further that SKF Germany did not respond sufficiently to the Department's supplemental question addressing the percentage of total material costs for each part purchased from a related supplier, but instead stated that the information was not available. Torrington claims that SKF Germany should have provided the information. Torrington also contends that SKF Germany stated that it has not reported, and cannot report, discrete elements of costs for the products not manufactured by SKF Germany and, Torrington concludes, there is little basis for the Department to accept representations of actual costs.

SKF Germany replies that its response indicates clearly that it only purchased two component types from a related supplier for use in the production of subject merchandise. It states further that, in another proceeding, a related supplier provided the Department with a complete description of its methodology for determining the actual cost of the finished bearing and this related supplier's cost-accounting methodology has been previously verified by the Department with no discrepancies noted. SKF Germany states that it used the greater of transfer price or actual cost for CV purposes to arrive at the actual cost of purchased components for COP purposes and used the greater of the transfer or actual cost for CV purposes.

Department's Position: We disagree with Torrington. SKF Germany has stated on the record that it applied its internal transfer price indices to arrive at the actual cost of purchased components for reported COP and used the greater of the transfer price or actual costs for CV reporting. SKF Germany has explained and provided examples of the methodology it used to determine the actual cost of components purchased from related suppliers. Because its methodology is reasonable and reflects respondent's normal records, we have accepted the costs of inputs from related suppliers, as we have done in prior reviews.

Comment 2: Torrington argues that, if Ovako Steel, a 100-percent-owned related supplier, sold the same or a reasonably comparable product to unrelated buyers of steel, SKF Germany should have reported Ovako Steel's arm's-length price information in order

to demonstrate whether Ovako Steel's sales to SKF fairly reflect market price. Torrington claims further that Ovako Steel apparently experienced improved operations during the POR and, if Ovako Steel's profits became healthy, market prices might exceed transfer prices and/or COP.

SKF Germany states that it had no referent market price data for the material it purchased from Ovako Steel because the steel products were unique to SKF. Hence, SKF Germany reported Ovako Steel's actual costs to manufacture the material. With respect to CV, SKF Germany claims that it relied on the greater of COP or transfer price for material purchased from Ovako Steel. SKF Germany claims that this methodology is consistent with instructions in the Department's questionnaire. Specifically, SKF Germany claims to have followed the Department's instructions by providing COP information for the input where the purchase prices for an identical or comparable input was not available. SKF Germany also states that its annual report, at pages 46 and 47, makes clear that Ovako Steel continued to operate at a loss in 1993, albeit slightly less than that experienced in 1992.

Department's Position: We disagree with Torrington and we affirm our methodology from prior reviews with respect to SKF Germany's purchases of raw materials from the related supplier, Ovako Steel. The inputs that SKF Germany purchased from Ovako Steel were unique, and they were produced according to SKF Germany's specific product specifications. Absent referent market prices for the inputs, we are accepting SKF Germany's cost reporting with respect to CV by relying on the greater of the COP or transfer price for these inputs.

Comment 3: Torrington argues that the Department should eliminate any related-party input transfers by Koyo that do not reflect the higher of arm's-length prices or COP.

Koyo argues that the Department does not have statutory authority to investigate the cost of inputs Koyo obtained from related suppliers. Koyo contends that, in order to request information regarding the COP of inputs obtained from related suppliers, the Department must have ''reasonable grounds to believe or suspect'' that the value Koyo reported for such inputs is below the COP of the inputs, citing section 773(e)(3) of the Tariff Act. Koyo maintains that, according to the language of the statute, in order to launch an investigation under section 773(e)(3) and demand cost data for inputs obtained from related suppliers, there must be a ''bona fide allegation'' or a ''specific and objective basis for suspecting'' that the related suppliers of major inputs were transferring them to Koyo at values less than their COP. Since no such allegation has ever been made by the petitioner, and the Department had no independent basis upon which to believe or suspect that such sales were made at below COP, Koyo requests that the Department remove the COP data for such inputs from the administrative record in this review and use the transfer prices Koyo reported in calculating the CV of the affected bearing models.

Torrington responds that related-party transfers are inherently different from arm's-length HMPs and, therefore, the Department may treat the question of below-cost related-party transfers differently than the issue of below-cost arm's-length sales. Torrington claims that, while the Department may require petitioners or domestic parties to show that arm's-length sales in the HM are below cost, it may require respondents to supply evidence as to whether related-party sales are below cost because (1) related-party transfers are a suspect category under the law, and (2) foreign manufacturers and their subsidiaries inherently have access to the best information for purposes of analyzing transfer prices. Finally, Torrington asserts that it has been the practice of the Department since enactment of section 773(e)(3) of the Tariff Act to require respondents to submit evidence concerning related-party production costs.

Department's Position: As we stated in *AFBs IV* (at 10923), we disagree with Koyo that the Department lacks authority to request cost data from related suppliers. In calculating CV, the Department does not necessarily accept the transfer prices the respondent paid to related suppliers as the appropriate value of inputs. Related parties for this purpose are defined in section 773(e)(4) of the Tariff Act. In accordance with section 773(e)(2) of the Tariff Act, we generally do not use transfer prices between such related parties unless those prices reflect the market value of the inputs purchased. To show that the transfer prices for its inputs reflect market value, a respondent may compare the transfer prices to prices in transactions between unrelated parties. A respondent may provide prices for similar purchases from an unrelated supplier or similar sales by its related supplier to unrelated purchasers. If no comparable market price for similar transactions between related parties is available, we may use the actual COP incurred by the related supplier as an indication of market value. If the transfer price is less than the market value of the input, we may value the input using the best evidence available, which may be the COP.

Koyo did not provide information regarding prices between unrelated parties for some inputs it purchased from related suppliers. In those instances, we require the actual COP of those inputs to determine whether the transfer prices reflected the market value of the inputs. Where the transfer prices were less than the COP, we used the COP as the best evidence available for valuing the input. Under section 773(e)(3) of the Tariff Act, if the Department has reason to believe or suspect that the price paid to a related party for a major input is below the COP of that input, we may investigate whether the transfer price is in fact lower than the supplier's actual COP of that input even if the transfer price reflects the market value of the input. If the transfer price is below the related supplier's COP for that input, we may use the actual COP as the value for that input.

We found in *AFBs IV* that Koyo had purchased major inputs from related parties at prices below COP. Therefore, in accordance with normal practice, we determined that we had reasonable grounds to believe or suspect that Koyo purchased major inputs from related suppliers at prices below the COP of those inputs during this review period. See *AFBs IV* (at 10923–10924).

Comment 4: NSK argues that the Department did not have statutory authority to request supplier cost information absent a bona fide allegation that the transfer prices from suppliers are below cost, citing section 773(e)(3) of the Tariff Act. NSK contends further that the Department does not have authority to substitute COP for transfer price for the finished bearings NSK purchased from a related supplier. NSK notes that petitioners have never alleged that NSK purchased inputs from specific related parties at prices below the input's COP, and argues that the Department improperly rejected related-supplier transfer prices when calculating CV. NSK suggests that the Department's calculation of CV, using the higher of transfer price or cost for each input, is an unreasonable interpretation of the statute as it fails to consider the total return to the supplier for transfer of inputs for the same finished bearing or the entire relationship of the supplier with NSK.

Torrington argues that there is nothing in the statute that supports NSK's contention that the Department should consider factors other than cost

or transfer price in determining whether related-supplier inputs reflect fair market value. Torrington argues that the Department should reject NSK's argument as it did in the prior review.

Department's Position: As we stated in *AFBs IV* at 10923–24, we disagree with NSK that the Department violated the antidumping law by requesting cost data from related suppliers. In calculating CV, the Department does not accept the transfer prices paid by the respondent to related suppliers as the appropriate value of inputs. Related parties for this purpose are defined in section 773(e)(4) of the Tariff Act. In accordance with section 773(e)(2) of the Tariff Act, we generally do not use transfer prices between such related parties unless those prices reflect the market value of the inputs purchased. To show that the transfer prices for its inputs reflect market value, a respondent may compare the transfer prices to prices in transactions between unrelated parties. A respondent may provide prices for similar purchases from an unrelated supplier or similar sales by its related supplier to unrelated purchasers. If no comparable market price for similar transactions between related parties is available, we may use the actual COP incurred by the related supplier as an indication of market value. If the transfer price is less than the market value of the input, we may value the input using the best evidence available, which may be the COP. Absent information from a respondent regarding prices between unrelated parties for some inputs it purchased from related suppliers, we require the actual COP of those inputs to determine whether the transfer prices reflected the market value of the inputs. In these cases, where the transfer prices were less than the COP, we used the COP as the best evidence available for valuing the input. Under section 773(e)(3) of the Tariff Act, if the Department has reason to believe or suspect that the price paid to a related party for a major input is below the COP of that input, we may investigate whether the transfer price is in fact lower than the supplier's actual COP of that input even if the transfer price reflects the market value of the input. If the transfer price is below the related supplier's COP for that input, we may use the actual COP as the value for that input.

4E. Inventory Write-down and Write-off

Comment 1: Torrington claims that FAG Germany did not report inventory write-down amounts as costs in its response. Citing *Canned Pineapple Fruit from Thailand,* 60 FR 29553, 29571 (June 5, 1995), and other cases, Torrington states that write-downs are production costs that should be included in antidumping cost calculations. Torrington argues further that the Department should include inventory write-down amounts on a model-specific basis and that, if this cannot be done, the Department should use BIA in determining inventory write-down expense.

FAG Germany argues that inventory write-downs are not true costs for the Department's antidumping calculations. FAG Germany states that, if a product that had been written-down is later sold, the product would still be matched under the Department's antidumping methodology to the actual COM and selling, general, administrative, and financing expenses of the relevant periods as contained in the COP and CV data for the product. FAG Germany states further that, if the product that was written-down was later written-off, then reporting the write-down as a cost would effectively ''double-count'' the cost. Finally, FAG Germany claims that the Department verified that FAG Germany had a substantial net write-up of inventories and that, if the Department accepts Torrington's argument, it should also allow the amounts of inventory write-ups as an offset to cost.

Department's Position: We agree with FAG Germany. As demonstrated during the cost verification, FAG Germany did not incur inventory write-downs during the POR. Thus, Torrington's argument concerning write-downs is moot.

Comment 2: Torrington claims that FAG Germany did not report inventory write-off amounts on a model-specific basis, but rather spread the charge over numerous or all models. Torrington says that write-offs are model-specific by their nature and should be reported that way. Torrington argues that the Department should restate FAG Germany's inventory write-off charges to be model-specific or, if this cannot be done, use BIA in determining inventory write-off expense.

FAG Germany argues that it has included all write-offs of materials, components and finished goods in its COP and CV calculations, and that its record-keeping system does not permit ready identification and valuation of finished goods write-offs of individual bearing models. FAG Germany also argues that model-specific calculations and application of inventory write-offs defy commercial reality.

Department's Position: We agree with FAG Germany. As demonstrated at verification, FAG Germany accounted for the finished goods write-offs in FAG Germany's COP/CV calculation as an addition to COM. We found that, due to FAG Germany's record-keeping system, it is not feasible for FAG Germany to allocate write-off charges to specific models. Since FAG Germany has allocated its write-off costs to COP/CV, we conclude that FAG Germany's allocation methodology is appropriate.

4F. Interest Expense Offset

Comment 1: Torrington argues that, because NSK did not demonstrate that its reported short-term interest income was derived from business operations, the Department should disallow this offset and use total interest expense as a percentage of cost of goods sold.

NSK responds that it consistently invests excess cash from operations in short-term investments to maximize the return on such funds until they are needed. NSK states further that the short-term income it used in the offset involves income from short-term investments related to the production of subject merchandise and income from investments of working capital. NSK contends that it determined the percentage of total interest income that was short-term following the methodology the Department recommended, *i.e.*, by calculating the ratio of short-term (current) assets to long-term (non-current) assets, using the information on its Ministry of Finance report. NSK explains that it then applied the ratio to total interest income so as to determine the portion of interest income that was deducted from gross interest expense in order to calculate net interest expense. NSK argues that it had to calculate short-term interest indirectly because its record-keeping system does not track how much interest income from its consolidated subsidiaries is, in fact, short-term or long-term in nature.

Department's Position: We agree with NSK. We are satisfied from information on the record that NSK's business records do not report separately the short- and long-term nature of the interest income earned by the company and its subsidiaries. NSK's alternative calculation of its income offset reasonably reflects the short-term interest income related to production activities and the investment of working capital.

4G. Other Issues

Comment 1: Torrington asserts that the Department omitted SKF Sweden's R&D and imputed interest expenses from the calculation of general expenses of the CV section in the Department's computer program which applies the statutory minimum test for reported GS&A expenses. Torrington suggests

that the Department correct this error by adding SKF Sweden's R&D and imputed interest expenses to the calculation of general expenses.

SKF Sweden agrees with Torrington that R&D and imputed interest expenses should be included in the general expense calculation. SKF Sweden states that the methodology that Torrington presents to correct the problem, however, is incorrect because it would leave the imputed expenses out of the CV selling expense fields. SKF Sweden proposes instead that the Department add the direct imputed interest charges expense to HM direct expenses for CV and add the indirect imputed interest charges to HM indirect expenses for CV. SKF Sweden also states that the R&D expenses should be added separately to the calculation of general expenses.

Department's Position: We agree with the methodology proposed by SKF Sweden and have made the necessary changes to the final margin calculation program.

Comment 2: Torrington claims that, in the Department's correction of SKF France's G&A ratio, as provided in SKF France's supplemental questionnaire at page 2, the Department omitted the R&D expenses reported by SKF France in the calculations of CV and COP.

SKF France agrees with Torrington that the Department made this clerical error and notes further that the Department failed to add the imputed expenses in calculating CV selling expenses. In addition, SKF France states that the Department omitted inventory carrying costs from the calculation of HM ISEs for CV.

Department's Position: We agree with both Torrington and SKF France and have corrected these errors.

Comment 3: Torrington contends that SKF Germany did not report severance pay and/or restructuring costs on a class-or-kind basis, and recommends that, as a BIA solution, the Department assume that all POR severance pay and restructuring costs were attributable exclusively to each class or kind and should allocate these costs on that basis. Torrington claims that SKF Germany's reporting methodology is incorrect since each class or kind of bearing is produced in a completely separate industry and costs associated with closures in one industry are not appropriately allocated to another.

SKF Germany claims that, as the Department has previously verified, its job order variance and cost adjustments are computed by product division and by factory, which assures that the job order variance and adjustments are specific by class or kind of merchandise. SKF Germany notes, in addition, that the general adjustments to the product division and factory-specific job order variances are also product division and factory-specific, although they contain, in part, amounts allocated from company-wide expenses in addition to the product division and factory-specific costs.

Department's Position: We disagree with Torrington. SKF Germany's job order variance and cost adjustments are computed by product division and by factory, as supported by SKF Germany in its submission. This assures that the job order variance and adjustments are specific by class or kind of merchandise. Because SKF Germany's calculation of both the job order variance and the general adjustment to the job order variance are specific by product division and by factory, there is no reason to apply BIA to severance pay and/or restructuring costs.

Comment 4: Torrington argues that the Department should use BIA in calculating FAG Germany's severance pay and restructuring costs because FAG Germany did not calculate such costs on a class-or-kind basis. Torrington contends that the Department should reject FAG Germany's argument that such costs are general in nature and not specifically attributable to any particular bearing type. Torrington argues that if, for example, a respondent closed a BB plant, the costs involved in the closure should not be allocated to other types of bearings. Torrington states that FAG Germany would have known which plants closed and where laid-off workers had worked and, thus, should have been able to report such costs on a class-or-kind basis. Torrington recommends that, as BIA, the Department assume that all POR severance pay and restructuring costs were attributable exclusively to each class or kind.

FAG Germany states that its reported restructuring costs were general in nature, relating to company-wide downsizing and the closure of DKFL, and that these costs were incurred in a prior POR. FAG Germany also claims that they were captured and allocated properly in general and administrative (G&A) expenses by the ''bridge'' calculation. FAG Germany states that none of the plants that it closed produced specific bearing classes and that no single class or kind of merchandise bore a disproportionate share of the expense. FAG Germany claims that dismissed workers were not necessarily associated with the particular areas being downsized because, in addition to laying off workers, FAG Germany shifted workers and administrators extensively within the organization. FAG Germany contends that attempting to calculate such costs on a class-or-kind basis would be impossible and contrary to FAG Germany's actual experience.

Department's Position: We agree with FAG Germany that it recognized the majority of restructuring costs related to the closure of DKFL, a subsidiary, in 1992. At verification we examined the restructuring costs indicated in the footnotes of the 1993 audited financial statements. We traced the amounts stated in the footnotes to FAG's ''bridge'' adjustments and G&A expenses. We noted that the downsizing and closure costs of DKFL were general in nature and the related expenses FAG incurred cannot be applied to specific classes or kinds of merchandise produced at each facility. Therefore, we have included FAG Germany's restructuring costs and severance pay in G&A expenses for the final results.

Comment 5: Torrington states that SKF Germany's responses contain conflicting statements as to whether it purchased finished products from outside suppliers. Torrington asserts SKF Germany should clarify the record on this matter.

SKF Germany maintains that, for five successive administrative reviews, SKF Germany has reported, as sales of its own product, certain finished bearings manufactured by unrelated subcontractors. SKF states that the Department has repeatedly verified that SKF Germany's cost-reporting and cost-accounting methodologies are correct. SKF Germany acknowledges that it purchased finished bearings from unrelated subcontractors but states that it has reported sales of such subcontracted bearings in the HM and United States. SKF Germany states that it has also reported the acquisition costs of such bearings in its cost response. SKF Germany claims that its unrelated subcontractors do not know the destination of the subcontracted products at the time of their acquisition and, since these products are manufactured for SKF Germany, SKF Germany has treated them consistently as its own production.

Department's Position: As SKF Germany has stated on the record, it reports, as sales of its own product, certain finished bearings manufactured by unrelated suppliers. In addition, SKF Germany reported the acquisition costs of these bearings in its cost response. Because the unrelated suppliers do not know the destination of these finished bearings and because SKF Germany has consistently controlled the production and sale of these bearings, we have

treated them as SKF bearings in our analysis.

Comment 6: Torrington contends that it is unclear whether FAG Germany included costs associated with DKFL-produced ''FAG Germany-brand'' bearings in its cost response. Torrington states that, although FAG Germany said that it included such costs in its submission, FAG Germany's cost response contains very little discussion of DKFL and focuses on FAG Germany-KGS. Torrington argues that the Department should resolve this question prior to issuing the final results and that, if weighted-average DKFL costs are not included, the Department should not accept FAG Germany's cost response for the models in question.

FAG Germany argues that, because no identical DKFL-made and FAG Germany-made bearing types were sold in the United States during the POR, weight-averaging the costs is not necessary. FAG Germany states that it included all appropriate DKFL production costs in its response for DKFL-made bearings sold in the United States during the POR. FAG Germany claims that the reason it placed little emphasis on DKFL in its narrative cost response is due to the fact that FAG Germany withdrew from the DKFL business three months into the POR, so DKFL's production had little overall impact on the response.

Department's Position: We agree with FAG Germany. We examined FAG Germany's cost response and found that it had reported the costs for DKFL bearings properly. Therefore, we have accepted FAG Germany's reported costs for such bearings for the final results.

Comment 7: Torrington notes that, at verification, the Department found that FAG Germany did not include a loss it incurred on the sale of a Korean subsidiary in its G&A expense calculation. Torrington argues that the Department should assign the amount of the loss to the type of merchandise the Korean facility produced. Torrington argues further that, if the Department rejects its arguments about restructuring costs, then the Department should allocate the amount of the loss on the sale of the Korean subsidiary to all bearings under review.

FAG Germany argues that the Department should not include the loss it incurred on the sale of its Korean affiliate because this entity produced bearings in Korea, not Germany, and thus the merchandise produced was not within the scope of the order. FAG Germany argues that this loss should be treated as an investment loss and not included in the pool of G&A expenses.

Department's Position: We disagree with Torrington that we should allocate the loss on the sale of the Korean subsidiary to FAG Germany's sales on a class-or-kind basis. This cost relates to the overall operation of the company. Therefore, it is most appropriately characterized as a G&A expense and, for the preliminary results, we recalculated FAG Germany's G&A expense to include this expense. For these final results, we have also allocated the amount of the loss on the sale of the Korean subsidiary on the basis of all costs incurred by the company during the POR, including non-subject merchandise.

Comment 8: Torrington observes that FAG Germany reported different CVs for further-manufactured products depending on whether they were sold to OEM or to distributor customers, and argues that the printout of CV of further-manufactured products shows that FAG Germany did not report distributor values for certain parts. Torrington concedes that it may be possible that there were no distributor sales for these parts, but argues that the Department should insure that it calculates margins properly if there were such sales. Torrington suggests computer-programming language to conduct this test.

Department's Position: We agree with Torrington that, in the event that FAG Germany did not report the CV for all further-manufactured products to distributors, we must apply BIA to such sales. Torrington's suggestion is reasonable and appropriate in this case, as the value we would use would be calculated for the same component for the same manufacturer, albeit for a different LOT. Therefore, we made the programming change suggested by Torrington for the final results as a safeguard. However, we note that information on the record does not indicate that FAG Germany actually failed to report the CV for components further manufactured into products sold to distributors.

Comment 9: Torrington argues that the Department should adjust the reported G&A data to include certain miscellaneous, non-operating expenses which (i) the Department adjusted for in the previous review, (ii) the Department did not verify in the current review, and (iii) it appears are not included in Koyo's response in this review. Torrington suggests that the adjustment be made based on Koyo's 1993–94 financial statements, which indicate that nonoperating expenses amounted to about two percent of the cost of goods sold.

Koyo argues that the Department's reclassification of these expenses was erroneous in the previous review because these expenses were clearly unrelated to its production activities, and Koyo has appealed the Department's treatment of these expenses to the CIT. According to Koyo, even if the Department were to accept Torrington's argument, the total amount of the adjustment for the prior review was *de minimis*, as identified in the Department's cost verification report. Assuming that the specific expenses the Department identified in the previous review remained a consistent percentage of total non-operating expenses, Koyo states that, since the total non-operating expenses as a percentage of cost of sales declined in this review, these expenses would be even lower.

Department's Position: We disagree with Torrington. In the previous review, as a result of a cost verification, we adjusted for certain non-operating expenses, *i.e.*, bonus payments to directors and auditors, exchange losses, and miscellaneous non-operating expenses, that were not included in Koyo's reported costs of production. Although we did not verify costs in this review, there is no evidence on the record for this review that indicates that an adjustment is needed.

Comment 10: Torrington argues that Koyo did not provide sufficient information for the Department to determine where it has reported depreciation on idle assets. Torrington recommends that the Department apply as BIA the highest amount of depreciation on idle assets reported by any other respondent.

Koyo asserts that it responded directly to the Department's supplemental questionnaire regarding changes in the manner in which it calculated its depreciation of idled assets. Koyo claims that Torrington has provided no evidence that Koyo had additional depreciation on idle assets which it did not report and, therefore, there is no reason for the Department to apply BIA in this situation.

Department's Position: We agree with Koyo. Koyo responded to our supplemental questions on this issue, adequately explaining that it reported an amount for depreciation on idled assets. There is no evidence that Koyo's reporting of depreciation on idle assets was deficient.

Comment 11: Torrington argues that NSK has excluded depreciation on some classes of assets since its non-consolidated financial statements indicate that depreciation of plant and equipment declined during the POR while non-current assets increased. Thus, Torrington argues, the Department should apply as BIA the

highest amount of depreciation on idle assets reported by any other respondent.

NSK responds that Torrington failed to note that, in its financial statements, NSK uses a declining-balance method of depreciation which results in larger depreciation expenses in early years. NSK contends that there is no need for adjustment for idle asset depreciation, since the full expense is already included in NSK's reported costs.

Department's Position: We agree with NSK. We found no indication from information on the record that NSK excluded depreciation from its reported totals.

Comment 12: Torrington states that the Department used the ten-percent statutory minimum selling, general and administrative expense (SG&A) calculation for NMB/Pelmec without first determining whether NMB/Pelmec's actual SG&A exceeded the statutory minimum. Torrington asserts that the Department must confirm that the use of the statutory minimum is appropriate.

Department's Position: We have reviewed our calculations. In our preliminary results, we neglected to test actual SG&A for NMB/Pelmec to determine whether NMB/Pelmec's actual SG&A exceeded the statutory minimum. We have corrected this error for these final results.

5. Discounts, Rebates, and Price Adjustments

As a general matter, the Department only accepts claims for discounts, rebates, and other price adjustments as direct adjustments to price if actual amounts are reported for each transaction. Discounts, rebates, or other price adjustments based on allocations are not allowable as adjustments to price unless, as described below, they are based on a fixed and constant percentage of sales price. Allocated price adjustments have the effect of distorting individual prices by diluting the discounts or rebates received on some sales, inflating them on other sales, and attributing them to still other sales that did not actually receive any at all. Thus, they have the effect of partially averaging prices. Just as we do not normally allow respondents to report average prices, we do not allow respondents to average direct additions to or subtractions from price. Although we usually average FMVs on a monthly basis, we require individual prices to be reported for each sale.

Therefore, we have made direct adjustments for reported HM discounts, rebates, and price adjustments if (a) they were reported on a transaction-specific basis, or (b) they were granted as a fixed and constant percentage of sales price on all transactions for which they are reported, as in the case with a fixed-percentage rebate program or an early-payment discount granted on the total price of a pool of sales. In other words, we did not accept as direct deductions discounts or rebates unless the actual amount for each individual sale was calculated. This is consistent with the policy we established and followed in *AFBs II* (at 28400), *AFBs III* (at 39759), and *AFBs IV* (at 10929).

In accordance with the CAFC's decision in *Torrington V* (at 1047–51), we have not treated improperly allocated HM price adjustments as ISEs, but have instead disallowed negative (downward) adjustments in their entirety. We have included positive (upward) HM price adjustments (*e.g.*, positive billing adjustments that increase the final sales price) in our analysis. The treatment of positive billing adjustments as direct adjustments is appropriate because disallowing such adjustments would provide an incentive to report positive billing adjustments on an allocated (*e.g.*, customer-specific) basis in order to minimize their effect on the margin calculations. That is, if we were to disregard positive billing adjustments, which would be upward adjustments to FMV, respondents would have no incentive to report these adjustments on a transaction-specific basis, as requested. *See AFBs IV* at 10933.

With respect to the CIT's decision in *Torrington V* (at 640) that we must disallow HM price adjustments that respondents allocated in a manner that does not allow us to separate expenses incurred on sales of scope products from those incurred on non-scope products, we note that our methodology incorporates this decision because we have denied all allocated price adjustments except those granted as a fixed and constant percentage of sales price on all transactions for which they are reported. If a respondent grants and reports a price adjustment as a fixed percentage across only those sales to which it pertains, the fact that this pool of sales may include non-scope merchandise does not distort the amount of the adjustment respondent granted and reported on sales of subject merchandise, since the same percentage applies to both subject and non-subject merchandise.

For USP adjustments, we deducted the per-unit amounts reported for U.S. discounts, rebates, or price adjustments if respondents granted and reported these adjustments on a transaction-specific basis or as a fixed and constant percentage of sales price. If these expenses were not reported on a transaction-specific basis, we used BIA for the adjustment and treated the adjustment as a direct deduction from USP. *See AFBs IV* at 10929.

Post-Sale Price Adjustments (PSPAs)

Comment 1: Torrington argues that the Department should not accept customer-specific billing adjustments reported by SKF Germany, SKF France, SKF Italy, and SKF Sweden because the reporting methodology does not tie the adjustments to individual transactions and does not separate billing adjustments granted on in-scope merchandise from those granted on out-of-scope merchandise. Torrington cites *Torrington III* (at 640) for the proposition that the Department must develop a methodology that removes HM PSPAs and rebates paid on sales of out-of-scope merchandise from any adjustments made to FMV or, if no viable method can be developed, the Department must deny such adjustments to FMV. Torrington recommends that, since these SKF companies could not provide evidence to support limiting their allocation of these billing adjustments with respect to in-scope merchandise only, the Department should disallow any downward adjustments to FMV for the claimed adjustments. Torrington further requests that the Department retain all upward adjustments so that these respondents do not benefit from a failure to report information (citing *AFBs IV* at 10907, 10933).

The SKF companies argue that there is no basis for the treatment of these billing adjustments in the manner Torrington suggests. These respondents contend that, since these billing adjustments were associated with multiple invoices and multiple invoice-lines, it was necessary to report these adjustments on a customer-specific basis rather than on a transaction-specific basis. The respondents assert that the manner in which these adjustments were reported was not the result of an unwillingness to report more narrowly, but was the only manner feasible. The companies contend that the fact that they are unable to prove the negative (that these allocations were not affected by price adjustments made on out-of-scope merchandise) is not a sufficient reason to treat these adjustments in the manner suggested by Torrington. Further, the respondents contend that the CIT's rationale for denying any allocated adjustment that is not limited to in-scope merchandise is unreasonable, and note that this argument is now on appeal.

The SKF companies also argue that Torrington's proposal that only upward adjustments to FMV be retained serves no useful purpose since the treatment of such adjustments as indirect expenses, or even their complete denial, serves as an adequate incentive for respondents to report such adjustments in the most accurate manner possible. Moreover, Torrington's proposal contravenes the CIT's remand order in that *no* adjustments should be made on merchandise that cannot be limited to in-scope merchandise.

Finally, the respondents contend that Torrington's cite to *AFBs IV* is incorrect with respect to the treatment of positive and negative billing adjustments. They state that, in that review, the Department did not disallow negative billing adjustments but instead treated them as ISEs.

Department's Position: We agree with Torrington. The SKF companies did not tie the billing adjustments in question to specific transactions, but instead calculated and reported them using customer-specific allocations. The contention that these adjustments could not be reported on a transaction-specific basis because they were granted on multiple invoices or multiple invoice lines is beside the point; the fact that a single billing adjustment is granted with respect to multiple transactions does not preclude our treatment of the item as a direct adjustment to FMV. However, in order for us to do so, each individual billing adjustment must be reported only with respect to the specific transaction(s) involved in the invoice (or group of invoices) on which the billing adjustment is granted. Further, the per-unit amount reported must be the amount specifically credited to the transaction in the company's records or, if there is no such transaction-specific recording, the adjustment must be granted and reported as a fixed and constant percentage of the sales price on all transactions to which the adjustment applies.

The reporting methodology used by respondents does not tie each billing adjustment to the specific transaction(s) on which each adjustment was granted. Instead, all POR billing adjustments were cumulated by customer and allocated across all POR sales to the customer, regardless of whether the customer actually received a billing adjustment on a particular sale. Therefore, in accordance with the guidelines regarding the acceptance of such adjustments, as stated above, we have disallowed the allocated negative HM billing adjustments and have included positive billing adjustments in our analysis.

Because we have disallowed these negative billing adjustments due to the allocation methodology used by these companies, and these adjustments were not granted as a fixed percentage across sales, we do not reach Torrington's argument that we should disregard these adjustments because they do not remove the effect of adjustments paid on out-of-scope merchandise. However, as noted above, our methodology is consistent with, and incorporates, the CIT's decision regarding the in-scope/out-of-scope distinction in *Torrington III* at 640.

Comment 2: Torrington argues that the Department's allowance of Koyo's HM billing adjustments (BILLADJH1, BILLADJH2) as ISEs in the preliminary results was incorrect. Torrington states that Koyo granted these adjustments on a transaction- or product-specific basis but allocated both adjustments on a customer-specific basis. Torrington notes that Koyo assigns debit and credit memos to the POR without any ties to specific invoice numbers establishing that the debits or credits related to period sales or to non-scope products. Torrington recommends that the Department deny negative HM billing and include positive billing adjustments in the antidumping analysis. Torrington further suggests that, since positive billing adjustments were not reported on a transaction-specific basis, the Department should not use the reported positive billing amounts but should apply, as partial BIA, Koyo's highest reported positive billing adjustment to all sales involving positive adjustments.

Koyo acknowledges that it reported both types of billing adjustments using customer-specific allocations. Koyo maintains, however, that the Department should accept these adjustments for the final results as, at a minimum, ISEs. Koyo notes that, contrary to Torrington's statements, the Department in fact treated only BILLADJH1 as an ISE in the preliminary results, while denying BILLADJH2 altogether.

With respect to the billing adjustments reported in the field BILLADJH1, Koyo contends that, although it reported these adjustments on a customer-specific basis, the granting and reporting of such billing adjustments were limited to scope merchandise (AFBs). Koyo requests that the Department therefore treat this adjustment as an ISE.

With respect to billing adjustments reported in the BILLADJH2 field, Koyo argues that the Department's rejection of this adjustment was improper because Koyo reported the PSPAs that comprise this adjustment as accurately as possible according to the records it maintained in the normal course of business. Koyo states that it granted its second billing adjustment (BILLADJH2) on a model-specific basis, but it did not maintain the adjustment in that format in its computer records. Koyo therefore reported this adjustment by calculating customer-specific allocation ratios and applying such ratios across all POR sales to the customer. (Koyo calculated the customer-specific ratios by summing all POR billing adjustments per customer, multiplying the customer-specific adjustment totals by the ratio of its POR AFB sales to that customer to the total POR sales to that customer, then divided the resulting amount by the POR AFB sales to each customer, thus deriving a factor).

Department's Position: We agree with Torrington, in part. In accordance with our guidelines regarding PSPAs, as stated above, we have denied Koyo's negative HM billing adjustments reported under the BILLADJH1 and BILLADJH2 fields, and have retained positive billing adjustments for both fields, because Koyo reported these adjustments using customer-specific allocations. Although we verified that Koyo's billing adjustments were allocated on a customer-specific basis, they were not reported on a transaction-specific basis. As previously stated in this section, we do not accept allocations that do not result in the reporting of the actual amount of price adjustments incurred on each transaction. We do not agree with Torrington's proposal that we apply the highest reported HM billing adjustment for each field to all reported HM transactions because this would be unnecessarily punitive. We are satisfied that our guidelines in this area provide sufficient incentive to report transaction-specific adjustments in the manner in which they are granted.

Discounts

Comment 3: Torrington argues that the Department should disallow SKF Germany's reported HM ''cash discounts'' (early payment discounts) because SKF Germany claimed amounts on the basis of broad allocations that included sales of non-subject merchandise and SKF Germany did not establish that all sales earned the cash discount or did so on a proportional basis.

SKF Germany argues that its reported cash discounts are typically taken by SKF Germany's customers by submitting a single discounted payment covering multiple invoices. SKF Germany claims that, because it grants the cash discount against a bundle of invoices, it is

impossible to report these discounts more narrowly than by customer number. SKF Germany recognizes the CIT has determined that SKF Germany's allocation approach is unacceptable, but argues that the Court has imposed an excessively stringent test of requiring SKF Germany to prove that no adjustments on non-subject merchandise appear in any of these customer-number-specific allocations.

Department's Position: We agree with Torrington. According to our guidelines as stated above, we have disallowed SKF Germany's cash discounts because SKF Germany did not report these discounts on a transaction-specific basis or as a fixed and constant percentage of sales price for each transaction on which the company incurred this expense. See *Torrington I, AFBs IV* (at 10932), and *Comment 1,* above.

Comment 4: Torrington argues that the Department should disallow a discount paid by SKF Italy to one customer for 1994 transactions because the supporting documentation submitted by SKF Italy was limited to 1993 sales to this customer.

SKF Italy argues that, as proof of the availability and amount of the cash discount for the entire POR, it submitted a copy of a letter confirming the discount to this customer for 1993 sales. SKF Italy states that this is the same type of information the Department verified and upon which it allowed a cash discount for all sales in the relevant POR in prior reviews (citing *AFBs IV* at 10963). SKF Italy offers to provide, upon request by the Department, copies of the cash discount documentation for sales made to this customer in 1994.

Department's Position: We disagree with Torrington. While SKF Italy provided supporting documentation only with respect to discounts given to the customer for 1993 sales, we are satisfied that the documentation is representative of discounts paid for the entire POR. Had we suspected a possible error or misrepresentation with regard to this matter in SKF Italy's response, we would have asked SKF Italy to provide additional documentation.

Comment 5: SKF Germany claims the Department inconsistently treated its ''Other Discounts'' field as an ISE in deriving HMP for price-to-price comparisons, while treating it as a direct adjustment in deriving the adjusted HMP used in the COP test. SKF Germany states that, in fact, ''Other Discounts'' are indirect and the Department should treat them as such in the cost test.

Torrington argues that these cash discounts are direct in nature since they are earned on an invoice-by-invoice basis and go directly to actual price. Torrington recommends that they be treated as such for COP purposes. Torrington asserts that the fact that SKF Germany failed to report these discounts on a sale-by-sale basis should not alter their treatment as direct expenses in deriving the adjusted price for the cost test. Hence, Torrington claims that the Department should treat these as direct for COP purposes but should treat them as indirect for the FMV calculation due to SKF Germany's deficiency in reporting.

Department's Position: We disagree with SKF Germany. SKF Germany reported this field using customer-specific allocations. Accordingly, we are disallowing these HM discounts for the purpose of deriving the FMV in price-to-price comparisons. However, we are treating them as direct adjustments to the adjusted HMP used in the cost comparison because to do otherwise (*i.e.* to make no adjustment to HMP for these discounts) would provide respondents with an adjustment that is preferable to the adjustment that would be made if this expense was reported as incurred (on a transaction-specific basis).

Comment 6: FAG Germany argues that the Department should not treat HM third-party payments and early-payment discounts as an ISE. FAG Germany argues that it reported these expenses on a transaction-specific basis and they are tied directly to the sales for which they are reported. FAG Germany contends that the Department should treat these expenses as direct adjustments to FMV.

Torrington argues that the Department should require FAG Germany to submit additional data to substantiate its claims that it reported these expenses on a transaction-specific basis. Torrington argues that, if FAG Germany cannot tie these expenses to specific transactions, the Department should treat these expenses as indirect for the final results.

Department's Position: We agree with FAG Germany with regard to early-payment discounts, but we disagree with FAG Germany with regard to third-party payments. With regard to early-payment discounts, information that FAG Germany submitted in its supplemental questionnaire response indicates that the company grants, tracks, and reports such discounts on a transaction-specific basis. Because FAG Germany has tied early-payment discounts to individual transactions, we have treated these discounts as a direct expense.

However, the evidence submitted by FAG Germany does not demonstrate that the company's third-party payments are directly related to the products under review. Contrary to FAG Germany's assertions in its brief, the company failed to provide information demonstrating how it ties its third-party payments directly to the sale by FAG Germany to the distributor, which is the sale we use for comparison purposes. Further, the information on the record does not clearly indicate that the amount of this expense varies with the quantity of merchandise sold from FAG Germany to the distributor.

In this respect, FAG Germany's third-party payments are akin to a promotional expense. *See* discussion of NSK's stock transfer commission, item 3.C, *supra*. As with NSK's stock transfer commission, it is evident from the record that FAG Germany's third-party payment expense is not related directly to sales by FAG Germany to its customers and is properly treated as an indirect selling expense adjustment. This item does not relate to any particular sale by FAG Germany and does not vary with the quantity of merchandise that FAG Germany sells. *See Zenith Electronics* v. *United States*, 77 F.3d 426, 431 (Fed. Cir. 1996). Accordingly, as this program was equally available with respect to both kinds of merchandise, and was not associated with any particular sale, we have treated FAG Germany's third-party payments as an ISE for the final results.

Comment 7: Torrington agrees with the Department's decision to disallow NSK's early-payment discounts to distributors (OTHDISH) because NSK failed to demonstrate that it calculated such discounts on the basis of sale of in-scope merchandise only.

NSK argues that, regardless of the mix of scope and non-scope merchandise that a distributor might have purchased in any one month, the early-payment discount for that month applies as a *fixed percentage* equally to both the scope and non-scope sales. Citing *AFBs IV* (at 10935), NSK asserts that proof of stable payment patterns for all early payment discount customers is adequate to prove a direct expense. NSK argues, further, that the Department verified that NSK incurred this expense with respect to sales of scope merchandise to specific customers and on equal percentages for both scope and non-scope sales. NSK claims that the process of reporting and verification are intended to determine whether the respondent's methods accurately represent the facts. NSK notes that the Department verified NSK's HM early-payment discounts for this review and noted in the verification report that it found no discrepancies.

Department's Position: We agree with NSK. In accordance with our guidelines, as stated above, since these early payment discounts were granted as a fixed percentage of all purchases by a given customer, we have allowed these early payment discounts as a direct adjustment to price.

Comment 8: Torrington claims that, because NTN used an aggregate method of reporting some billing adjustments rather than reporting HM billing adjustments on a transaction-specific basis, the Department should reject the billing adjustments or, in the absence of outright rejection, treat the adjustments as indirect expenses. Torrington contends that respondents must tie FMV adjustments to sales of subject merchandise, rather than simply allocate them over all sales. Torrington also asserts that certain discounts NTN claimed do not qualify as direct adjustments to price because they are not transaction-specific or constant across all sales. Petitioner asserts that NTN did not report the discounts on a transaction-specific basis and it provided no evidence that it granted discounts as a fixed percentage of all HM sales. Torrington recommends that the Department reject the claimed discounts.

NTN contends that it reported the billing adjustments on a customer- and product-specific basis and that, in the vast majority of cases, the reporting was transaction specific. NTN notes that only in a very few cases are adjustments only customer- and product-specific.

Department's Position: We agree, in part, with Torrington. As stated above, we allow direct adjustments for discounts and price adjustments if they are reported on a transaction-specific basis (rather than allocated) or if they were granted and reported as a fixed and constant percentage on all sales to a customer. NTN reported its discounts on product- and customer-specific bases, not on a transaction-specific basis, and did not grant and report such discounts as a fixed and constant percentage of sales. Accordingly, we have disallowed those discounts because NTN did not report them on a transaction-specific basis.

However, we disagree with Torrington that we should reject NTN's billing adjustments. During verification, we examined NTN's HM sales, and found no reason to believe or suspect that NTN failed to report its HM billing adjustments accurately and completely. In addition, we found that the great majority of adjustments were transaction-specific; the number of instances of non-transaction-specific reporting is so slight as to not render the billing adjustments distortive. Accordingly, we have treated NTN's reported HM billing adjustments as direct adjustments to price for these final results.

Rebates

Comment 9: Torrington contends that the Department should not accept SKF Sweden's reported HM rebates (REBATE1H) because SKF Sweden only describes the available rebate programs in vague, general terms and does not explain how the rebates are reported on a transaction-specific basis. Further, Torrington states, SKF Sweden reported imputed rebates for the first four months of 1994 but did not elaborate on the precise methodology it employed to impute these rebate amounts. Torrington also states that SKF Sweden does not have a rebate schedule and therefore has no straightforward mathematical calculation to determine rebates. As a result of the absence of a rebate schedule, Torrington argues the rebates SKF Sweden gives will vary based on numerous factors, and SKF Sweden's customers may not know the rebate terms at the time of sale. Torrington also asserts that SKF Sweden did not limit its reporting of rebates to in-scope merchandise. Torrington states that, for these reasons, the Department should not make any adjustment to FMV for the claimed HM rebates.

SKF Sweden responds that it granted and reported its rebates as fixed-percentage rebates and they should therefore qualify as direct price adjustments. SKF Sweden asserts that this reporting is consistent with the Department's guidelines for reporting rebates and with the CIT's decision in *Torrington II* (at 390). SKF Sweden also contends that it described the rebates in full in its questionnaire response, and that it only reported rebates for those transactions for which customers received the rebates. SKF Sweden contends that the fixed-percentage rebate is not distorted by PSPAs paid on sales of out-of-scope merchandise, if the rebates or PSPAs paid to each customer are the same for each sale of in-scope and out-of-scope merchandise that occurred during the POR, citing *Federal Mogul III*. With respect to the issue of imputed rebate amounts for sales made in the first four months of 1994, SKF Sweden argues that it reported imputed rebate amounts for those customers who qualified for the rebate in 1993. SKF Sweden states that the Department previously verified SKF Sweden's rebates and SKF Sweden has not changed its methodology for reporting rebates in this review. Thus, SKF Sweden asserts, the price methodology for imputing rebates for 1994 is in the record, and the Department should reject Torrington's assertion that SKF Sweden did not elaborate on its pricing methodology.

Department's Position: We agree with SKF Sweden. As noted above, we make direct adjustments for reported rebates if they are granted as a fixed and constant percentage of sales on all transactions for which they are reported. SKF Sweden reported its rebates as a fixed percentage of sales, and maintained the fixed-rebate percentage granted to its customers throughout the POR. The fact that SKF Sweden did not provide a rebate schedule in its response does not mandate rejection of the reported rebates. Absent verification, it is the Department's practice to accept the information respondent submits as factual unless it has reason to believe otherwise. There is nothing on the record to demonstrate that SKF Sweden's customers did not know the HM rebates terms at the time of sale.

SKF Sweden granted its HM rebates for the following: (1) certain customers and certain product codes; (2) certain customers achieving specified sales levels; and (3) certain customers for all sales. In each of these situations, SKF Sweden applied a fixed-percentage rebate to those sales of in-scope merchandise that received a fixed-percentage rebate. Under this methodology, SKF Sweden has not distorted the rebate amounts in its response.

With respect to imputed HM rebates, SKF Sweden explained that it did not know the total amount of rebates its qualified customers received when it was preparing its response and, therefore, SKF Sweden imputed this amount based on historical experience. We find that the manner in which it imputed HM rebates for qualified customers was reasonable, and we have accepted and used the imputed HM rebates for the final results of this review.

Comment 10: Torrington argues that the Department should reject SNR France's HM rebates. Torrington asserts that rebates are not an allowable adjustment unless the terms of the rebate are set forth at the time of the sale, therefore, the rebate schedules must be known at the time of the sale for a reported rebate to be allowable. Torrington states that the record evidence suggests that SNR France determines its rebate schedules after a year of sales has occurred. Torrington suggests that, under this program, SNR France could choose to pay rebates as it anticipates dumping margins, thereby

providing funds to customers rather than paying antidumping duties.

SNR France responds that, although it does not have a rebate policy for all customers, the company grants rebate payments, as the Department verified, to its customers periodically throughout the year. SNR France emphasizes that it calculates rebates on a customer-specific basis and its rebate programs are granted and paid as a part of the company's standard business practice. Therefore, SNR France contends, it does not use the rebate programs to anticipate dumping margins as speculated by petitioner. SNR France notes that the Department has verified in past reviews that SNR France's rebate methodology is part of SNR France's standard business practice, and cites *AFBs II* (at 28401–02) to support its argument that the Department's policy is to accept rebate programs that are granted and paid as part of the respondent's standard business practice.

Department's Position: We agree with SNR France. Information submitted by SNR France, as well as our findings at verification, indicates that SNR France granted these rebates as a fixed and constant percentage of price and reported them as such. Moreover, SNR France's submission and the documentation that it provided at verification support a conclusion that the adjustments it claimed were customary and in the ordinary course of trade and, thus, were known to SNR France's customers at the time of sale. Therefore, we have allowed SNR France's HM rebate adjustments for our final results.

Comment 11: Torrington argues that the Department should disallow SKF Germany's reported HM rebate 2 because these payments were lump-sum amounts to compensate customers for inadequate profits. Torrington claims that SKF Germany claimed amounts on the basis of broad allocations that included sales of non-subject merchandise but it did not demonstrate that resales of subject merchandise caused the rebates to be earned.

SKF Germany argues that its rebate 2 calculation aggregates rebate payments made to certain of SKF Germany's dealer/distributor customers to compensate them for competitive conditions in the German market. SKF Germany states that these rebates are based on sales by SKF Germany's customers rather than to SKF Germany's customers and payment can only be allocated over the entire sales base to the dealer/distributor. SKF Germany recognizes the CIT's decision that SKF Germany's allocation is not acceptable, but argues that the court has imposed an excessively stringent test in requiring SKF Germany to prove that no adjustments on non- subject merchandise appear in any of these customer-number specific allocations.

Department's Position: We disagree with Torrington. As is the case with NSK's stock transfer commission (*see* Item 3.C, Comment 1) and FAG Germany's third-party payments (*see* Item 5, Comment 6) this expense is not related directly to sales by SKF Germany to its customers, and is properly treated as an indirect selling expense adjustment. This item is a promotional expense that does not relate to any particular sale by SKF Germany and does not vary with the quantity of merchandise that SKF Germany sells. *See Zenith Electronics* v. *United States*, 77 F.3d 426, 431 (Fed. Cir. 1996).

Comment 12: Torrington contends that the Department should not accept certain of SKF Italy's rebate claims. Torrington argues that these claimed adjustments were allocated on a customer-specific basis and that SKF Italy has not demonstrated that it did not allocate rebates it paid on out-of-scope merchandise to in-scope merchandise. Torrington suggests that, as partial BIA, the Department should disallow these rebate claims for the final results, with the exception that, if the claim increases FMV, the Department should keep the claim so that the respondent does not benefit from failure to report appropriate information.

SKF Italy argues that Torrington has mischaracterized its rebate programs and states that it granted and reported both its rebates as fixed-percentage rebates, and that they therefore qualify as direct price adjustments.

Department's Position: We disagree with Torrington. SKF Italy demonstrated that it pays both types of rebates to individual customers based on a fixed percentage of all sales to the customer. Therefore, because SKF Italy granted these rebates on a fixed and constant basis, SKF Italy qualifies for a direct price adjustment to FMV for its HM rebate programs.

Comment 13: Torrington claims that FAG Germany based its claimed HM rebates on broad allocations that included out-of-scope merchandise, and that FAG Germany has not demonstrated that resales of in-scope bearings caused the rebates to be earned or that straightforward mathematical apportionment yielded accurate amounts. Torrington argues that the Department should reject FAG Germany's claimed rebates.

FAG Germany states that it granted such rebates on the basis of a fixed percentage of all sales of merchandise, whether in-scope or non-scope, to a customer during the POR. FAG Germany contends that its methodology directly ties the rebates it paid to individual transactions.

Department's Position: We agree with FAG Germany. Because FAG Germany granted and reported rebates based on a fixed percentage of all sales to a customer during the year, we have allowed FAG Germany's claimed rebates as a direct adjustment to FMV for the final results.

Comment 14: Torrington argues that the Department should not adjust FMV using FAG Italy's reported HM rebates. Torrington states that rebates are not an allowable adjustment unless the terms of the rebate are set forth at the time of the sale. Torrington contends that FAG Italy's HM rebate schedules were not negotiated until after the sales occurred, based on FAG Italy's questionnaire responses. In addition, Torrington asserts that FAG Italy's rebate program suggests that its rebates are reported on a customer-specific basis only and do not account for non-scope merchandise.

FAG Italy responds that Torrington misunderstands the nature of its rebate programs. FAG Italy states that its rebates are not determined at the end of the year depending upon the achievement of certain sales volumes, but are instead negotiated at the beginning of the year and, if the requisite sales volume is met by the end of that year, the rebate is then paid or credited as a fixed percentage applicable to all covered sales. FAG Italy notes that, for a reported rebate to be allowable, the rebate schedule (*i.e.*, specific rebate percentages or amounts associated with specific levels of sales or other factors) must be known at the time of the sale. FAG Italy holds that its rebate program meets the Department's standard for the allowance of HM rebates.

With respect to Torrington's argument regarding non-scope merchandise, FAG Italy claims that Torrington has misinterpreted established case law. FAG Italy states that, pursuant to specific CIT direction, PSPAs and rebates are permitted if granted on a fixed-percentage basis on all sales of merchandise (in-scope and out-of-scope) to a customer during the POR. FAG Italy claims that it grants its rebates in this fashion, *i.e.*, they are fixed-percentage rebates, negotiated at the beginning of the year, and applied to total sales of all merchandise to a customer where the customer has met the agreed-upon requisite sales volume.

Department's Position: We agree with FAG Italy. We are satisfied from the

record that FAG Italy sets the terms of its rebates at or before the time of sale. Consistent with our standards for allowable rebate adjustments (above), we have accepted FAG Italy's rebate adjustments because it grants the rebates as a fixed and constant percentage of all sales of merchandise to a customer.

Comment 15: NSK argues that the Department incorrectly treated its return rebate as an ISE (NSK pays return rebates to its distributors if the distributors resell the bearings to certain customers approved in advance by NSK). NSK explains that it has improved its methodology from prior AFB reviews and is able to match exactly the reported rebate amounts paid to distributors during the POR to the number of pieces actually sold to the distributor during the POR and to those that were resold by the distributor to the approved customers. NSK contends that, at the verification for this review, NSK demonstrated that its return rebate is transaction-specific and that it calculated it at the part-number and customer level. NSK argues that the Department should treat this rebate as a direct adjustment to price for the final results.

Torrington responds that NSK's narrative response in its supplemental response contradicts NSK's claim that it reported return rebates on a transaction-specific basis:

''* * * NSK * * * cannot tie specific return rebates to specific sales because there is nothing in its computer records to tie the two transactions together,'' citing NSK's supplemental response of November 30, 1994 at 23–24. Torrington argues that the Department correctly determined not to treat NSK's return rebates as a direct adjustment to price. Torrington argues, further, that the Department should have disallowed the return rebates rather than treat them as ISEs since these rebates are price adjustments, not selling expenses.

Department's Position: We agree with NSK. We consider NSK's return rebates to be a promotional expense as opposed to a price adjustment because NSK grants these rebates to promote sales made by distributors. NSK has demonstrated that it incurs, and has reported, this expense on a model-specific basis. Because NSK has tied this promotional expense to the subject merchandise, we consider it to be a direct selling expense.

Comment 16: Torrington contends that the Department properly disallowed NSK's distributor incentives (REBATEH2) because NSK did not demonstrate that this rebate does not include rebates paid on non-scope merchandise, citing *AFBs IV* (at 10935).

NSK argues that the Department's treatment of this rebate in this review is totally at odds with its recently issued remand in the 1990–91 review of these orders. NSK contends that the Department defended its findings in its response to comments parties filed in the remand determination that this rebate ''was granted as a straight percentage of sales and, therefore, treated as a direct expense.'' NSK argues that the record before the Department in this review is virtually identical to the earlier record.

Department's Position: Since NSK's distributor incentive rebates were granted as a fixed percentage of the sales on which they were reported, we have allowed them as direct expenses.

Comment 17: NSK contends that the Department should treat its PSPAs, which NSK reported in its REBATEH3 and REBATEH5 fields, as direct adjustments to FMV. NSK argues that it is able to match the PSPAs recorded as REBATEH3 or REBATEH5 to underlying transactions. NSK claims that these PSPAs are incurred, calculated, and reported with respect to sales of individual part numbers to individual customers. NSK contends that it did not allocate them across models or customers and, as they are part-number specific, they are by definition limited to scope merchandise. NSK claims that it determined the exact quantity of sales to which the PSPA applied and it applied the PSPA to that quantity of sales, working backwards from the date the price change was recorded in its computer system. In this way, NSK contends, it reported only the pieces that generated the PSPA as having received a REBATEH3 or REBATEH5. NSK argues that the Department should treat these rebates as direct adjustments to FMV.

Torrington argues that NSK, in its description of its PSPAs in its response, states that it was not able to tie its PSPAs to the specific transactions on which they were incurred. Torrington argues that the Department determined correctly in its preliminary results not to treat NSK's PSPAs, recorded as REBATEH3 or REBATEH5, as direct adjustments to price. Furthermore, Torrington argues, this adjustment is a price adjustment by nature, not a selling expense and should, therefore, be disallowed completely rather than be treated as an indirect expense.

Department's Position: We agree with NSK. We have allowed NSK's PSPAs because NSK's methodology matches PSPAs to particular underlying transactions using product and customer codes as they were originally paid.

Comment 18: Torrington argues that, although the Department treated NSK's lump-sum PSPA as an HM ISE, the Department should disallow it because there is no evidence to link such adjustments to in-scope merchandise.

NSK contends that its lump sum rebates were claimed as an indirect expense adjustment because they were granted on a customer-specific basis, not a product-specific or sale-specific basis. NSK further claims that, although the customer negotiations leading up to these rebates proceed from a base of sales, the end result represents negotiation and compromise, and cannot be said to specific sales. NSK argues that what is relevant is whether the methodology used by NSK to apportion the lump-sum rebates between scope and non-scope merchandise is fair and non-distortive. NSK states that it used an allocation method based on the percentage of scope to non-scope merchandise for those customers accounting for a significant percent of the total lump-sum rebates granted during the POR. NSK also states that it demonstrated the stability of the purchasing patterns of these customers at verification.

Department's Position: We agree with Torrington. We have disallowed this adjustment because it is a direct price adjustment and NSK did not tie these adjustments to the particular sales affected by the adjustment. Based on NSK's description, it grants lump-sum discounts as a fixed percentage of a discrete group of sales. However, instead of tying the discount to the particular transactions covered by the base of sales, NSK allocated the lump-sum discounts by the proportion of scope and non-scope merchandise purchased by certain customers, *i.e.*, NSK allocated this expense across a broader base of sales than those on which it granted the rebates. Accordingly, we have disallowed these expenses for these final results.

Comment 19: Torrington claims that NTN and NTN Germany used an improper allocation methodology to attribute U.S. rebates to sales. Torrington contends that NTN and NTN Germany allocated rebates to sales that were not eligible for the rebates, thereby diluting the rebate amounts for sales that were eligible. Torrington urges the Department to apply some form of BIA to the U.S. rebates.

Department's Position: We disagree with Torrington. NTN's and NTN Germany's U.S. rebates were customer-specific, were not tied to specific invoices, and were granted on a fixed basis for sales of all merchandise. NTN and NTN Germany have demonstrated

that they offered rebates to certain U.S. customers who attained specified target sales volumes, and granted the rebate amounts based on the total sales volume goals. NTN and NTN Germany reported these rebates as a fixed and constant percentage across all eligible sales to each customer. Therefore, we have treated these rebates as direct adjustments to FMV for these final results.

6. Further Manufacturing and Roller Chain

Section 772(e)(3) of the Tariff Act requires that we reduce ESP by the amount of any increased value to the subject merchandise resulting from further manufacturing performed after importation in the United States and prior to sale to the unrelated U.S. customer. Based on this section of the Tariff Act and the applicable legislative history, we have developed a practice whereby we do not calculate and do not assess antidumping duties on subject merchandise imported by a related party and further processed where the value of the subject merchandise comprises less than one percent of the value of the finished product sold to the first unrelated customer in the United States. *See AFBs III* at 39732 and 39737. This practice has come to be known as the ''Roller Chain'' principle after the first case in which we articulated this convention. *See Roller Chain, Other Than Bicycle, from Japan,* 48 FR 51801, 51804 (November 14, 1983).

Comment 1: Torrington argues that the Department should reconsider and discontinue application of the ''Roller Chain'' principle. Torrington contends that the Uruguay Round Agreements Act (URAA) clarifies that Congress never intended to limit the antidumping law to imports accounting for a ''significant percentage'' of the value of the completed product via the Roller Chain principle. Torrington asserts that Congress intends that the Department determine USP for such products on the basis of the ''price of identical merchandise sold * * * to an unaffiliated person,'' the price of ''other subject merchandise sold,'' or ''any other reasonable means,'' citing the URAA amendments to section 772 of the Tariff Act.

Torrington argues that there is no concern over retroactive application of the law because Congress always intended that the Department resort to alternative bases to determine USP rather than exclude the imports. Torrington asserts the following: (1) excluding such imports vitiates Congress' purpose to ensure that ''imported merchandise for which an exporter's sales price calculation must be made will not escape the purview of the Tariff Act by virtue of its being further processed or manufactured subsequent to its importation but before its sale to the first purchaser in the United States unrelated to the foreign exporter,'' citing S. Rep. No. 1298, 93d Cong., 2d Sess. 172–3; (2) when enacting the further-manufacturing provision of the statute, Congress intended that existing Department of Treasury regulations, which do not exempt such merchandise, would apply to this section; and (3) the pre-1995 GATT Antidumping Code does not exempt such imports. Torrington concludes, therefore, that applying this new-law provision to respondents would not be a retroactive application of the law, but would implement the law as Congress had originally intended.

Torrington argues in the alternative that, if the Department continues to use the Roller Chain principle, it should revisit the methodology it uses to apply the one-percent test. Torrington contends that the Department's current practice is improper because the value of the imported bearings may be based on entered value, which can be artificially lowered through low-cost transfer pricing. Torrington argues that, through low-cost pricing, respondents are able to manipulate entered values such that, as a result of its current test, the Department will disregard transactions and circumvention of the order will occur. Torrington contends that, instead of entered value, the value of imported bearings should be based upon the ESP or PP of such or similar bearings sold at arm's-length prices. Torrington suggests that the Department compare this value to the resale price of the finished merchandise, which is not subject to manipulation by related parties. Where the importer does not resell bearings, or resells only a small quantity, Torrington asserts that the Department should base the USPs for the model in question on sales by another manufacturer or the manufacturer who produced the model in question.

NSK responds that it agrees with Torrington that the Department must, under certain circumstances, assess dumping duties on further-manufactured imports based on the weighted-average margin for the remainder of goods in the class or kind. NSK states, however, that the circumstances under which this is appropriate are where the imported merchandise is further manufactured into finished products of the *same class or kind* of the imported product (*e.g.,* BBs, CRBs, SPBs). NSK states that the further-manufacturing provision of the statute does not apply to such situations, and the Department must therefore discontinue its further-manufacturing analysis of bearing parts made into bearings. NSK contends that the Department must use its sampling authority to estimate the dumping duties applicable to these imported parts.

NTN argues that Torrington is attempting to apply the URAA amendments retroactively. NTN contends that the Statement of Administrative Action (SAA) states that the elimination of the Roller Chain principle is a change in the law, thus confirming the validity of the Roller Chain principle under prior law.

Koyo argues that the Department's treatment of further-manufactured merchandise has been used in every review of the AFB orders and that the CIT has affirmed this treatment. Koyo also contends that Congress intended that the further-processing provisions not apply unless the product ultimately sold to an unrelated purchaser contains a significant amount by quantity or value of the imported product. Koyo notes that the SAA indicates that the law has changed with respect to further-manufactured merchandise and the new approach is not a mere clarification.

Koyo further argues that the Department's methodology in its one-percent test is correct. Koyo claims that the purpose is to compare the value of the component as imported to the value of the non-scope merchandise as ultimately sold to an unrelated purchaser.

Department's Position: We disagree with Torrington. As NTN and Koyo note, the SAA clearly indicates that the new law represents a change, not merely a clarification, in the treatment of imported merchandise that does not constitute a significant portion of the value of the product into which it is further manufactured. The SAA notes that ''under existing law, in some situations, Commerce has been left with no choice but to exempt imported components from the assessment of antidumping duties.'' *See* SAA at 155–156.

Our approach in following the Roller Chain principle in this review is identical to our approach and practice in previous reviews of these orders. Moreover, this practice has been affirmed by the CIT. *See Torrington III* at 645. As we stated in *AFBs IV,* section 772(e)(3) of the Tariff Act requires that, where subject merchandise is imported by a related party and further processed before being sold to an unrelated party in the United States, we reduce ESP by

any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after importation but before its sale to an unrelated party. In ESP transactions, therefore, we typically back out any U.S. value added to arrive at a USP for the subject merchandise. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof from Korea,* 54 FR 53141, 53143 (December 27, 1989).

The legislative history of this provision suggests that the practice of subtracting the value added by the further-processing operations in the United States should be employed only where the manufactured or assembled product contains more than an insignificant amount by quantity or value of the imported product. *See* S. Rep. No. 1298, 93d Cong. 2d Sess. 172–73, 245, *reprinted in* 1974 U.S.C.C.A.N. 7185, 7310. Conversely, when the quantity or value of the imported product is insignificant in comparison to that of the finished product, we are not required to calculate a USP for the imported merchandise. Therefore, we conclude that Congress did not intend that a USP be calculated in these situations and hence that no dumping duties are due. *See* H. Rep. No. 571, 93d Cong. 1st. Sess. 70 (1973).

In situations such as this, in which the statute provides general guidance and leaves the application of a particular methodology to the administering authority, we are given significant discretion in determining the precise methodology to be applied. The application of a one-percent threshold, based on a comparison of entered value of the imported product to the sale price of the finished product, constitutes a proper use of the Department's discretion. Inasmuch as our statutory interpretation is not an unalterable rule, it does not constitute rule-making within the meaning of the Administrative Procedure Act. *See Zenith Elec. Corp.* v. *United States*, 988 F.2d 1573, 1583 (CAFC 1993).

We disagree with Torrington's assertion that the Roller Chain principle has created a vehicle for circumvention of the antidumping duty order. The antidumping statute provides for the assessment of antidumping duties only to the extent of the dumping that occurs. If there can be no determination of any dumping margin where the imported merchandise is an insignificant part of the product sold in the United States, assessment of antidumping duties is not appropriate. Furthermore, the Roller Chain principle acts only to exclude subject merchandise from assessment of antidumping duties during the POR. We continue to require cash deposits of estimated antidumping duties for all future entries, including entries of bearings potentially excludable from assessment under the Roller Chain principle. This is because we have no way of knowing at the time of entry whether the Roller Chain principle will operate to exclude any particular entry from assessment of antidumping duties. Any decision to exclude subject merchandise from assessment of antidumping duties based on a Roller Chain analysis is made on a case-by-case basis during administrative reviews. *See AFBs I* at 31703.

With regard to Torrington's argument that we should base the numerator of the ''one-percent test'' ratio on arm's-length prices of identical or similar merchandise, we agree with Koyo that entered value is the best reflection of the value of the component as it is imported. The price of identical or similar imported components sold to unaffiliated customers without being further manufactured in the United States will invariably reflect certain costs, such as advertising, that are not normally incurred on products sold to affiliates. Therefore, to use the price to an unaffiliated party would overstate the numerator of the ''one-percent test'' ratio. In addition, our reliance on respondents' reported entered values which, in ESP situations, are generally based on transfer price, is not misplaced. Antidumping proceedings are only one of the forces applicable to a respondent's transfer pricing practices, and such prices are subject to Internal Revenue Service audits for U.S. tax purposes. Finally, as noted above, our practice has been affirmed by the CIT. Accordingly, we have not modified our treatment of minor components further manufactured in the United States or our methodology for determining whether a component is minor for the final results.

Regarding NSK's comment, please see Comment 2 and our response, below.

Comment 2: NSK argues that the Department lacks a statutory basis for conducting a further-manufacturing analysis with respect to imported bearings that are further processed into merchandise that remains within the class or kind of merchandise covered by the order. NSK contends that the legislative history to the further-manufacturing provision of section 772(e)(3) of the Tariff Act limits this provision clearly to imports ''changed by further process or manufacture so as to remove it from the class or kind of merchandise involved in the proceeding before it is sold to an unrelated purchaser,'' citing H.R. Rep't No. 571, 93rd Cong., 1st Sess. 70 (1973). NSK states that the Department excluded such merchandise correctly from the further-manufacturing analysis in the original investigation and in the 88/90 administrative review, assigning a margin to such merchandise based on the margins calculated for imports of complete bearings, but that it has wrongly deviated from this approach in subsequent reviews.

NSK acknowledges that the CIT has rejected its previous challenges to the Department's further-manufacturing methodology, citing the CIT's decision on *AFBs II* in *NSK I* and the CIT's decision on *AFBs III* in *NSK II.* NSK contends, however, that the CIT has not ruled on the particular argument NSK is making in this segment of the proceeding. NSK concludes that the CIT has affirmed that the Department is not required to review every U.S. sale, citing *NSK II* at 1270.

Torrington responds that the statute, administrative practice, and judicial precedent support the Department's application of a further-manufacturing analysis to NSK's further-manufactured sales, pursuant to section 772(e)(3) of the Tariff Act. Torrington notes that the CIT has held that, where the imported parts at issue are covered by the antidumping order, they ''are not eligible for automatic exclusion from Commerce's analysis,'' citing *NSK II* at 1270. Torrington notes that the CIT excepted from the further-manufacturing analysis only ''manufactured or assembled products which contain less than a significant amount of the imported merchandise,'' citing *Id.*, and did not exempt imported parts that are further manufactured into products that remain within the scope of the order.

Department's Position: We disagree with NSK that we should not calculate dumping margins for merchandise which NSK further manufactured (but which stayed within the class or kind) in the United States. As we have explained in previous reviews (*see AFBs II* at 28360, *AFBs III* at 39737, and *AFBs IV* at 10939), we disregard antidumping duties only on those parts and bearings that comprise less than one percent of the value of the finished product sold to the first unrelated customer in the United States, pursuant to the Roller Chain principle (see our description above). Because imported merchandise that has been further manufactured is subject to antidumping duties, the Department cannot disregard sales of this merchandise in its analysis or the

adjustments to USP provided for in section 772(e)(3) of the Tariff Act.

The purpose of section 772(e)(3) is to include within the Department's antidumping margin calculations subject merchandise that is further-processed in the United States, with the proviso that the USP of such merchandise must not include value added in the United States prior to sale to the first unrelated buyer. While NSK argues that this provision only applies to merchandise that is transformed by the U.S. affiliate into non-subject merchandise prior to sale to the first unrelated buyer, the plain language of section 772(e)(3) makes no distinction between subject merchandise which is transformed by a related party in the United States into non-subject merchandise, and subject merchandise which is further-processed by a related party in the United States into merchandise which is still within the class or kind subject to the order. Section 772(e)(3) states that, ''[f]or purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any of—* * * (3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.''

Contrary to NSK's argument, the legislative history did not unambiguously alter the plain language of the provision. It is true that the House Report that accompanied the Trade and Tariff Act of 1974 seems to focus on merchandise which continues to be subject merchandise after processing by a related party in the United States. *See* H.R. Rep. No. 571, 93d Cong., 1st Sess. 70 (1973). The Senate Report that accompanied the Trade and Tariff Act of 1974, however, was in accordance with the plain language of the statute and made no distinction between merchandise which was ultimately sold as subject merchandise and merchandise which was ultimately sold as non-subject merchandise. The relevant paragraph stated:

> The first amendment would codify existing Treasury regulations in providing that imported merchandise for which an exporter's sales price calculation must be made will not escape the purview of the Act by virtue of its being further processed or manufactured subsequent to its importation but before its sale to the first purchaser in the United States unrelated to the foreign exporter. Under the amendment, adjustments to the prices at which the article is ultimately sold to an unrelated purchaser would be made in order to subtract out the value added to the merchandise after importation.
>
> S. Rep. No. 1298, 93d Cong., 2d Sess. 172, 173 (1974).

Comment 3: NSK/RHP argues that the Department should not apply BIA to calculate the FMV for those bearings that the Department has agreed are not subject to a further-manufacturing analysis. NSK/RHP contends that, through a series of conversations with the Department, it confirmed that reporting further-manufacturing data for ''first category'' bearings (*e.g.,* bearings that involve greasing, change of preload, or etching) was not necessary. Moreover, NSK/RHP asserts that the Department never asked the company to change its response to include further-manufacturing cost data for first category bearings. NSK/RHP states that it should not be penalized because it responded correctly to the Department's request for information.

Torrington argues that the Department should continue to classify NSK/RHP's first category bearings as subject to a further-manufacturing analysis. Torrington asserts that the record indicates that the first category bearings were in fact subject to further manufacturing in the United States. Torrington contends that the burden is properly placed on the respondent to provide all data the Department requests in its questionnaire. For these reasons, Torrington argues, the Department should apply BIA to calculate the FMV for the first category bearings.

Department's Position: We agree with NSK/RHP. We determined that NSK/RHP's first category bearings do not require a further-manufacturing analysis because such bearings entered the U.S. market as complete bearings (first category) and underwent minor alterations that did not significantly change the costs of these bearings. *See* NSK/RHP's February 1, 1995 questionnaire response. Further, Torrington has not provided any evidence to suggest otherwise. Therefore, for these final results, we did not apply BIA to calculate the FMV for the first category bearings NSK exported to the United States.

Comment 4: Torrington argues that the Department should include group administrative expenses in FAG Germany's further-manufacturing response. Torrington states that FAG Germany did not report such expenses and that FAG Germany stated that such expenses are typically recovered by way of transfer prices and distribution of profit. Citing *Color Picture Tubes from Japan*, 52 FR 44171, 44174 (November 18, 1987), and *Certain Carbon Steel Butt-Weld Pipe Fittings from the United Kingdom*, 60 FR 1558, 10561 (February 27, 1995), Torrington contends that group-level headquarters expenses and broadly based R&D benefit all group members, including U.S. subsidiaries engaged in adding value. Torrington also claims that another respondent in this proceeding, SKF, reported such costs in its further-manufacturing response. Torrington argues that the Department should restate FAG Germany's further-manufacturing costs so that they include group administrative expenses.

FAG Germany states that it included the portion of group administrative expense related to production in its CV for further-manufactured parts, but it did not include the portion of the expense related to sales. Citing *Brass Sheet and Strip from the Federal Republic of Germany; Final Results of Administrative Review*, 56 FR 60087 (November 27, 1991), FAG Germany argues that the statute authorizes a deduction from ESP of increased value resulting from a process of manufacture or assembly performed on the imported merchandise after importation of the merchandise, and that the Department has held that headquarters G&A expense incurred abroad to support U.S. sales is not within this definition of value added. FAG Germany also states that its methodology is consistent with the cases petitioner cites in support of its argument.

Department's Position: We agree with Torrington that group-level headquarters expenses and broadly based R&D benefit all group members, including U.S. subsidiaries engaged in adding value. While FAG Germany reported such expenses for the cost of the parts imported, it did not include such expenses in the cost of further processing in the United States. In addition, we consider these expenses to affect the processing cost in the United States as well as support sales. Therefore, we have recalculated the G&A expenses for further processing in the United States to include group-level headquarters expenses and broadly based R&D expenses.

In addition, we discovered that we erred in our calculation of further manufacturing performed in the United States by calculating the further manufacturing based on COM instead of COP. We have corrected this error for the final results.

Comment 5: Torrington asserts that Koyo incorrectly used weighted averages of entered value rather than an arm's-length price for resale at the same LOT as the finished goods in its ''Roller Chain'' calculations. Torrington claims

that using a weighted-average entered total value for all models, *i.e.*, including non-scope (U.S.-made) bearings, rather than a separate average for each bearing model, distorts the Roller Chain calculation. Torrington contends that the Department should reject Koyo's request for exclusion from reporting full further-manufacturing information. Torrington also contends that there is insufficient documentation to support Koyo's use of estimated resale prices in its calculations and that the Department did not verify these estimated prices. Torrington argues that the Department should use the highest Koyo margin as BIA for each entry that is further manufactured.

Koyo contends that Torrington has raised these same challenges to its Roller Chain calculations in past AFB reviews and the Department has rejected them in every such review. Koyo claims that Torrington's argument that, instead of using the entered value of the imported scope merchandise as the numerator of the Roller Chain calculation (to determine whether the value of the imports is less than one percent of the value of the non-scope merchandise that is sold to the unrelated customer and hence should be excluded from the antidumping order), the Department should use the price at which the scope imports are sold to unrelated customers in the United States, is contrary to the whole thrust of the Roller Chain one-percent test which is to determine the value of the scope product as imported in relation to the value of the non-scope merchandise as sold to an unrelated customer. Koyo argues that Torrington has no evidence to support its claim that Koyo may have manipulated entered value, and notes that it is required to report all entered values to the Customs Service at the time of entry of its imports and is subject to severe penalties for improper reporting. Since there is no way for Koyo to know which units of a model were used in the production of particular units of the non-scope merchandise, Koyo asserts that the use of a weighted average is perfectly reasonable. Finally, Koyo explains that it used estimated resale values for the finished non-scope merchandise not out of choice but because the so-called ''affiliates'' that produced that merchandise refused to provide Koyo with the necessary pricing information. Koyo asserts that the CIT specifically upheld this aspect of Koyo's methodology in *Torrington III* (at 645).

Koyo claims that, according to the legislative history of the 1974 Act, when Congress enacted the provision of the antidumping law authorizing the Department to deduct further-processing expenses incurred in the United States in ESP situations, Congress recognized that there would be situations in which the value added in the United States would be so great that it would be inappropriate to apply the further-processing provision of the antidumping law. Moreover, Koyo points out that the CIT has affirmed the Department's use of the Roller Chain methodology, in finding ''Commerce's decision to accept the estimates and allocations for the calculation of the 'Roller Chain' percentage [to be] reasonable and supported by substantial evidence and in accordance with law,'' citing *Torrington III* (at 645).

Department's Position: We disagree with Torrington. We addressed this in detail in *AFBs IV* at 10937–10938. Koyo provided sufficient information in its letter of November 27, 1994, to demonstrate the applicability of the Roller Chain principle to certain identified sales. Notably, Koyo submitted examples of all calculations necessary to determine that the value of this imported merchandise was below the one-percent threshold. Furthermore, there is no evidence on the record to indicate that the estimated resale prices Koyo submitted are unreliable.

Comment 6: Torrington argues that Koyo's U.S. sales database is incomplete with respect to sales of products further-processed into non-scope merchandise. Torrington contends that since the Department, not Koyo, determines what, if any, merchandise is excluded on the basis of the Roller Chain principle, the Department should apply a BIA rate to all models where Koyo refused to report on the grounds that further manufacturing produced non-scope merchandise.

Koyo states that the Department rejected this identical argument in the prior review. Koyo also states that the Department has specified in this review, as in all prior reviews, the threshold for determining which merchandise is to be excluded, *i.e.*, merchandise that passes the one-percent test. Koyo contends that, as in all past reviews, it has provided the data to demonstrate which models satisfy that test. Koyo explains that, once it had determined that certain sales should be excluded from the order on the basis of the Roller Chain principle, it deleted those sales from its U.S. sales database, as it did for any other sale of non-scope merchandise. Finally, Koyo explains that, in two previous reviews the Department applied BIA to certain of Koyo's Roller Chain sales where Koyo's calculations indicated that these bearing models failed the Roller Chain test. Koyo concludes that, because none of its products failed the one-percent test in this review, the issue is moot.

Department's Position: We disagree with Torrington. There is no evidence on the record to suggest that Koyo has failed to report any sales of in-scope merchandise further-processed into non-scope merchandise.

7. Level of Trade

Comment 1: Torrington contends that the Department should reclassify SKF France's SOS (an SKF subsidiary) sales as distributor/aftermarket sales rather than as consumer sales. Torrington states that SOS is strictly a sales organization in France whose purpose is to offer a complete line of bearing products to its customers on an emergency basis. Torrington argues, further, that the Department determined in *AFBs I* that SOS and the other SKF France affiliates all sell to the same customers. Torrington concludes that the fact that SOS promotes faster delivery does not demonstrate that its customers function at a different LOT from SKF France's other customers and, as a result, the Department should not treat its sales separately. Torrington claims that the Department should classify such sales as distributor/aftermarket sales.

SKF France claims that SOS serves a specialized function in the French market in its resale of bearings on an emergency basis and the Department has considered similar factors in other cases recently which led it to recognize differences in LOT. SKF France claims that, in *Stainless Steel Bar From Spain*, 59 FR 66931 (1994), the Department recognized a different LOT for products involving a shorter lead time and comprising relatively small orders filled from inventory of already manufactured products. SKF France states that, because SOS sells on average less than ten percent the number of units per transaction than the other SKF France companies in the HM, and because these sales constitute a unique niche in SOS's selling practices, the Department properly allowed SKF France's distinct customer categorization of SOS sales.

SKF France also comments that the CIT overturned the Department's *AFBs I* decision regarding SKF France's claim of two levels of ISEs on SOS sales, supporting SKF's position that SOS sales incur additional expenses.

Department's Position: We agree with Torrington and have reclassified the claimed consumer-level sales as distributor/aftermarket sales. As we stated in *AFBs I*, the fact that SOS may provide fast delivery of bearings and incurs higher selling expenses does not

demonstrate a LOT distinct from other SKF France selling units which service distributors. Therefore, we have considered SOS sales to be at the same LOT as that of the other SKF France selling units which sell to distributors. Further, the CIT's decision in *SKF*, to allow the ISEs SKF France incurred on sales to SOS as an adjustment to SOS's sales to unrelated parties, does not affect our decision to consider SOS's sales to be made at the distributor/aftermarket level, because the CIT did not address the issue of the nature of the sales from SOS to their unrelated customers in its decision. In addition, the fact that SKF France incurs differing expenses on different sales does not necessarily mean that those sales are made at different levels of trade.

Comment 2: Torrington argues that the Department should reject FAG Italy's separate treatment of government sales and reclassify them as OEM sales. Torrington contends that LOT classifications are based on the function of the class of customers, citing *AFBs III* (at 39767). Torrington states that FAG Italy has offered no evidence that its government customers perform a different function than other OEM customers and notes that the Department specifically rejected similar arguments INA raised in *AFBs III.* Torrington requests that the Department reclassify FAG Italy's government sales as OEM sales.

FAG Italy notes that, pursuant to Section 1335 of the Omnibus Trade and Competitiveness Act of 1988, the Department will exclude those U.S. sales from its margin calculation that have no substantial non-military use and are made pursuant to an existing Memorandum of Understanding (MOU), citing *AFBs I* at 31713. FAG Italy claims that it has properly identified Government sales made pursuant to the U.S.-Italian MOU that have no substantial non-military use. FAG Italy states that these sales are properly categorized as a separate LOT and have been correctly excluded from the U.S. sales database for purposes of calculating FAG Italy's dumping margin. FAG Italy notes that Torrington has raised similar arguments in prior reviews and the Department has rejected Torrington's position on each occasion.

Department's Position: We agree with Torrington that FAG Italy's U.S. government sales should not be classified as a separate LOT from OEM sales. According to the record, FAG Italy's government customers function as end-users, just like OEMs. Therefore, absent any evidence to the contrary, we would classify FAG Italy's OEM sales and sales to government customers as the same LOT. However, the LOT classification of FAG Italy's government sales is irrelevant to the Department's margin analysis in this review. The United States and Italian Governments maintain a current MOU covering the AFBs subject to these orders and, in accordance with section 1335 of the Omnibus Trade and Competitiveness Act of 1988, we have excluded FAG Italy's government sales from the U.S. sales database used for the margin analysis.

Comment 3: NTN argues that the Department should make a LOT adjustment to its FMV based on differences in price to distinct levels in the HM. Respondent cites *NTN I*, in which the Court agreed that NTN incurred different expenses at different LOTs. NTN also claims that the changes to the antidumping laws under the URAA, which directs the use of a LOT adjustment based on differences in prices, should be applied in these reviews.

Department's Position: We disagree with NTN that we should make a price-based LOT adjustment. We note that the standards established in the antidumping laws under the URAA are not controlling in these reviews. For pre-URAA reviews, we have an established standard requiring that respondents correlate the degree to which differences in prices are due to differences in LOT or to any other factors that might affect prices. As we said in *AFBs III* (at 39767–68), ''(r)espondents must quantify any price differentials that are directly attributable to differences in levels of trade.'' During the course of this administrative review, NTN made no attempt to quantify the degree to which differences in prices were attributable wholly or partly to differences in levels of trade. Consequently, we are unable to consider a LOT adjustment based on differences in price. The CIT has upheld this line of reasoning in *NTN II.*

Comment 4: Torrington contends that respondents bear the burden of demonstrating that reported LOTs are proper and NTN has failed to demonstrate that AM sales are a distinct LOT. Torrington asserts that allowing NTN to classify sales as AM would permit NTN to circumvent the selection of such or similar merchandise. Torrington also states that inaccuracies in the designation of customer category for certain customers in NTN's response make the acceptance of the AM customer category untenable. Petitioner urges the Department to reclassify NTN's AM sales as OEM sales.

Department's Position: We disagree with Torrington. We have an established practice of applying a ''functional test'' to determine whether different levels of trade exist. This functional test involves an examination of the type of customer and customer functions respondents report, which reporting is subject to verification. *See, e.g., Disposable Pocket Lighters from Thailand*, 60 FR 14263, 14264 (1995), and *Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 FR 18791, 18794 (1994). When, through the application of the functional test, we find different levels of trade, we may make price comparisons at these levels of trade. Our practice has been that satisfaction of the functional test creates an economic presumption that LOT has an impact on price and, therefore, the comparability of the sales. Notably, this presumption exists regardless of which party (respondent or petitioner) supports or opposes the finding of distinct LOTs.

Once the functional test has been satisfied, a party opposed to reliance on the resulting LOTs for matching purposes bears the burden of rebutting the presumption that the distinct LOTs have an impact on price. That rebuttal may be made by presenting information to demonstrate a lack of correlation between selling prices or selling expenses and LOTs. If rebuttal information is presented, we conduct a correlation test and, if appropriate, disregard LOTs when comparing U.S. and foreign market prices. *See, e.g., Certain Stainless Steel Butt-Weld Pipe and Tube Fittings From Japan*, 59 FR 12240, 12241 (1994).

In 1992, we articulated this practice by announcement in Import Administration Policy Bulletin 92/1. Therein, we summarized our practice, stating:

> (i)n our questionnaire we will request that respondents list the levels of trade at which they sell the merchandise under investigation. The respondent will also be asked to explain what function each level of trade performs. Initially, the analyst will have to determine, based on the reported functions, if the respondent sells to distinct, discernable levels of trade. Either party will have an opportunity to contest the reported levels of trade by presenting evidence that there is not a significant correlation between prices and selling expenses on one hand, and levels of trade on the other. The information on level of trade will be subject to the same verification requirements as other information presented to the Department. * * * If a party wishes to contest matching at LOT, the party will either have to rebut the claim that there are discernable functions or will have to show that there is no correlation between prices and selling expenses on the one hand, and LOT on the other.

In other words, our practice is to create the presumption after the

application of the functional test. Our policy, based on established practice, has been that the correlation test need not be performed in order to recognize sales at distinct LOTs. Rather, the correlation test need only be applied when a party opposed to recognition of the LOTs presents information calling into question those LOTs established by the application of the functional test. *Certain Stainless Steel Butt-Weld Pipe and Tube Fittings From Japan*, 59 FR 12240, 12241 (1994). Only then will we examine whether there is a correlation between selling prices, selling expenses, and LOTs.

In applying the functional test in this instance, we note that NTN was unable to adequately attribute ISEs to LOTs. However, an examination of direct selling expenses and prices shows distinct differences in NTN's three LOTs. We disagree with Torrington that NTN's designations for customer category are unreliable, although we have redesignated one customer. Torrington provided no other information calling into question the LOTs NTN reported and which we tested. Therefore, for the final results we have continued to recognize NTN's three LOTs.

8. Packing and Movement Expenses

Comment 1: SNR Germany claims that the Department intended to subtract movement expenses from unit price, including domestic inland insurance expense, from unit price as indicated in the Department's December 1, 1995, ''Preliminary Results Analysis Memorandum,'' but the Department inadvertently added domestic inland insurance to net price.

Department's Position: We agree with SNR Germany that we should have subtracted domestic inland insurance expense from unit price. Accordingly, we have made appropriate changes to the calculation of net price for the final results.

Comment 2: Torrington asserts that, because FAG/Barden failed to report its air freight separately from its ocean freight expenses for its FAG U.S. sales, and because it failed to report air freight expenses on a transaction-specific basis for its Barden sales, the Department should apply partial BIA for these expenses in the final results. Torrington argues that the record indicates that FAG/Barden was able to report air freight expenses on a transaction-specific basis. Torrington further states that FAG U.S.'s claim that its internal record-keeping precludes segregating the two types of freight charges is inconsistent with other record evidence.

FAG/Barden responds that this argument is not applicable to ESP sales because of the inability to tie shipments to the United States to sales by the subsidiary in the United States. FAG/Barden contends that this can only be relevant to PP sales. FAG/Barden suggests that Torrington's claim that the factual record supports such a transaction-specific methodology is unfounded since, contrary to Torrington's statement, nowhere is there any indication that Barden can trace imports to sales and thus report ocean freight expenses on a sale- or transaction-specific basis. FAG/Barden states that, even if Torrington's argument were applicable to ESP sales, there is no commingling of air and ocean expenses in Barden's calculation such that the ocean freight factor could be skewed or unrepresentative.

Department's Position: We agree with FAG/Barden. We verified that FAG/Barden's records do not allow the company to link its entries to its ESP sales. The Department has long recognized this common problem with respect to this generally fungible commodity product. *See AFBs I* at 31700 and *AFBs IV* at 10942–43. Additionally, the Department has recognized that allocation is appropriate for freight expenses, which are often not incurred on a transaction-specific basis. *See AFBs II* at 28398; *See also Certain Steel Flat Products from Japan*, 58 FR 37154, 37163 (1993). The record evidence discussed by Torrington demonstrates that it may have been possible for FAG/Barden to link freight expenses with specific entries; however it does not indicate that FAG/Barden could link freight expenses with ESP sales to unrelated customers. Given that verified inability, FAG/Barden's allocation of ocean and air freight expenses was in accordance with the Department's instructions and was reasonable.

Comment 3: Torrington asserts that RHP did not properly report its air freight expenses for U.S. sales. Torrington states that, because RHP failed to provide separate figures for its air freight and its ocean freight expenses, the Department should not accept RHP's reporting methodology pertaining to ocean and air freight expenses for the final results. Torrington requests that the Department apply partial BIA to U.S. sales for these expenses in the final results.

NSK/RHP argues that there is nothing to support Torrington's argument that, because NSK did not divide its ocean freight expense variable into air- and sea-freight portions, the Department should apply BIA to NSK/RHP. NSK/RHP contends that the Department never requested that NSK/RHP segregate the two freight expenses and that, in fact, the company is unable to do so due to the lack of a direct link between entries and ESP sales to the unrelated U.S. customer. NSK/RHP states that, since it cannot link individual ocean freight costs to specific U.S. sales, it cannot link groupings of such costs (*e.g.*, ocean freight, air freight) with specific U.S. sales.

In addition, NSK/RHP suggests that Torrington's request is not timely, because it did not raise this issue in its deficiency comments during the ''fact finding'' stage of the proceeding.

Department's Position: We disagree with Torrington. In the case of NSK/RHP's ESP transactions, the respondent explained in its section B response, and the Department verified, that its records did not permit it to tie specific shipments to specific resales. As noted in Comment 2, above, the Department has long recognized that few AFB producers can link their entries to their resales in ESP situations. *See AFBs I* at 31700 and *AFBs IV* at 10942–43. It follows that respondents will be unable to tie freight expenses on entries to specific resales. In past reviews the Department has permitted respondents to allocate air and ocean freight. *See AFBs IV* at 10942. The Department found no evidence at verification that NSK/RHP could link its air freight expenses to specific sales or customers.

The Department has also recognized that freight expenses are often not incurred on a transaction-specific basis. Therefore, the Department does not require transaction-specific reporting of this expense, but rather permits reasonable allocations. *See AFBs II* at 28398; *See also Certain Steel Flat Products from Japan*, 58 FR 37154, 37163 (1993). In accordance with the Department's instructions, because NSK/RHP incurred its freight expenses on the basis of weight, it allocated those expenses on the same basis in its section B response.

Comment 4: NSK/RHP requests that the Department calculate a packing expense factor for bearings manufactured by RHP Aerospace (a division within NSK/RHP) and deduct this packing expense from the FMV as a direct expense. NSK/RHP states that it does not maintain these expenses as separate components of standard cost in RHP Aerospace's standard COP overhead, although it made every effort to identify material and labor costs for packing from RHP Aerospace's standard COP overhead. NSK/RHP requests that the Department use this information in the final results as the most accurate

cost calculation of packing for bearings manufactured by RHP Aerospace. NSK/RHP contends that the Department confirmed the accuracy of the information in its verification of NSK/RHP.

Torrington responds that, given that NSK/RHP's normal business records do not document or otherwise support NSK/RHP's estimated packing expenses, the Department should not deduct this estimated expense from FMV. In addition, Torrington contends that NSK/RHP has not adequately demonstrated that its attempt to segregate this expense from RHP Aerospace's standard COP overhead reflects its actual experience. For the reasons stated above, Torrington request that the Department not make an adjustment to FMV for packing expenses (materials and labor) for bearings manufactured by RHP Aerospace.

Department's Position: We agree with NSK/RHP. Prior to verification, NSK/RHP identified, in its supplemental response, those expenses in RHP Aerospace's standard COP overhead associated with packing material costs and packing labor costs. *See* NSK/RHP's January 19, 1995 supplemental questionnaire response. We verified the accuracy of these expenses and found no discrepancies. We also verified that packing expenses were included in RHP Aerospace's COM and CV. Therefore, we have accepted NSK/RHP's packing material costs and packing labor costs data and have deducted packing expenses from FMV calculated for bearings manufactured by RHP Aerospace for these final results.

Comment 5: NSK/RHP argues that the Department should split domestic inland freight for all RHP-brand bearings, other than those manufactured by RHP Aerospace, into pre-sale freight and post-sale freight components, and should deduct post-sale domestic inland freight from FMV as a direct expense. NSK/RHP states that it did its best to comply with the Department's request to segregate these costs by calculating two expenses based on available transport records from the months May–December 1994 for RHP-brand products delivered to and from a specific warehouse.

Furthermore, NSK/RHP argues, the Department should separately calculate a post-sale domestic inland freight factor for bearings manufactured by RHP Aerospace and deduct that post-sale domestic inland freight from FMV as a direct expense. NSK/RHP asserts that it complied with the Department's request and, as noted above, identified those expenses within the Material Control Department (a division of the standard COP overhead) associated with post-sale domestic inland freight. NSK/RHP states that, if the Department decides to take this action, then it must also reduce RHP Aerospace's COM and CV by the same expense factor to avoid double counting.

Torrington responds that the Department should not adjust FMV for these estimated post-sale domestic inland freight expenses. Torrington asserts that NSK/RHP has not adequately demonstrated that its estimated calculations are reflective of actual costs, nor has it demonstrated that its attempt to isolate post-sale domestic inland freight expense from RHP Aerospace's standard COP overhead reflects its actual costs. Torrington further states that, given that NSK/RHP's normal business records do not document or otherwise support NSK/RHP's estimated amounts for pre-sale freight and post-sale freight and post-sale freight for bearings manufactured by RHP Aerospace, the Department should not deduct the estimated pre-sale/post-sale domestic inland freight expense and post-sale domestic inland freight expense from bearings manufactured by RHP Aerospace from FMV. Torrington also argues that NSK/RHP has not adequately demonstrated that the months it selected for its estimates were representative of its actual experience. Finally, Torrington contends that, while the Department examined NSK–RHP's calculation of domestic inland freight expenses at verification, it did not specifically examine the estimated split between post-sale and pre-sale domestic inland freight.

Additionally, with respect to RHP-brand bearings manufactured by RHP Aerospace, Torrington argues that if the Department permits such an adjustment, it should not reduce RHP's Aerospace COM and CV by the same expense factor. Torrington takes issue with NSK/RHP's argument that not to do so would be double-counting, stating that NSK/RHP has not demonstrated that post-sale domestic inland freight expenses were actually included in RHP Aerospace's COM and CV. For these reasons, the Department should not deduct these estimated expenses from FMV.

Department's Position: We agree with NSK/RHP, in part. Prior to verification, NSK/RHP, in its supplemental response, presented calculations of pre-sale and post-sale expenses based on available transport records for the months May–December 1994 and stated that a separate break-out for domestic inland freight did not exist for RHP Aerospace in the normal course of business but was included within the standard COP overhead. NSK/RHP identified those expenses associated with post-sale domestic inland freight for RHP Aerospace. *See* NSK/RHP's January 19, 1995 supplemental questionnaire response. We verified the accuracy of NSK/RHP's domestic freight methodology and noted no discrepancies. Therefore, for these final results, we have accepted NSK/RHP's pre-sale/post-sale domestic-freight methodology and have deducted post-sale domestic inland freight from FMV for all transactions except those involving bearings manufactured by RHP Aerospace. We have also accepted NSK/RHP's calculated post-sale domestic inland freight for bearings manufactured by RHP Aerospace.

We disagree with NSK/RHP's contention that, if the Department accepts NSK/RHP's post-sale domestic inland freight calculation for bearings manufactured by RHP Aerospace, it must also reduce RHP Aerospace's COM and CV by the same expense factor. Since we cannot determine from NSK/RHP's questionnaire response whether post-sale domestic inland freight expenses were actually included in RHP Aerospace's COM and CV, we will not reduce RHP Aerospace's COM and CV by the post-sale domestic inland freight factor that NSK/RHP calculated.

Comment 6: Torrington argues that the Department has improperly allowed Koyo to report aggregated air- and ocean-freight expenses. Torrington claims that Koyo has allocated air-freight expenses over all bearings shipped from Japan rather than reporting these expenses on a transaction-specific basis. Torrington cites examples in the verification report, stating that Koyo maintains records that enable it to calculate air-freight adjustments on a transaction-specific basis and, if it refuses to do so, the Department should apply a partial BIA rate, *i.e.*, the highest movement expenses reported by any Japanese respondent.

Koyo responds that the Department's verification report for this review specifically notes that there were no discrepancies in Koyo's reporting of air-freight expenses. According to Koyo, the verification report supports its contention that, although it tracks its air-freight costs, Koyo is unable to tie individual air shipments to particular sales to unrelated customers in the United States. Finally, Koyo contends that it has treated its air-freight expenses in this review as it has in every past review of the orders on TRBs and AFBs, and the Department should continue to accept Koyo's methodology for reporting its air-freight expenses.

Department's Position: We agree with Koyo. In the case of ESP transactions, there is often no direct link between shipments and resales. We agree with Koyo's characterization of its freight records as described in the verification report. In the one instance cited by Torrington, there is no evidence that Koyo was able to link the air-freight costs associated with the shipment to subsequent sales of the bearings involved in this shipment, nor does it establish that Koyo's records generally allow it to link air-freight shipments to subsequent sales. We also agree with Koyo that the verification report establishes that, with respect to the example cited by Torrington, air freight was used to maintain inventory and was not incurred on direct shipments to the unrelated U.S. customer. Therefore, because we verified Koyo's air- and ocean-freight expenses and found them to have been reasonably allocated, we have accepted Koyo's freight-expense calculations.

Comment 7: NTN claims that the Department identified HM pre-sale freight expenses erroneously as ISEs rather than as movement expenses in its calculations, and that the Department also failed to recognize the attribution of model-specific COP by customer category. NTN requests that the Department correct these clerical errors.

Department's Position: We disagree that our identification of HM pre-sale freight expenses as ISEs is a clerical error. Our calculations are consistent with the methodology resulting from the CAFC's decision in *Ad Hoc Comm. of AZ–NM–TX–FL Producers of Gray Portland Cement* v. *United States*, 13 F.3d 398, 401–02 (CAFC 1994) . We also disagree that we should attribute model-specific COP to customer categories. As noted above, NTN was unable to adequately attribute ISEs to LOTs. Therefore we have used only a model-specific cost for our final calculations.

9. Related Parties

Comment 1: SKF Sweden asserts that the customer numbers for which the Department applied an arm's-length test in the preliminary margin calculations do not correspond to the customer numbers SKF Sweden provided in its COP/CV supplemental questionnaire response. SKF Sweden states that the Department should use only those customer numbers reported in the COP/CV section of its supplemental questionnaire response.

Torrington contends that the Department established the related-party customer code properly in its calculations and should not adjust its calculations.

Department's Position: We have examined the record and agree with SKF Sweden that we made an error in identifying which customers to include in the related-party arm's length test. Therefore we have modified the customer-code list in the arm's-length test to reflect only those customers SKF Sweden identified in its COP/CV supplemental questionnaire response.

Comment 2: Torrington asserts that the Department should test SKF France's reported HMPs for differences in selling prices to related and unrelated customers as it did for other respondents in this review.

SKF France contends that, pursuant to the Department's instructions, it excluded sales to related parties from the sales file, so no test is necessary.

Department's Position: We disagree with Torrington. Because SKF France reported HM sales to unrelated customers only and did not request the Department to consider sales it made to related parties, there are no relevant related-party sales for which we need to conduct an arm's-length test.

Comment 3: NTN objects to the Department's standards for eliminating related-party HM sales not made at arm's length. NTN contends that the Department's method of comparing sales prices by class, model, and customer category is inadequate to determine whether prices are comparable without consideration of other factors such as payment terms and quantities sold.

Department's Position: We disagree with NTN. Section 353.45 our regulations provides that we will use related-party sales in the calculation of FMV ''only if satisfied that the price is comparable to the price at which the producer or reseller sold such merchandise to a person not related to the seller'' (emphasis added). The regulations direct us to focus on price. We have established a reasonable and objective standard for determining whether related-party-sales prices are comparable to unrelated-party-sales prices; if at least 99.5% of the volume of a related-party's sales are made at prices equal to, or greater than, prices to unrelated parties, then we consider those related-party sales to be reliable. We used this methodology in *AFBs III* and the CIT upheld it in *NTN II.*

Further, we disagree with NTN that we do not consider payment terms. We take payment terms into account by adjusting prices for credit expenses. Because we deduct credit and conduct our analysis by level of trade, our arm's-length test accounts for differences in payment terms and, to the extent that they are reflected in sales to different levels of trade, differences in quantities of sale. *See AFBs IV* at 10946–47. Finally, with respect to NTN's contention that the related-party test does not adequately consider quantities sold, we note that NTN has not shown the affect, if any, that quantity differences had on its selling prices.

10. Samples, Prototypes, and Ordinary Course of Trade

Although we may exclude sales from the home market database under section 773(a)(1) of the Tariff Act where we determine that those sales were not made in the ordinary course of trade, there is no parallel provision allowing for exclusion of such sales from the U.S. database. *See Floral Trade Council of Davis, Cal.* v. *United States*, 775 F. Supp. 1492, 1503 n.18 (CIT 1991). As we have explained in past reviews, we do not exclude U.S. sales from our review merely because they are designated as 'samples'' or ''prototype.'' *See AFBs II* at 28395 and *AFBs III* at 39744. However, we will only exclude U.S. sales from our review in unusual situations, in which those sales are unrepresentative and extremely distortive. *See, e.g., Chang Tieh Indus. Co.* v. *United States*, 840 F. Supp. 141, 145–46 (CIT 1993) (exclusion of sales may be necessary to prevent fraud on the Department's proceedings).

Contrary to the statements made by several parties, while we have acknowledged that we may exclude small quantities of sales in investigations, we do not follow the same policy in reviews. This is because, under the statute, the Department is required in an administrative review to calculate an amount of duties to be assessed on all entries of subject merchandise, and not merely to set a cash deposit rate.

Our treatment of samples and prototypes was recently upheld by the CIT in *FAG III.* In that case, the CIT recognized the limitations on our authority to exclude U.S. sales in an administrative review. The CIT upheld our procedural requirements for establishing that a sale is a true sample, which require the respondents to establish that: (1) Ownership of the merchandise has not changed hands; and (2) the sample was returned to the respondent or destroyed in the testing process. *Id.* at 11, *citing Granular Polytetrafluoroethylene Resin from Japan*, 58 FR 50343, 50345 (September 27, 1993).

The fact that merchandise is sold at a very low price, or even priced at zero is not sufficient to establish that the sale is a sample. The reason for this policy is that a respondent could disguise

dumping by matching zero-priced sales, designated as ''samples,'' with sales above fair value. Although, on average, customers would be purchasing the merchandise below fair value, if we were to disregard the sales designated as ''samples,'' our calculations would find no dumping. For this reason, we require additional evidence that sales are true samples before they will be excluded from the U.S. sales database.

Comment 1: Torrington asserts that the Department properly included in the preliminary results U.S. sales that SKF France had deemed sales of sample and prototype merchandise and requested excluded. Torrington claims that the statute mandates that the Department must analyze the USP of each entry of subject merchandise and assess antidumping duties on each entry, and the statute does not make an exception for sample or prototype sales. Torrington also claims that, in all previous reviews of these orders, the Department agreed with this position. Torrington states, in addition, that SKF France did not provide adequate factual information regarding the alleged samples or prototypes to support its position.

SKF France argues that the Department may exclude U.S. sample or prototype sales from its margin calculation, as the Department explained in a recent brief to the CIT. *See Defendant's Response Brief* (December 15, 1995) in Ct. No. 95–03–00335–S at 16. According to SKF France, the Department cited three circumstances in which it can exclude certain U.S. sales, including where sample sales do not constitute true sales (citing Defendant's Response Brief, Dec. 15, 1995, CT No. 95–03–00335–S at 16). SKF France contends that the statute sets forth general requirements for conducting administrative reviews and the general definition of dumping, but does not preclude the Department from exercising its discretion to exclude sales in which the failure to exclude such sales would result in an inaccurate margin calculation, citing *NTN I.* In addition, SKF France claims the Department has recognized its authority to exclude U.S. sample and prototype sales in administrative reviews. SKF France claims that it provided full cost information and sales prices for each of the reported sample and prototype sales.

Department's Position: We agree with Torrington. As we explained in *AFBs II* (at 28395), other than for sampling, and except under the limited circumstances discussed above, there is neither a statutory nor a regulatory basis for excluding U.S. sales from review. The Department must examine all U.S. sales within the POR. *See* also *Final Results of Antidumping Administrative Review; Color Television Receivers From the Republic of Korea,* 56 FR 12701, 12709 (March 27, 1991).

Comment 2: Torrington states that the Department should reject SNR's claims that it should exclude certain U.S. and HM sales from the dumping analysis. First, Torrington claims, the Department has no statutory authority to exclude any U.S. sales. With respect to HM sales, Torrington argues that SNR has recorded a separate product code for the sample models and it did not clarify how this affected the code reported in field IDNUM (which SNR claims should be used for matching purposes). Additionally, Torrington contends that SNR did not supply any documentation nor has it offered a description of the types or models involved. Therefore, the Department should deny SNR's requests for exclusions.

SNR responds that Torrington is in error and that, in fact, the Department used all U.S. and HM sample sales in its analysis. SNR concludes that the Department does not need to make any changes in the margin program for the final results with regard to this comment.

Department's Position: We agree with Torrington that we should not exclude any of SNR's U.S. and HM sample sales from our analysis. We also agree with SNR that we included all such sales in our preliminary margin calculations. Therefore, no change for the final results is necessary.

Comment 3: Torrington contends that the Department should not exclude any of SKF Sweden's U.S. sample and prototype sales. Torrington cites section 751(a)(2)(A) in support of its position that any imports that are dumped should be subject to antidumping duty assessments. Torrington also cites *AFBs I* at 31713, *AFBS II* at 28394–95, *AFBs III* at 39776, and AFBs IV at 10947 in noting the Department's practice of including all U.S. sales in these reviews. Torrington states that, although the Department will exclude sample sales in situations where there is no transfer of ownership between the exporter and the U.S. purchaser, SKF Sweden did not demonstrate that it retained ownership of its sample sales.

In addition, Torrington states, because SKF Sweden did not provide any factual information regarding the sample or prototype sales, the Department should not exclude HM sales of samples and prototypes from its analysis. Furthermore, Torrington contends, in SKF Sweden's supplemental questionnaire response, SKF Sweden stated that there were no sales of samples and prototypes in the HM. Thus, since SKF Sweden claims that none of its HM sales were of samples or prototypes, there is no basis to exclude these sales from the HM database.

SKF Sweden responds that the Department may, under certain circumstances, exclude sample or prototype U.S. sales from the margin calculation. SKF Sweden states that, in arguments before the CIT, the Department explained that it would exercise its authority to exclude certain U.S. sales when small quantities are sold, to prevent fraud in the proceeding, or where sample sales do not reflect true sales. SKF Sweden contends that the Department also has the discretion to exclude sales when the inclusion of such sales may result in an inaccurate margin calculation, citing *NTN I* at 1208. SKF Sweden also contends that the transfer of ownership between seller and purchaser is not a sole criterion upon which the Department bases its analysis. SKF Sweden asserts that the record demonstrates that its sample and prototype U.S. sales are not representative of the products sold within the ordinary course of trade and, therefore, they should be excluded from the margin calculations.

SKF Sweden notes that its supplemental questionnaire response indicates that there were no HM sales of samples and prototypes, and states that Torrington's assertions regarding the inclusion of these sales in the Department's analysis are moot.

Department's Position: We agree with Torrington. As noted above, we will only exclude U.S. sales from our review in unusual situations, *i.e.*, where the sales are unrepresentative and extremely distortive. SKF Sweden has not submitted evidence sufficient to satisfy the criteria for excluding U.S. sample sales from our analysis. Specifically, SKF Sweden has failed to demonstrate that: (1) It maintains ownership of the subject merchandise after exportation to the United States, and (2) the customer destroyed the merchandise during testing or returned it to SKF Sweden.

We also disagree with SKF Sweden's argument that we may exercise discretion to exclude sales in which the quantities are small. The case that SKF Sweden cites in support of its argument concerns an LTFV investigation. As noted above, we have the discretion to eliminate unusual U.S. sales in an investigative proceeding; we do not have the same discretion in an administrative review.

SKF Sweden did not have HM sales of samples and prototypes. Therefore, Torrington's argument that the

Department should not exclude these sales from the HM database is moot.

Comment 4: NSK/RHP argues that the Department should remove from the calculation of USP those transactions of bearings NSK/RHP gave away in the United States as samples. NSK/RHP states that the antidumping law applies only to sales of the subject merchandise in the United States and that, by including such samples in the U.S. database, the Department fails to acknowledge that consideration must be promised or paid by the buyer to the seller in order for the transaction to constitute a sale. NSK/RHP argues that the Department should revise its definition of the term ''sale'' to comport with a standard definition of this term.

Torrington asserts that NSK/RHP's contention that alleged ''sample'' sales made at ''zero prices'' should not be included in the U.S. sales database is contrary to the statute. Torrington argues that, in administrative reviews, the Department must analyze the USP of each entry of merchandise subject to the antidumping duty order and there is no exception to this categorical mandate for zero-price ''sample'' sales. Torrington argues that NSK/RHP's argument that the Department should revise its definition of the term ''sale'' to comport with an alleged non-legal ''standard'' definition of the term ''sale'' lacks merit because NSK/RHP has not demonstrated that its purported non-legal definition of the term ''sale'' comports with the definition of the term ''sample sale'' sanctioned by law and the courts.

Department's Position: We agree with Torrington. NSK/RHP failed to demonstrate either of the two criteria, described above, which must be met for sample sales to be excluded from the U.S. sales database. Therefore, we have continued to review and calculate margins on the basis of NSK/RHP's claimed samples. With regard to NSK/RHP's argument that the ''samples'' are not true ''sales,'' we note that we cannot accept a sample sales claim simply on the basis of designation. Furthermore, as noted above, were we to accept NSK/RHP's argument that the alleged samples are not actually sales *per se*, we would be allowing a loophole that respondents could use to mask dumping.

Comment 5: Torrington argues that the Department should not exclude SKF Italy's sample and prototype sales from the U.S. or HM databases. Torrington notes that the Department properly did not exclude such sales in its preliminary margin calculation.

SKF Italy argues that the Department has the discretion to exclude sample sales from both the U.S. and HM databases. SKF Italy asserts that it has demonstrated that its reported sample sales in both the U.S. market and the HM are samples and, therefore, they should be excluded.

Department's Position: We disagree with SKF Italy. As noted above, merely designating a sale as a ''sample'' does not entitle a respondent to exclusion of that sale from the database. The respondent must provide evidence to prove its claim that the designated sales are actually sample sales. Further, they must meet the criteria discussed above in order to merit the exclusion of U.S. sample sales, and must demonstrate that HM sample sales are outside the ordinary course of trade. In this instance, SKF Italy failed to provide any evidence to support its sample sale claims. Therefore, we have continued to review and calculate margins on the basis of SKF Italy's sample sales.

Comment 6: Torrington requests that the Department examine all of FAG Italy's U.S. sales. Torrington argues that section 751(a)(2) of the Tariff Act requires that the Department analyze the USP of each entry of merchandise subject to the antidumping duty order. Petitioner states that there is no exception for zero-price sample or prototype sales.

FAG Italy responds that the Department has consistently held that, where merchandise is not sold within the meaning of section 772 of the Tariff Act, the transaction is not a sale for antidumping purposes. FAG Italy contends that section 772 defines an ESP sale as the price at which merchandise is sold or agreed to be sold in the United States. In FAG Italy's case, respondent asserts, all sample transactions were zero-priced so there was no price at which merchandise was sold.

FAG Italy argues that Torrington's reliance on section 751(a)(2)(A) of the Tariff Act is misplaced. Respondent contends that the provision requiring the Department to analyze the USP of each entry of merchandise subject to the antidumping duty order applies in its literal sense only to PP situations. In ESP situations, FAG Italy holds, the Department does not review any entries; it reviews sales. In conclusion, FAG Italy requests that the Department exclude sales of zero-priced sample/prototype merchandise from FAG Italy's U.S. sales database.

Department's Position: We agree with Torrington. FAG Italy failed to substantiate its claims that the sales were actually sample sales or to demonstrate that either of the two criteria described above were met. Therefore, we have continued to review and calculate margins on the basis of FAG Italy's claimed sample sales.

Comment 7: NSK argues that the Department should eliminate zero-price sample transactions from the U.S. database because the record demonstrates that the provision of these samples are not sales but rather promotional expenses. NSK contends that the Department verified that NSK did not ''sell'' sample bearings in the United States during the review period, but rather supplied sample bearings to customers free of charge.

Torrington argues that every entry is subject to review and that, if the Department excludes the zero-priced sample sales from the U.S. sales database, it will allow NSK to evade the antidumping law by providing zero-based sales coupled with higher-priced sales to yield lower weighted-average margins. Torrington contends that the Department should continue to include NSK's zero-priced sample sales in the U.S. sales database for the final results.

Department's Position: We disagree with NSK. NSK failed to demonstrate either of the two criteria described above. Therefore, we have continued to review and calculate margins on the basis of NSK's claimed samples. With regard to NSK's argument that the ''samples'' are not true ''sales,'' we note that we cannot accept a sample sales claim simply on the basis of designation. Furthermore, as noted above, were we to accept NSK's argument that the alleged samples are not actually sales *per se*, we would be allowing a loophole that respondents could use to mask dumping.

Comment 8: NTN argues that it identified certain HM sales as sample sales and that the Department erred in not excluding these sales from the calculation of weighted-average FMVs. NTN also asserts that the Department included certain other HM sales respondent had identified as not in the ordinary course of trade in the calculation of weighted-average prices. NTN requests that the Department disregard these sales for the purposes of calculating FMV.

Torrington believes that NTN has not met the burden of proving that sample sales are outside the ordinary course of trade. Torrington contends that respondents must meet a standard such as that affirmed in *Murata Mfg. Co., Ltd* v. *United States*, (820 F. Supp. 603, 606 (1993)), which establishes that, if sample sales are to be excluded, respondents must demonstrate different sales practices with respect to sample sales, such as negotiating sample-sales prices separately from standard sales

transactions, in order to have such sales excluded.

Department's Position: We disagree with NTN that we should exclude certain sample sales from the calculation of FMV. Based on information we examined at verification we are satisfied that these sales were not made outside the ordinary course of trade. As the Department stated in *AFBs III* (at 39775), ''identify(ing) sales as sample * * * sales does not necessarily render such sales outside the ordinary course of trade. * * * Such evidence does not indicate that such sales were made outside the ordinary course of trade.'' We also disagree that we should disregard other sales NTN identified as not in the ordinary course of trade. NTN's standard of ''low volume of sales'' is inadequate as a definition of sales not in the ordinary course of trade. NTN has presented no other supporting information that identifies a low-volume sale as outside the ordinary course of trade. The Department has determined that ''(i)nfrequent sales of small quantities of certain models is insufficient evidence to establish that sales were made outside the ordinary course of trade.'' *Id*.

11. Taxes, Duties, and Drawback

Comment 1: FAG/Barden claims that the Department inadvertently dropped the variable for ''other revenue'' in its calculation of adjusted USP at a certain point in its computer program. Further, FAG/Barden argues that, in the calculation of VAT for HM sales, the Department should add the variable ''other revenue'' to the total unit price. FAG/Barden requests that the Department correct these clerical errors for the final results.

Torrington disagrees with FAG/Barden's argument that, in the calculation of VAT for HM sales, the Department should add the variable ''other revenue'' to the total unit price. Torrington argues that FAG/Barden has not provided a narrative description of this field nor did FAG/Barden identify this in its narrative description of the VAT. Torrington argues that the Department should not make the revisions FAG/Barden requests.

Department's Position: We disagree with FAG/Barden. FAG/Barden has misread the purpose of the language at a certain point in the Department's computer program. FAG/Barden contends that this language in the computer program refers to the calculation of adjusted USP. However, at the point in the computer program to which FAG/Barden refers, we adjust FMV for the application of the cost test, not for the adjustment of USP. Therefore, we have not made FAG/Barden's suggested changes to the computer program for these final results.

With respect to FAG/Barden's second contention, that the Department should add the variable ''other revenue'' to the total unit price in the calculation of VAT for HM sales, we determined that, because FAG/Barden did not provide a narrative description of this field in its questionnaire responses and did not identify this expense in its narrative description of VAT, we cannot accurately determine what the variable ''other revenue'' includes. Therefore, we have not adjusted VAT for HM sales to include the variable ''other revenue'' for these final results.

Comment 2: SKF France claims that the Department failed to make adjustments for billing adjustments 2, freight revenue, and packing revenue to the taxable base on which it calculated VAT.

Torrington argues that expenses for billing adjustments should not be an adjustment to the taxable base. Torrington contends that SKF France did not report this expense correctly because the reporting methodology does not isolate amounts incurred on in-scope sales. For freight revenue and packing revenue, Torrington contends that, for SOS sales, SKF France did not report these revenues on transaction-specific bases. Torrington asserts that the reporting methodology of these three expenses do not meet the standard that it claims the Court required in *Torrington I* at 1579.

Department's Position: We agree with SKF France and have included its home market billing adjustment 2, except as noted below, packing revenue, and freight revenue amounts in the taxable base used to calculate VAT. Torrington acknowledges that a significant majority of SKF France's packing and freight revenues were reported on a transaction-specific basis and provides only a conclusory statement that SKF France allocated a small portion of its revenue amounts.

We base the VAT adjustment on adjusted FMV; we factored these variables fully into FMV and have therefore included them in the VAT calculation. However, as noted in *Discounts, Rebates, and Price Adjustments,* above, we have disallowed SKF France's negative billing adjustment 2 amounts. Accordingly, we did not include negative billing adjustments in our VAT calculation.

Comment 3: SKF Germany argues that the Department neglected to adjust the price upon which it calculated VAT for billing adjustment 2, freight revenue 2, and packing revenue. SKF Germany also states that the HMP on which the Department calculated the VAT includes these adjustments.

Torrington argues that the Department should not adjust for billing adjustments because SKF Germany did not report them correctly, relying instead on a reporting methodology that does not isolate amounts incurred on in-scope sales. Torrington contends that freight revenues and packing revenues are also allocated amounts and these three expenses do not meet the CIT's allocation criteria since the expenses are allocated across sales that include non-subject merchandise.

Department's Position: We agree with SKF Germany for the reasons provided in response to Comment 2, above, and have included its home market billing adjustment 2, packing revenue, and freight revenue amounts in the taxable base used to calculate VAT. Torrington acknowledges that a significant majority of SKF Germany's packing and freight revenues were reported on a transaction-specific basis and provides only a conclusory statement that SKF Germany allocated a small portion of its revenue amounts. However, as noted in *Discounts, Rebates, and Price Adjustments,* above, we have disallowed SKF Germany's negative billing adjustment 2 amounts. Accordingly, we did not include negative billing adjustments in our VAT calculation.

Comment 4: SKF Italy argues that the Department should change its calculation of VAT by including packing revenue in the net price because the price on which VAT is actually assessed includes packing revenue.

Torrington notes that packing revenue is described as a negotiated charge for packing, expressed as a percentage of invoice price and separately listed on the invoice, and that SKF Italy did not provide any further details. Torrington contends that, on the basis of the record evidence, the Department is not required to modify its methodology for the final results.

Department's Position: We agree with SKF Italy. Because packing revenue is included in the price on which VAT is charged, the VAT we calculate for the HM sale should reflect packing revenue. We have made this change for the final results.

Comment 5: Torrington argues that the Department should disallow the duty drawback SKF Italy claimed in connection with its U.S. sales. Torrington contends that SKF Italy failed to demonstrate the link between

the import duties it paid and the rebate it received, and that SKF Italy failed to demonstrate that there were sufficient imports of the imported material to account for the duty drawback it received for the export of the manufactured product.

SKF Italy argues that its methodology for calculating duty drawback adjustment has not changed since the LTFV investigation and that the Department has accepted it in all segments of the proceeding. SKF Italy contends that the Italian legislation makes clear what is eligible for duty drawback and that the Department has verified the link between the legislation, SKF Italy's methodology, and SKF Italy's actual experience. SKF Italy observes that neither the legislation nor its methodology has changed since that verification. Finally, SKF Italy argues that its response demonstrates the sufficiency of imports of raw material inputs to account for the duty drawback it received on exports of finished goods.

Department's Position: We disagree with Torrington. We apply a two-part test to determine whether to grant a respondent's claimed adjustment to USP for duty drawback. In this test, a respondent must demonstrate that (1) a link exists between the import duties it paid and the rebate it received, and (2) there were sufficient imports of the imported material to account for the duty drawback it received for the export of the manufactured product. We applied this test in addressing the issue of SKF Italy's claimed duty drawback adjustment and, based on those verification findings, accepted the adjustment for the final results. *See AFBs II* at 28420. Thus, we have determined previously that, under the Italian duty drawback system, a sufficient link exists between the amount of duties paid and the amount of duty drawback claimed. In addition, as in prior reviews, we have reviewed SKF Italy's cost response and conclude that it purchased sufficient inputs from overseas related parties to support its claimed duty drawback adjustment. *See Federal Mogul V*, 924 F. Supp. 210 (CIT April 19, 1996). Furthermore, SKF Italy submitted copies and English translations of the applicable laws and duty drawback rates, and we observed from this evidence that the factual situation has not changed since the 90/91 review. Therefore, because SKF Italy used the same method to report duty drawback in this review as it did in the previous reviews, and because the factual situation had not changed during this review or during previous reviews, we conclude that SKF Italy's duty drawback claim for this review satisfies both parts of our tests.

12. U.S. Price Methodology

Comment 1: Torrington believes that the Department should reject NTN's and NTN Germany's allocation of certain U.S. expenses according to transfer price in favor of an allocation based on resale value. Torrington contends that NTN's and NTN Germany's reasoning that a transfer-price methodology eliminates distortions caused by profit margins on individual sales is not rational, since profit margins can only be determined after expenses have been allocated and deducted from each sale.

NTN answers that Torrington's contention is only correct if the allocation of selling expenses is based on a pre-profit price, which essentially equates to a transfer price.

Department's Position: We agree with Torrington. While transfer price is essentially equivalent to the cost of goods sold for an importing subsidiary, transfer price is not the same as cost of goods sold for the manufacturing parent if, for instance, transfer prices are below the manufacturing parent's COP. We consider resale prices to be the more reliable measure of value available to us, as we stated in *AFBs IV* (at 10919) that ''we prefer to allocate expenses using resale prices to unrelated parties because such prices are not completely under respondents' control and, therefore, provide a more reliable measure of the value that is not subject to potential manipulation by respondents.'' Consequently, we have recalculated NTN's U.S. expenses according to resale prices.

Comment 2: Torrington contends that the Department should reclassify NTN's and NTN Germany's U.S. advertising expenses as a direct selling expense based on a statement in both firms' responses that ''most of the advertising is general and promotes the company and not specific products,'' citing NTN's questionnaire response of September 6, 1994 at 21.

Department's Position: We disagree with Torrington. Although we stated in *AFBs IV* (at 10909) that NTN tacitly acknowledged that it incurred some direct advertising expenses in the United States by claiming that most of its U.S. advertising expenses were indirect in nature, we did not conduct a U.S. verification to examine the issue further in that review. In our U.S. verification of NTN in this review, we determined that respondent's advertising and sales promotion was general in nature. Thus, the expenses are properly classified as indirect selling expenses. For these final results, we have treated U.S. advertising expenses as an indirect selling expense for NTN and NTN Germany.

13. Accuracy of HM Database

Comment 1: Torrington claims that the Department should establish a rebuttable presumption that a sale is an export sale whenever the circumstances suggest that the sales are not in fact for HM consumption, and should remove those HM sales from respondents' HM sales listings . Torrington provides the following examples of such situations: (1) Sales to a home market customer with manufacturing facilities in the United States which include the bearings in a further-manufactured article (in which case Torrington recommends presuming sales of such bearings are U.S. sales), and (2) sales for which the manufacturer prepared export documents for the purchaser. Torrington suggests that respondents could rebut such presumptions by providing adequate evidence establishing that the sales are for home market consumption.

Torrington acknowledges that the Department rejected this rebuttable presumption in *AFBs IV*. Torrington urges the Department to reconsider its policy and revise its approach regarding this issue.

Koyo argues that the Department should reject Torrington's presumption. Koyo notes that the Department examined and verified whether respondents properly excluded export sales from the HM database in the current review and identified no problems. Koyo asserts that the dispositive question is whether respondents knew at the time of sale, when making price decisions, that the ultimate destination of the merchandise was the HM or some export destination. Koyo claims that requiring respondents to prove the ultimate destination of all HM sales is extremely burdensome and is of no relevance to the purpose of the antidumping statute, which is to prevent less-than-fair-value sales of merchandise in the United States. Koyo argues that the fact that some manufacturers do not know the ultimate destination of some of their merchandise guarantees that they are not engaging in price discrimination based on the markets in which they are selling their merchandise. Finally, Koyo states, Torrington litigated this issue at the CIT in its appeal of *AFBs I* and did not file an appeal after the court did not rule in its favor.

NSK argues that, pursuant to section 773 of the Tariff Act, it reported sales that it knew were intended for export as export sales, and it reported sales that it knew were intended for domestic

consumption as HM sales. NSK asserts that there is no statutory requirement that respondents seek or obtain propriety business information from unrelated customers in order to determine whether the customer may export a respondent's bearing at a later time. NSK contends that Torrington's argument, which assumes that certain, undefined classes of sales are export sales unless respondents can prove otherwise, has no support in the statute or case law.

NTN argues that Torrington's proposed test would nullify the statutory and regulatory provisions concerning resellers, citing section 772 of the Tariff Act and 19 CFR 353.2(5) (1994). NTN contends that, under Torrington's test, antidumping margins could never be calculated based on the reseller's price since the manufacturer would always be deemed to have knowledge that the sales were destined for the United States.

INA argues that Torrington's vague reference to ''circumstances suggesting that sales are not for HM consumption'' provides no guidance for determining to which sales the presumption would apply and would require respondents and the Department to make subjective judgments.

FAG contends that Torrington neither recognizes the pure subjectivity nor the administrative burdens involved in applying a ''circumstances suggest'' test for HM sales. FAG argues that only section 772(b) of the Tariff Act provides a basis for excluding sales from the HM database, and that it applies only to sales the Department characterizes as U.S. sales because the company knew at the time of sale that the merchandise would ultimately be destined for the United States. FAG Germany contends that section 772(b) of the Tariff Act requires that two standards must be met in order to exclude a sale from the home market database: (1) The Department must determine that knowledge of the export existed at the time of the sales and (2) the Department must establish that the export sale was made to the United States. With regard to the first criterion, FAG argues that the standard for imputing knowledge, as the Department has properly applied it in this case, is high. FAG contends that, even if it had reason to know that its customers would export the bearings, as long as it shipped the bearing to the customer in Germany, the sales should not be excluded from the sales database. FAG argues that, where the Department cannot say with objective certainty that all of a reseller's goods go to a known destination, the Department has not held that the supplier had reason to know the ultimate destination of those goods. FAG contends that, because the customer could dispose of the bearings in any manner it wished once the bearings were shipped to that customer, even if it believed the bearings would be exported, it cannot be sure of the ultimate disposition of the bearings. Therefore, FAG contends, the standard for imputing knowledge has not been met.

With regard to the second criterion, FAG argues that the only statutory basis for excluding sales from the HM database is where the producer knew at the time of sale that the product was destined for the United States. FAG argues that, because the bearings sold to its customers cannot be shown to have been ultimately shipped to the United States, the Department cannot exclude any such sales.

Department's Position: We disagree with Torrington regarding its proposal to establish rebuttable presumptions that certain home market sales were destined for export or, more specifically, destined to be exported to the United States. Indeed, in *Federal-Mogul IV,* Torrington unsuccessfully argued to the CIT that the Department should impose such a presumption. Instead, the Court held that, if we determined that certain information on the record provided evidence that respondents knew or should have known that certain sales were destined for the U.S. market, we must disregard those sales in calculating FMV. *Id.* Thus, we agree that home market sales made with knowledge of export should not be included in the home market database.

As we noted in *AFBs IV* at 10952–53, in accordance with section 772(b) of the Tariff Act, transactions in which the merchandise was ''purchased * * * for exportation to the United States'' must be reported as U.S. sales in an antidumping proceeding. However, we have examined the record closely with regard to every respondent and did not find sufficient evidence in these reviews to conclude that any alleged HM sales are in fact U.S. sales under section 772(b) of the Tariff Act. Furthermore, Torrington has not met its burden of proof of demonstrating, and the administrative record is lacking in evidence indicating, that our decision to use FAG Germany's home market sales is unreasonable. *See Torrington III* at 629 (holding that Torrington bears the burden of proving certain allegations concerning certain sales, including its allegation that they were not for home market consumption). Therefore, we have not reclassified any HM sales as U.S. sales in these reviews.

Section 773(a) of the Tariff Act provides that we must base FMV on sales ''for home consumption.'' Therefore, sales which are not for home consumption, even if they are not classifiable as U.S. sales under section 772(b), are not appropriately classified as HM sales for antidumping purposes. In these reviews, except for certain sales FAG Germany reported as HM sales by FAG Germany (*see* Comment 2, below), we did not find sufficient evidence to reasonably conclude that reported HM sales were not ''for home consumption'' as required by section 773(a) of the Tariff Act.

Comment 2: FAG Germany contends that the Department should not have excluded from the HM sales database sales to two customers in its preliminary results. FAG Germany argues that the Department gave no explanation for this exclusion and that there is nothing on the record to warrant such an exclusion. FAG Germany notes that, in *AFBs IV*, the Department excluded sales to these customers on the grounds that they were indirect exporters and that FAG Germany had reason to know that merchandise sold to these customers was to be exported. However, FAG Germany contends, there is nothing on the record in this review to justify such a conclusion. Citing *Natural Bristle Paint Brushes from the People's Republic of China; Final Results of Antidumping Administrative Review,* 55 FR 42599, 42600 (October 22, 1990) and *Fuel Ethanol from Brazil; Final Determination of Sales at Less Than Fair Value,* 51 FR 5572 (February 14, 1986), FAG argues that the standard for imputing that a respondent knew or had reason to know that merchandise it sold was not for home market consumption is high. FAG also argues, citing *Television Receivers, Monochrome and Color, from Japan; Final Results of Antidumping Administrative Review,* 58 FR 11211 (February 24, 1993), and *Oil Tubular Good from Canada; Final Results of Antidumping Administrative Review,* 55 FR 50739 (December 10, 1990), that where the Department cannot say with objective certainty that 100 percent of a reseller's goods go to a known destination, then the Department has not held that the supplier ''should have known'' the disposition of the goods. FAG contends that, beyond having a very high standard for imputing knowledge that the manufacturer knew at the time of the sale that the goods were not for home market consumption, the Department requires objective information that can be corroborated by the administrative record. In light of

this, FAG Germany requests that the Department change its analysis of the sales to the two customers for its final results. FAG Germany also notes that one of the customer codes the Department excluded does not exist.

Torrington contends that, if these two customers are the same two indirect exporters whose sales were excluded from the database in *AFBs IV*, the Department acted properly by excluding sales to these customers in the preliminary results. Torrington observes that, in *AFBs IV*, the Department found that FAG Germany misreported certain transactions after the Department and Torrington expended considerable time and effort to verify the factual situation. Torrington argues that this was necessary because the Department does not have power to compel evidence by legal process. Torrington contends that past findings of misreported sales should create presumptions in subsequent reviews, requiring respondents to demonstrate a change in the factual situation.

Torrington argues that, with respect to FAG Germany's argument that the standard for imputing knowledge is high, this is not a normal case because the Department found sales to these customers to be misreported in *AFBs IV*. Torrington argues that the existence in this review of evidence of misreporting in the home market database for the immediately preceding review distinguishes the instant situation from the situations in the cases that FAG Germany cited.

With respect to FAG Germany's argument that the Department can only exclude, from the HM sales database, sales of bearings which have been shown to have been ultimately shipped to the United States, Torrington contends that this interpretation could create a large legal loophole which would allow respondents to dump anywhere in the world through indirect exporters and then claim the sales as HM sales, thereby reducing FMV. Torrington observes that the Department has deemed that this would be improper and that such sales cannot be considered HM sales. Torrington argues that the Department has interpreted the statute reasonably with respect to the exclusion of sales improperly included in the HM database.

Department's Position: We disagree with FAG Germany. Section 773(a) of the Tariff Act states that FMV must be based on the price ''at which such or similar merchandise is sold * * * in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade *for home consumption*'' (emphasis added). This indicates clearly that HM sales must consist of only those sales consumed in the HM.

Only rarely will we be able to identify direct evidence of a respondent's knowledge with respect to the destination of merchandise. Therefore, we must impute whether knowledge existed based on the factual situation of each case. FAG Germany is correct in noting that, in deciding whether to impute knowledge that bearings sold to a HM customer were ultimately destined for the United States, the standard for imputing such knowledge is high. The cases FAG Germany cites to support this position state this clearly. FAG Germany overlooks the fact, however, that the statute establishes two separate tests for imputing knowledge. We use the first test, which FAG Germany discusses, to determine whether to treat a sale as a sale for exportation *to the United States.* We use a second test, which FAG Germany does not discuss, to determine whether to treat a sale as a sale *for home consumption* because the company had reason to know that the merchandise would be exported.

The standard for imputing knowledge for the second test is not as high as the standard for the first test. Under the second test, established in section 773(a)(1), we merely need to determine whether the company had reason to know that the merchandise was not intended for HM consumption, and we do not need to determine the specific market for which the merchandise was destined.

In addition, we note that section 773(a) does not require that the merchandise actually be consumed in the HM, but rather that it be sold for HM consumption. FAG Germany suggests that it only had to report sales it had certain knowledge would be exported because the customer might not actually export the merchandise. Under this interpretation of the statute, however, we would be required to trace HM sales in order to ensure that HM customers did not export the merchandise. Not only is FAG Germany's interpretation inconsistent with the statute but, assuming such an inquiry were possible, it would severely restrict the Department's ability to complete administrative reviews in a timely manner.

With regard to our factual conclusions, FAG Germany argues that there is nothing on the record to justify our exclusion of these companies' sales from the HM database. However, we decided in *AFBs IV* that:

> With respect to FAG Germany, for these final results we excluded reported HM sales to two customers. For these sales, the evidence indicates that the merchandise in question was destined for export and thus not for home consumption. We found at verification that FAG Germany referred to these customers as ''indirect exporters'' and that FAG Germany excluded sales to other ''indirect exporters'' based on its conclusion that these were export sales. In addition, one FAG Germany subsidiary sold to one of these two ''indirect exporters'' from its export, rather than domestic, price list. We also visited and interviewed one of these resellers and found that it only sells in export markets. This reseller claimed that its suppliers, including FAG Germany, know that it does not resell within Germany. For these reasons, we conclude that these sales were for export and not for domestic consumption. Therefore, these sales cannot be included in FAG Germany's HM sales.

See AFBs IV at 10953.

While some of the evidence which led to our factual conclusion in *AFBs IV* is not on the record of the current review, neither is there evidence on the record to show that the factual situation for these customers has changed since that POR, nor is there any new evidence about them on the record. In addition, FAG Germany has never challenged the factual situation underlying our conclusions in that review, but has only challenged our interpretation of the statute as applied to those facts. Therefore, in the absence of evidence demonstrating otherwise, we must assume that the factual situation in the immediately prior review still remains.

In *PPG Industries, Inc.* v. *United States*, 978 F.2d 1232, 1242 (Fed. Cir.1992) (*PPG Industries*), the CAFC ruled that the Department was correct in treating a government program as not countervailable in the review in question. In that review, petitioner submitted factual evidence that it claimed demonstrated that the program was countervailable. The Department disagreed, stating that the information did not contradict its finding in the original investigation with regard to the program. Thus, the Department relied on its analysis and conclusions in a prior segment of the proceeding to make its determination in the review in question. The CAFC upheld this position, stating that the petitioner went astray ''in assuming that the ITA's determination * * * in this review is based on a 'clean slate.' It is not.'' *See PPG Industries* at 1242. The CAFC also held that ''[b]ecause the allegedly new information was previously considered by the ITA * * * and because the allegedly new information does not cast substantial doubt on the ITA original determination, the ITA's conclusion that the new evidence submitted did not

justify a further investigation in this review cannot be an abuse of discretion and, therefore, must be affirmed.'' *Id.*

In this review, FAG Germany has provided no evidence to disabuse us of our conclusion in *AFBs IV* that it had reason to know that bearings sold to the two customers in question would subsequently be exported. Therefore, in accordance with section 773(a)(1) of the Tariff Act, which states that HM sales must be sales for HM consumption, and our factual conclusions from *AFBs IV*, we have excluded sales to these two customers from the HM database for these final results.

We note, however, that FAG Germany is correct that one of the customer codes we used in the computer program does not exist. This was a clerical error and we have corrected it for the final results.

Comment 3: Torrington notes that the Department found in *AFBs IV* that FAG Germany mischaracterized certain HM sales. Torrington contends that the Department should examine FAG Germany's sales listings to be certain that respondent reported all sales accurately for purposes of this review.

Department's Position: In the preliminary results, and in the final results, we have revised FAG Germany's HM sales database to exclude sales which were not for HM consumption. (*see* our response to Comment 2 for a complete discussion of this issue).

Comment 4: SKF Sweden states that it reported fewer than 2,000 sales of CRBs to the Department. In light of the Department's practice of not treating transactions as sampled sales for purposes of our calculations in instances where a party has reported fewer than 2,000 sales transactions, SKF Sweden contends that the Department should not treat these transactions as sampled sales in its calculations.

Torrington notes that SKF Sweden reported in its questionnaire response that it had more than 2,000 transactions of Swedish CRBs in Italy. In addition, Torrington cites to the Department's Preliminary Analysis Memo which indicates that respondent reported sales of CRBs in the third country based on sample months. Thus, Torrington requests that the Department determine whether SKF Sweden reported complete data in its database of third-country sales for CRBs before making any adjustment to its calculations.

Department's Position: We agree with SKF Sweden. While SKF Sweden reported that it had more than 2,000 transactions of Swedish CRBs in Italy, the sales data it submitted to us demonstrates otherwise. In fact, SKF Sweden also stated explicitly in its response that it reported *all* sales of CRBs and did not sample for purposes of reporting its data to us. Accordingly, for these final results of review, we made the necessary change to the margin calculation program as respondent suggested.

Comment 5: Torrington asserts that FAG/Barden's HM database is incomplete. Torrington states that FAG purchased a minimal quantity of Barden-produced scope merchandise which FAG failed to report to the Department. Torrington states that accurate model matching and a complete database are essential to the Department's dumping analysis. Torrington contends that omission of this type of information should not be left to the discretion of the respondent. Torrington requests that, to the extent that FAG/Barden did not report all sales of Barden-produced merchandise, the Department should apply BIA.

FAG/Barden argues that it reported all HM sales correctly in its database. FAG/Barden argues that it reported all sales of subject merchandise, by month, in its initial database as required by the Department's questionnaire. FAG/Barden states that it reported all sales in the HM sample months of bearing families and part types corresponding to those bearings and part types reported in its U.S. sales listing, as instructed by the Department's questionnaire. Finally, FAG/Barden asserts that the Department verified Barden's HM database and it found no discrepancies or deficiencies. For the reasons discussed above, FAG/Barden contends that the Department should accept its HM database as reported and verified.

Department's Position: We disagree with Torrington. We verified Barden's HM database and found no discrepancies. We agree with Torrington that accurate model matching and a complete database are important to our analysis. However, Torrington has not adequately supported its assertion that FAG/Barden's HM database excludes sales of subject merchandise which should have been included. Furthermore, our verification of FAG/Barden's HM database did not indicate that FAG/Barden failed to provide complete sales information. We have determined, therefore, that application of BIA to FAG/Barden is not warranted for these final results. Thus, we have used FAG/Barden's reported data for our calculations.

14. Programming

FAG/Barden, FAG Germany, FAG Italy, NSK/RHP, SKF Germany, SKF Sweden, and Torrington commented on alleged errors in the Department's computer programs. Where all parties agreed with a programming error allegation, we made the necessary changes to correct the error. Our final results analysis memoranda describe the programming errors and changes we made to correct the problems. The following comments address the programing error allegations, or rebuttals to such allegations, on which parties disagree.

Comment 1: NSK/RHP contends that the Department erred by subtracting U.K. commissions from its calculation of HM direct expenses instead of adding them. NSK/RHP states that this error results in increasing FMV by the cost of the expense.

Torrington argues that the Department had already accounted for HM commissions elsewhere in its computer program and disagrees with NSK/RHP that the Department should correct a clerical error in the computer program as NSK/RHP describes it. Torrington argues that the Department should not make a direct addition to or subtraction from FMV for U.K. commissions, since these commissions are addressed in the commission offset step of the computer program.

Department's Position: We agree with Torrington. We have accounted for U.K. commissions in the separate commission-offset step of the computer program. Therefore, we should not have included commissions in the HM direct expense calculation. We have changed the program as requested by Torrington to ensure that we adjust FMV properly for U.K. commissions.

Comment 2: Torrington alleges that the Department made a clerical error that results in below-cost sales not being excluded from the HM database. SKF Italy agrees with Torrington.

Department's Position: We disagree with Torrington and SKF Italy. For a complete discussion of this issue, see Comment 2 of Section 4.a. above, regarding a clerical error alleged by FAG Germany and Torrington. We did discover, however, that we inadvertently did not set the quantity and value of some of these transactions to zero as we should have. We have corrected this error for the final results.

Comment 3: FAG Italy states that the Department's program appears to calculate U.S. corporate rebates deducted from USP using a BIA methodology the Department applied in the 92/93 review. FAG requests that the Department rely on the actual U.S. corporate rebate information FAG submitted for the current review period instead of BIA.

Torrington argues that the Department's use of the BIA rate is a clerical error only if the Department did

not intend to apply BIA for this adjustment, and that the Department should first ascertain whether FAG correctly estimated and included 1994 rebates on reported U.S. sales before making the change FAG Italy requests.

Department's Position: We agree with FAG Italy. Because we determined that FAG Italy correctly estimated and included 1994 rebates on reported U.S. sales, we have corrected the program in order to use FAG Italy's reported U.S. corporate rebates for these final results.

Comment 4: Torrington claims that the Department should assign a BIA value to certain U.S. sales for which FAG Italy did not submit similar merchandise information or CV data. Petitioner states that the rate the Department should apply to the U.S. sales with no matching data is the final rate it calculated for FAG Italy ball bearings in the LTFV investigation.

In rebuttal, FAG Italy states that Torrington's argument is moot because no BIA sales should have appeared in the Department's margin analysis. FAG explains that the BIA sales involved the transfer of Italian-made parts to the United States for use in further-manufactured bearings. According to FAG Italy, due to an error in the Department's program, no further-manufacturing analysis was performed for these sales, and this resulted in transactions being identified as BIA sales. FAG Italy requests that the Department insert the appropriate programming language to combine further-manufacturing data with the U.S. sales database and perform the further-manufacturing analysis. FAG Italy contends that these changes will reveal that there are no U.S. sales with missing home market data.

Department's Position: We disagree with Torrington. There is no need to assign a BIA value to certain U.S. sales because, as a result of making the programming changes requested by FAG Italy, there are no U.S. sales with missing home market data.

Comment 5: FAG Italy argues that the Department made an inadvertent clerical error in its cost test. FAG Italy states that, due to a missing programming instruction, the Department aggregated observations that failed the cost test with observations that passed the cost test.

Torrington agrees with FAG Italy that observations which failed the cost test are aggregated into a single database with observations that passed the cost test. However, Torrington contends that the Department intended to aggregate the observations in order to avoid price-to-price comparisons between HM below-cost sales of models and U.S. sales. Torrington explains that the sales of models that failed the cost test are retained in the database for matching the models' CVs to USPs. Torrington contends that, if the Department did not aggregate the sales into a single database and instead ''tossed'' the below-cost sales, the matching U.S. sales could be compared with prices of similar merchandise, instead of CV.

Department's Position: We disagree with FAG Italy. Torrington's understanding of our programming is accurate. There is no clerical error as FAG Italy claimed and, therefore, we have not made the change.

15. Duty Absorption and Reimbursement

Comment 1: Torrington requests that the Department reconsider its treatment of antidumping duties and deduct such duties from ESP as a selling cost. Torrington argues that the Department should recognize that, where a related U.S. importer absorbs antidumping duties as a cost of doing business, the duties themselves are selling expenses, just as are ordinary customs duties, movement expenses, or credit terms. As such, Torrington contends, they should be deducted from ESP pursuant to section 772(d)(2)(A) of the Tariff Act. Alternatively, Torrington argues, the Department should apply its reimbursement regulation, citing 19 CFR 353.26, where transfer prices between related parties are less than cost plus profit (or cost) and actual dumping margins are found.

Koyo maintains that the Department's position on this issue is correct and has been upheld in court. Koyo urges the Department to reject Torrington's argument since Torrington does not provide sufficient reason for the Department to alter its methodology. Koyo adds that, if Torrington is suggesting that duties ultimately assessed on merchandise covered by the current review should be counted as expenses in the review during which they are paid, such expenses would bear no relation to pricing policies during the review period in which the final assessment of duties occurred. Furthermore, Koyo argues, because final liquidation and payment of duties occurs at lengthy, unpredictable time periods after the deposit rate is set, it would be extremely difficult for a respondent to anticipate when and at what rate its entries would finally be liquidated.

NTN and FAG reject Torrington's arguments concerning both reimbursement and the deduction of antidumping duties from ESP and note that the Department has rejected Torrington's request in prior reviews, citing *AFBs III* at 39736 and *AFBs IV* at 10906–07.

Department's Position: We disagree with Torrington that we should recognize that, where a related U.S. importer simply ''absorbs'' antidumping duties as a cost of doing business, the duties are themselves a selling expense, similar to ordinary customs duties, movement expenses, or credit terms, which we should deduct from ESP as a selling cost. Our position was upheld in *Federal Mogul I.* Moreover, making an additional deduction from USP for the same antidumping duties that correct for price discrimination between comparable goods in the U.S. and foreign markets would result in double-counting. *See AFBs IV* at 10907.

On the separate issue of reimbursement, we will apply the reimbursement regulation if record evidence demonstrates that the exporter directly pays antidumping duties for the importer or reimburses the importer for such duties in PP or ESP situations, regardless of the relationship of the parties. *See Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Reviews,* 61 FR 4408, 4410–11 (February 6, 1996), *Brass Sheet and Strip from the Netherlands,* 57 FR 9534, 9537 (March 19, 1992), *Brass Sheet and Strip from Sweden,* 57 FR 2706, 2708 (January 23, 1992), and *Brass Sheet and Strip from Korea,* 54 FR 33257, 33258 (August 14, 1989). For example, we applied the reimbursement regulation in one case where we stated our position on the applicability of the reimbursement regulation to related-subsidiary situations and indeed made an affirmative determination based upon evidence demonstrating that the exporter reimbursed its related importer for antidumping duties. In these reviews, Torrington has not identified record evidence that there was reimbursement of antidumping duties, and we have not adjusted USP for the duties.

However, we disagree with Torrington's argument that we should apply the reimbursement regulation where transfer prices between related parties are less than cost plus profit (or cost) and where we find actual dumping margins. These two factual situations do not, in and of themselves, constitute sufficient evidence for us to conclude that reimbursement is taking place. Therefore, we disagree with both of Torrington's arguments. *See AFBs III* at 39736 and *AFBs IV* at 10906–07.

Comment 2: Torrington argues that Koyo reimburses Koyo Corporation of U.S.A. (KCU) for antidumping duties

through low transfer prices and direct and indirect transfers of funds and financial guarantees.

Koyo responds that the Department stated in *AFBs IV* that the antidumping statute and regulations make no distinction in the calculation of USP between costs incurred by a foreign parent company and those incurred by its U.S. subsidiary. Koyo contends further that, since the Department treats related companies as a single consolidated entity, neither transfer prices between related parties nor the transfer of funds from one affiliate to another within such an entity are relevant for purposes of the antidumping law.

Department's Position: We disagree with Torrington. As noted in our response to Comment 1 of this section, we do not find that facts of the kind Torrington alleges apply to Koyo, in and of themselves, constitute sufficient evidence for us to conclude that reimbursement is taking place. As there is not other record evidence to support Torrington's assertion that Koyo is reimbursing its U.S. affiliate for antidumping duties, we have not applied the reimbursement regulation with regard to Koyo.

Comment 3: Torrington contends that since the Department continues to find significant dumping margins, it is clear that many respondents have adopted a strategy of simply absorbing antidumping duties rather than correcting their price discrimination. Therefore, Torrington argues, the Department should treat these duties as selling expenses to be deducted from gross price in calculating ESP. Torrington suggests, as an alternative, that the Department should consider that the foreign manufacturer is reimbursing the importer for the duties and deduct the duties under the Department's reimbursement regulation.

Koyo argues that there is no legal basis for Torrington's argument that the Department should treat antidumping duties as selling expenses to be deducted from USP. Koyo argues further that Torrington's alternative proposal of applying the reimbursement regulation should be rejected as the record contains no evidence whatsoever of a pattern of reimbursement of antidumping duties. Koyo argues that this is a purely theoretical issue because none of its entries have yet been liquidated.

Department's Position: We disagree with Torrington. As noted in our positions on comment 7 of section 11 and on comment 1 of this section, evidence of reimbursement is necessary before we can make an adjustment to USP. As no such evidence has been found in the context of this review for any respondent, we have not adjusted USP for antidumping duties.

16. Miscellaneous Issues

16A. Verification

Comment: Torrington contends that the Department's cost verification did not resolve all issues regarding FAG Germany's cost response and asks that the Department re-verify to ensure that FAG Germany is not shifting costs from in-scope products to out-of-scope products.

FAG Germany states that the petitioner's concern about the relationship of standard costs to actual costs has been addressed in verifications of FAG Germany's cost response in this review and in two prior reviews. In every case, FAG Germany claims, the Department found that its system of standard cost calculation was valid and reasonable, and that FAG Germany made the calculations on an accurate and consistent basis. FAG Germany contends that Torrington has provided nothing on the record of this review to controvert the Department's findings or to establish that cost-accounting distortions are present.

Department's Position: As indicated in the verification report, we reconciled FAG Germany's actual and standard costs and did not find any discrepancies. We also reviewed production costs for both subject and non-subject merchandise. We did not note, in examining FAG Germany's accounting documents, that its standard cost calculation for both subject and non-subject merchandise was unreasonable or inconsistent with its submissions. Had we been unsatisfied with the accuracy of FAG Germany's cost reporting, we would either not have concluded the verification when we did, or else have rejected FAG Germany's cost response and resorted to BIA. Accordingly, we have not re-verified FAG Germany's cost response for this POR.

16B. Pre-Final Reviews

Comment: Asahi contends that, in order to avoid potential problems such as ministerial errors prior to issuance of the final results of review, the Department should provide it with an opportunity to comment on any changes in methodology from the preliminary results.

Department's Position: As noted in previous reviews (see *AFBs III* (at 39786) and *AFBs IV* (at 10957)), in the interest of issuing the final results in a timely manner, the Department cannot implement this step. Moreover, the regulations provide a procedure for correcting ministerial errors in the final results of review. *See* 19 CFR 353.28.

16C. No Sales During Period of Review

Comment: Kaydon contends that the Department mistakenly determined that Hoesch and Rollix had no shipments during the POR. Kaydon states that the Department determined in a scope ruling that the products Hoesch sold to Consolidated Saw Mill Machinery International, Inc. (CSMI) are within the scope of the antidumping order on BBs from Germany, citing *Final Scope Ruling: Certain Spring Steel Wires (or Rotor Bearing Wires) Imported by CSMI; Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany* (May 2, 1995). Kaydon asserts that Hoesch may have known at the time of its sales to CSMI that the bearing parts were intended for the United States, as Hoesch stated in a letter to the Department on October 16, 1995. Kaydon comments that, in a letter to the Department on January 16, 1996, Hoesch asserted that it was not the manufacturer of the wire races sold to CSMI, but CSMI submitted a letter on June 23, 1994 in which it certified that a company official indicated that Hoesch produces the wire races. Kaydon argues that this alleged contradiction gives the Department reason to clarify this issue by requiring Hoesch to respond fully to the questionnaire.

Department's Position: We disagree with Kaydon that we determined erroneously that Hoesch and Rollix had no shipments during the POR. We have confirmed through the U.S. Customs Service that no subject merchandise exported by Hoesch or Rollix entered the U.S. market during the POR. Furthermore, there is no information on the record to support Kaydon's assertion that these respondents, or related affiliates in the United States, have made sales of subject merchandise during the POR. While we agree with Kaydon that the CSMI scope ruling found certain merchandise to be within the scope of the order, we confirmed with the U.S. Customs Service that, at the time we suspended liquidation of the entries of this merchandise, there was no record of shipment by Hoesch or Rollix.

16D. Certification of Conformance to Past Practice

Comment: Torrington argues that the Department should require respondents to affirm that responses conform to prior Departmental determinations for reviews of these orders. Torrington

suggests that, at a minimum, respondents identify where they have continued to use any methodology that the Department rejected in a prior review, accompanied by a statement justifying the departure from established practice. Torrington proposes that, in such cases, the Department require respondents to supply data both in the format established by past practice and the manner that respondents hope will be acceptable to the Department despite the prior practice. Torrington suggests that, without such identification, the emergence of a consistent Departmental practice is dependent on the continued vigilance of the Department in analyzing responses and in the availability of funding for repeated verification. Torrington cites examples of respondents' unidentified use of reporting methodologies that do not conform to Department practice and which the Department has previously rejected.

NTN responds that Torrington's suggestion is unfair and must be rejected on several grounds. First, NTN contends, respondents must submit information in the administrative review that conforms to their position regarding the appropriate reporting methodology or forfeit their judicial right to argue their position. Second, Torrington's suggestions that respondents maintain their right of appeal by preparing alternative data sets is not administratively feasible, since it would require respondents to prepare, and the Department to analyze and verify, multiple responses. Third, Torrington's argument ignores the fact that each review is a distinct segment of the proceeding.

FAG agrees with NTN that each administrative review is a separate segment involving different sales, adjustments, and underlying facts, and that what transpired in previous AFBs reviews is not binding precedent in later reviews. FAG further argues that Torrington's proposal would place upon respondents the need to, in effect, provide in each succeeding review, a history over multiple prior reviews of the methodology they used for each field of data, the facts on which that methodology was based, and the Department's acceptance, rejection, or modification of that methodology (noting also that respondents would have to consider judicial review and overlapping proceedings in detailing their methodologies). FAG states that, as a practical matter, methodologies accepted by the Department in one review are generally used by respondents in subsequent reviews, and methodologies rejected by the Department are not perpetuated in later reviews.

NSK contends that Torrington's suggestion is impossible because factual records differ from review to review, as do respondents' explanations of the information they submit. NSK argues in addition that, since the final results for a prior review may not be published until after submissions are entered and verifications are conducted for subsequent reviews, there is no way for respondents to determine in advance how current submissions differ from those final results.

INA suggests that Torrington's proposal is unrealistic because the responses for this review have already been submitted, and reiterates NTN and NSK's concern for the administrative burden that would result from Torrington's proposal, as well as the difficulty in anticipating the Department's position in a given review.

SKF adds that the appropriate standard for responding to the questionnaire should be that which is most consistent with respondents'' business records and the facts of the specific review.

Department's Position: We disagree with Torrington that we should require that all respondents conform their submissions, their allocations, and their methodology to the Department's most recent prior determinations and rulings. We also disagree with Torrington that respondents should identify where they have continued to use any methodology that we rejected in a prior review and justify the departure from established practice. Each administrative review is a separate reviewable segment of the proceeding involving different sales, adjustments, and underlying facts. What transpired in previous reviews is not binding precedent in later reviews, and parties are entitled, at the risk of the Department's determining otherwise, to argue against a prior Department determination. As a practical matter, methodologies accepted by the Department in one review are generally used by respondents in subsequent reviews, and methodologies rejected by the Department are not perpetuated in later reviews. The Department, however, may reconsider its position on an issue during the course of the proceeding in light of facts and arguments presented by the parties.

16E. All-Others Rate

Comment: SKF Italy requests that the Department correct the ''all others'' rate for ball bearings from Italy. SKF Italy contends that the rate given in the preliminary results is incorrect because it does not reflect changes resulting from judicial review. SKF argues that the correct ''all others'' rate should reflect the ''all others'' rate from the LTFV investigation with corrections resulting from judicial review.

Torrington notes that SKF Italy has no apparent interest in what the ''all others'' rate is, since SKF Italy has its own rate. Torrington argues that SKF Italy should clarify its interest and that, barring such clarification, the Department is under no obligation to address this issue.

Department's Position: We agree with SKF Italy that the ''all others'' rate should reflect corrections made to the LTFV margins as a result of judicial review. We note that this is true regardless of whether SKF Italy has any interest in the matter. The ''all others'' rate for BBs from Italy is 69.98 percent.

16F. Resellers

Comment: Godo Kogyo states that the Department stated in the preliminary results that Godo Kogyo had no shipments or sales subject to the review. At the same time, the Department terminated reviews with respect to five companies who were resellers of Japanese-made bearings on the grounds that those firms were not resellers as defined in 19 CFR 353.2(s) because all their suppliers had knowledge at the time of sale that the merchandise was destined for the United States. Godo Kogyo states that it reported in its questionnaire response that it sold subject AFBs in the United States during the POR. However, Godo Kogyo states that it did not produce any of the subject merchandise that it sold, but was a reseller of bearings produced by other unrelated firms. Therefore, as Godo Kogyo does not qualify as a reseller pursuant to 19 CFR 353.2(s), it states that it requested that the Department discontinue the review with respect to Godo Kogyo and the Department determined in August 1994 that Godo Kogyo did not need to respond further to the questionnaire. Godo Kogyo requests that the Department's final results reflect that Godo Kogyo does not qualify as a reseller and that the Department terminate the review with respect to Godo Kogyo.

Department's Position: We examined the information on the record and have determined that Godo Kogyo is not a reseller as defined in 19 CFR 353.2(s) because all of its suppliers had knowledge at the time of sale that the merchandise was destined for the United States.

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Federal Register

Tuesday
December 17, 1996

Part IV

Department of Housing and Urban Development

Sale of Single Family Mortgage Loans; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4188–N–01]

Notice of Sale of Single Family Mortgage Loans

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development.

ACTION: Notice of sale of single family mortgage loans.

SUMMARY: This notice announces the Department's intention to sell approximately 19,100 Secretary-held single family mortgage loans (the ''loans'') in a sealed bid auction. The majority of loans were insured under various sections of the National Housing Act, 12 U.S.C. 1701 *et. seq.* (the ''Act'') and thereafter assigned to the Department pursuant to Section 230 of the Act (12 U.S.C. 1715u). The loans are secured by single family properties located nationwide. This notice also describes the bidding process for these loans.

DATES: Bid Packages will be available to eligible bidders on or about November 27, 1996. The auction is currently scheduled for January 28, 1997.

ADDRESSES: Bid Packages will be available from FHA's Financial Advisor, Merrill Lynch Mortgage Capital Inc. (''Merrill'') 250 Vesey St., New York, NY 10281. Bid Packages will be made available only to parties who complete a Confidentiality Agreement and Qualification Statement and are determined to be eligible bidders. Interested parties can obtain a Confidentiality Agreement and Qualification Statement by calling 1–800–363–4704. This is a toll free number. Merrill will forward Bid Packages to eligible bidders via overnight courier. Imaged asset files for the loans included in the sale are available for review by eligible bidders who visit the due diligence facility located at 1140 Connecticut Ave, N.W., Suite 302, Washington, D.C. 20036. To schedule a visit to the due diligence facility or to order supplemental information on the loans, eligible bidders should contact Henry Kiema at 202–496–1170. This is not a toll-free number. The due diligence facility will be open between the hours of 8:00 a.m. and 8:00 p.m., Monday through Friday and 8:00 a.m. to 5:00 p.m. on Saturday. The facility will open on or about December 2, 1996 and will close on or about January 24, 1997.

FOR FURTHER INFORMATION CONTACT: Joseph McCloskey, Director, Single Family Servicing Division, Office of Insured Single Family Housing, Room 9178, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone 202 708–1672. This is not a toll free number. Hearing or speech-impaired individuals may access this number via PT (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339. This is a toll-free number.

SUPPLEMENTARY INFORMATION: The Department intends to sell approximately 19,100 single family loans in this auction. The loans are secured by single family properties. Some of the loans are performing and some are non-performing. The loans will be divided into one million dollar ($1,000,000) mortgage loan blocks, which will be further arranged into groups. A list of specific loans, mortgage loan blocks and group descriptions will be contained in the Bid Package. No loans will be sold individually. Prior to assignment to HUD, the loans were insured by the Federal Housing Administration (FHA). The loans are not now insured and will be sold without FHA insurance. In the case of most of the loans, HUD has agreed to forbear, under certain conditions, from enforcement of its rights upon default and, for those loans that are within the initial 36-month period of forbearance, mortgagors' payments may be reduced or suspended under the terms of the forbearance agreements. This sale contains loans from both inside and outside of the 36-month period. The Department will offer interested parties an opportunity to bid competitively on loan pools which they may create from combinations of loan blocks, subject to conditions set forth in the Bid Package. The Department shall use its sole discretion to evaluate and determine winning bids.

The Bidding Process

These are the essential terms of sale. To ensure a competitive bidding process, the terms of sale are not subject to negotiation.

The Department will describe in detail the procedure for participating in the Bid Package, which will include bid forms, a nonnegotiable loan sale agreement prepared by the Department (Loan Sale Agreement), specific bid instructions, as well as pertinent information on the loans such as total outstanding unpaid principal balances, interest rate ranges, maturity terms, geographic locations and performance. The Bid Packages also include computer diskettes containing data on all of the loans.

Bid Packages will be available approximately 8 weeks prior to the Bid Date. The Bid Package will also include instructions for bidder registration and will contain procedures for obtaining supplemental information about the loans. Any interested party may request a copy of the Bid Package by sending a written request together with a duly executed Confidentiality Agreement and Qualification Statement to the address specified in the **ADDRESSES** section of this notice.

Prior to the Bid Date a Bid Package Supplement will be mailed to all eligible bidders. It will contain the final list of loans to be conveyed to the successful bidder(s).

Each bidder must include with its bid a deposit equal to 10% of the amount of its highest bid. If a successful bidder fails to abide by the terms of the Loan Sale Agreement, including paying the Department any remaining sums due pursuant to the Loan Sale Agreement and closing within the time period provided by the Loan Sale Agreement, the Department shall retain any deposit as liquidated damages.

Due Diligence Facility

A bidder due diligence period will take place beginning on or about December 2, 1996. During the bidder due diligence period, eligible bidders may, for a non-refundable fee of $500, review all asset file documents which have been imaged onto a database by visiting the due diligence facility located at 1140 Connecticut Ave., N.W., Suite 302, Washington, D.C. 20036 and/or via modem. Finally, bidders may purchase at a cost of $500 CD Rom discs containing substantial due diligence materials such as approximately 34 month payment histories and Brokers' Price Opinions.

Specific instructions for ordering information in electronic format or making an appointment to visit the due diligence facility will be included in the Bid Package. The Department reserves the right to charge a reasonable fee to cover its costs in duplicating and forwarding any information requested by an interested party.

FHA Reservation of Rights

The Department reserves the right to remove loans from the sale at any time prior to the Bid Date for any reason and without prejudice to its right to include any loans in a later sale. The Department also reserves the right to terminate this sale at any time prior to the Bid Date.

The Department reserves the right to use its sole discretion to evaluate and determine winning bids. The

Department reserves the right at its sole discretion and for any reason whatsoever to reject any and all bids.

The Department reserves the right to conduct a ''best and final'' round among tied bidders, wherein bidders will be given the opportunity to increase their bids. A best and final round shall not be construed as a rejection of any bid or preclude the Department from accepting any bid made by a bidder.

Ineligible Bidders

Notwithstanding a bidder's qualification as an eligible bidder and approved servicer the following individuals and entities (either alone or in combination with others) are ineligible to bid on any one or combination of the loans included in the sale:

(1) Any employee of the Department, and any member of any such employee's household and any entity controlled by an FHA employee or by a member of such employee's household;

(2) Any individual or entity that is debarred or suspended from doing business with the Department pursuant to 24 CFR part 24;

(3) Any contractor, subcontractor, consultant, and/or advisor (or any agent, employee, partner, director, principal, or affiliate of any of the foregoing) who performed services for, or on behalf of, the Department in connection with this sale;

(4) Any individual that was an employee, partner, director, agent, or principal of any entity or individual described in paragraph (3) above at any time during which the entity or individual performed services for, or on behalf of, the Department in connection with this sale; and

(5) Any bidder that uses the services, whether directly or indirectly, of anyone who is deemed to be ineligible under any of paragraphs 1–4 above.

Number of Bids

Bidders may bid on any or all of the mortgage loan blocks and/or create their own pools of one or more mortgage loan blocks within a mortgage loan group.

Ties for High Bidder

If a tie continues after the best and final offers are submitted, the successful bidder will be determined by lottery.

Single Family Loan Sale Procedure

The Department has selected a competitive sealed bid auction as the method to sell the blocks of loans. Historically, this method of sale optimizes the Department's return on the sale of loans, affords the greatest opportunity for all interested parties to bid on the defaulted loans, and provides the quickest and most efficient vehicle for the Department to dispose of the loans.

Single Family Loan Sale Policy

Post Sale Servicing Requirements

The loans will be sold with servicing released by FHA. The loans must be serviced by an FHA approved mortgagee for the remaining lives of the loans, unless a loan is modified, refinanced or satisfied of record.

Successful bidders, or purchasers of these loans, and their successors and assigns, will be required to service the loans in accordance with the applicable provisions of the Loan Sale Agreement. The Department intends to take any and all steps possible to ensure enforcement of these provisions.

Scope of Notice

This notice applies to the Single Family Loan Sale Number 4, and does not establish Departmental procedures and policies for the sale of other mortgage loans. If there are any conflicts between this Notice and the Bid Package, the contents of the Bid Package prevail.

Dated: December 10, 1996.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 96–31894 Filed 12–16–96; 8:45 am]

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Federal Register

Tuesday
December 17, 1996

Part V

The President

Executive Order 13031—Federal Alternative Fueled Vehicle Leadership

Federal Register
Vol. 61, No. 243
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Presidential Documents

Title 3—

The President

Executive Order 13031 of December 13, 1996

Federal Alternative Fueled Vehicle Leadership

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Energy Policy and Conservation Act, as amended (42 U.S.C. 6201 *et seq.*), the Energy Policy Act of 1992 (Public Law 102–486) (''the Act''), and section 301 of title 3, United States Code, and with the knowledge that the use of alternative fueled motor vehicles will, in many applications, reduce the Nation's dependence on oil, and may create jobs by providing an economic stimulus for domestic industry, and may improve the Nation's air quality by reducing pollutants in the atmosphere, it is hereby ordered as follows:

Section 1. *Federal Leadership and Goals.* (a) The purpose of this order is to ensure that the Federal Government exercise leadership in the use of alternative fueled vehicles (AFVs). To that end, each Federal agency shall develop and implement aggressive plans to fulfill the alternative fueled vehicle acquisition requirements established by the Act. The Act generally requires that, of the vehicles acquired by each agency for its fleets, subject to certain conditions specified in section 303(b)(1) of the Act, 25 percent should be AFVs in fiscal year (FY) 1996, 33 percent in FY 1997, 50 percent in FY 1998, and 75 percent in FY 1999 and thereafter. These requirements apply to all agencies, regardless of whether they lease vehicles from the General Services Administration (GSA) or acquire them elsewhere. That section also defines which Federal agency vehicles are covered by the AFV acquisition requirements; this order applies to the same vehicles, which are primarily general-use vehicles located in metropolitan statistical areas with populations of 250,000 or more.

(b) To the extent practicable, agencies shall use alternative fuels in all vehicles capable of using them. Agencies shall continue to work together in interagency committees recommended by the Federal Fleet Conversion Task Force established by Executive Order 12844 of April 21, 1993, to coordinate their vehicle acquisitions and placement.

Sec. 2. *Submission of Agency Plans and Reports on Statutory Compliance.* (a) Sixty (60) days after the date of this Executive order, and annually thereafter as part of its budget submission to the Director of the Office of Management and Budget, each agency shall submit a report on its compliance with sections 303 and 304 of the Act. A copy of the report shall also be submitted to the Secretary of Energy and to the Administrator of General Services. The report shall state whether the agency is in compliance with the Act, and substantiate that statement with quantitative data including numbers and types of vehicles acquired and the level of their use. At a minimum, the report shall indicate the number of vehicles acquired or converted for each fuel type and vehicle class, and the total number of vehicles of each fuel type operated by the agency. The Director of the Office of Management and Budget shall issue further reporting guidance as necessary.

(b) If an agency has failed to meet the statutory requirements, it shall include in its report an explanation for such failure and a plan, consistent with the agency's current and requested budgets, for achieving compliance with the Act. The plan shall include alternative sources of suitable AFVs if the agency's primary vehicle supplier is unable to meet the AFV requirements.

(c) The Secretary of the Department of Energy and the Administrator of General Services shall cooperatively analyze the agency AFV reports and acquisition plans, and shall submit jointly a summary report to the Director of the Office of Management and Budget.

Sec. 3. *Exceptions for Law-Enforcement, Emergency, and National Defense Vehicles.* Section 303 of the Act allows exemptions to the acquisition requirements for law-enforcement, emergency, and vehicles acquired and used for military purposes that the Secretary of Defense has certified must be exempt for national security reasons. Law enforcement vehicles shall include vehicles used for protective activities. Each agency that acquires or utilizes any such vehicles shall include in its report an explanation of why an exemption is claimed with respect to such vehicles.

Sec. 4. *Fulfilling the Acquisition Requirement.* (a) Agencies may acquire alternative fueled vehicles to meet the requirements of this order through lease from GSA, acquisition of original equipment manufacturer models, commercial lease, conversion of conventionally fueled vehicles, or any combination of these approaches. All vehicles, including those converted for alternative fuel use, shall comply with all applicable Federal and State emissions and safety standards.

(b) Based on its own plans and the plans and reports submitted by other agencies, the Administrator of General Services shall provide planning information to potential AFV suppliers to assist in production planning. After consulting with AFV suppliers, the Administrator of General Services shall provide to Federal agencies information on the production plans of AFV suppliers well in advance of budget and ordering cycles.

(c) As required by section 305 of the Act, the Secretary of Energy, in cooperation with the Administrator of General Services, shall continue to provide technical assistance to other Federal agencies that acquire alternative fueled vehicles and shall facilitate the coordination of the Federal Government's alternative fueled vehicle program.

Sec. 5. *Vehicle Reporting Credits.* The gains in air quality and energy security that this order seeks to achieve will be even larger if medium- and heavy-duty vehicles are operated on alternative fuels, and if ''zero-emissions vehicles'' (ZEVs) are used. Therefore, for the purposes of this order, agencies may acquire medium- or heavy-duty dedicated alternative fueled vehicles or ZEVs to meet their AFV acquisition requirements, and they shall be given credits for compliance with their AFV targets as follows. Each medium-duty and ZEV shall count the same as two light-duty AFVs, and each dedicated alternative fueled heavy-duty vehicle shall count as three light-duty AFVs. The ZEV credits may be combined with vehicle size credits. The Director of the Office of Management and Budget, in consultation with the Secretary of Energy, shall issue detailed guidance on the classification and reporting of medium-duty, heavy-duty, and ZEVs. In the reports mandated in section 2 of this order, medium- and heavy-duty AFVs and ZEVs shall be identified separately from light-duty vehicles.

Sec. 6. *Funding Alternative Fueled Vehicle Acquisition.* (a) The Department of Energy will no longer request or require specific appropriations to fund the incremental costs of alternative fueled vehicles, including any incremental costs associated with acquisition and disposal, for other agencies. Agencies shall formulate their compliance plans based on existing and requested funds, but shall not be exempt from the requirements of the Act or this order due to limited appropriations.

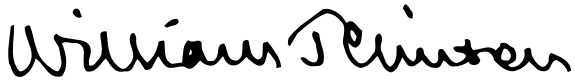
(b) An exception regarding funding assistance shall be made for electric vehicles, which are in an earlier stage of development than other alternative fueled vehicles. The Secretary of Energy shall establish a program beginning in FY 1997 to provide partial funding assistance for agency purchases of electric vehicles. Up to $10,000 or one-half the incremental cost over a comparable gasoline-powered vehicle, whichever is less, may be provided as funding assistance for each electric vehicle, subject to the availability of funds.

Sec. 7. *Agency Cooperation with Stakeholders on Alternative Fueled Vehicle Placement and Refueling Capabilities.* The Secretary of Energy shall work with agencies procuring AFVs to coordinate the placement of their vehicles with the placement of similar vehicles by nonfederal alternative fuel stakeholders. Federal planning and acquisition efforts shall be coordinated with the efforts of the Department of Energy's ''Clean Cities'' participants, private industry fuel suppliers, and fleet operators, and State and local governments to ensure that adequate private sector refueling capabilities exist or will exist wherever Federal fleet alternative fueled vehicles are located. Each agency's fleet managers shall work with appropriate organizations at their respective locations, whether in a ''Clean Cities'' location or not, on initiatives to promote alternative fueled vehicle use and expansion of refueling infrastructure.

Sec. 8. *Definitions.* For the purpose of this order, the terms ''agency,'' ''alternative fueled vehicle,'' and ''alternative fuel'' have the same meaning given such terms in sections 151 and 301 of the Act.

Sec. 9. *Executive Order 12844.* This order supersedes Executive Order 12844.

Sec. 10. *Judicial Review.* This order is not intended to, and does not, create any right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.



THE WHITE HOUSE,
December 13, 1996.

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